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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 6, 2020

(FRIDAY SESSION)

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Taken before Teri Lynne Workman, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 6th day of November, 2020, between the hours of 8:58 a.m. and 12:41 p.m., via Zoom videoconference and YouTube livestream in accordance with the Supreme Court of Texas' Emergency Orders regarding the COVID-19 State of Disaster.

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Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

Documents referenced in this session

20-45 August 24, 2020, Memo - Appeals in Parental Termination Cases

20-46 August 26, 2020, Letter from Judge Dean Rucker

20-47 Proposal for Appeals in Termination of Parental Rights cases

20-48 November 2, 2020, Report on Pro se Executor Issue

20-49 Ex parte Shaffer, 649 S.W.2d 300

20-50 Steele v. McDonald 202 S.W.3d 926

20-51 In re Guetersloh 326_S_W_3d_737

20-52 Probate Court pro se policy

20-53 TAJC Amicus Brief-Filed September 24, 2019

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(FRIDAY, NOVEMBER 6, 2020; 8:58 A.M.)

CHAIRMAN BABCOCK: Welcome, everybody. Another zoom meeting for our committee. You'll notice, if you're looking closely, that Dee Dee Jones is not here reporting our meeting today. But she is replaced by the able substitute Teri Lynne Workman. Teri Lynne is -- is a terrific court reporter and is going to take down what we say today.

And, Teri, you will notice that we go in order. And the next order is for the Chief to report on the goings of the Court and -- as it relates to this committee and other things.

So, Chief Justice Hecht, who I should mention is also newly elected to another term, congratulations.

CHIEF JUSTICE HECHT: Thanks, Chip.

All the high court incumbents, as you probably know, were re-elected, and none of the races was especially close. And so we're pleased to have that done for another time. And we're counting on Chip and others to change the system one of these days. But, meanwhile, we survived another election cycle.

We have a new justice, Rebecca Huddle. Rebecca was appointed by Governor Abbott just a couple of weeks ago. She is a first-generation American. She

was born and raised in El Paso, and then she went to -- got her undergraduate degree at Stanford and her law degree at University of Texas.

And she practiced for a while at Baker Botts before she was appointed to the Court of Appeals in Houston where she stayed for about six years. She was elected after her appointment. Then she went back to Baker Botts for a couple of years and has most recently been the partner in charge of the Houston office.

We had a very nice swearing in for her the other day in the courtroom, all masked up and socially distanced, and are looking forward to a formal investiture when we can have use of the House Chamber across the street. But the House itself doesn't know when they're going to have use of the House Chamber, so that may be a little while before we're able to celebrate her appointment to the Court appropriately.

The Court is continuing to work remotely. We have not met in person since March. Our oral arguments have been conducted remotely. Our legal staff are mostly working from home -- it's their choice -- and a few work in the office, but it's mostly teleworking.

And the Court is completely current. Teleworking hasn't hurt us at all. We're able to get

all of our work done timely, and we have our next conference on Tuesday. And just watching the circulations come in over the last few days, I'm sure we'll be in a good position on Tuesday.

We've issued three emergency orders since our last committee meeting on August 28, and one has been on evictions. We -- we're still trying to get information out to parties in eviction cases through notices that are circulated with citation, notices that can be given by the justice courts at the courthouse, even notices that go out with default judgments where there aren't judgments.

We're especially proud that the Governor agreed to use the CARES money to help fund an eviction diversion program. There are only a few of these, handful of these, in the country. And the idea is that the tenant can apply for -- to qualify for funds to pay for rent that the tenant has been unable to pay because of the pandemic, and the landlord can agree. They both have to agree. But it's to both their benefits because the tenant gets to stay and the landlord gets paid.

So this is a great program. It's $167 million of federal funding that the Governor diverted to this. And I'm just pleased, as I work with supreme courts across the country -- it's just so very

important that the branches in each state have a good working relationship. And that's mostly not the case, and it certainly is in Texas.

And the Governor is interested in this, and we visited with him about it over time. David Slayton was very active in getting it done. And so now we have $167 million administered through the Department of Housing and Community Affairs. We've got several pilot sites set up that are making sure that the process works to distribute the money to people who need it.

Included with the diversion money is -- the Governor gave $4 million to the Court for legal aid for basic civil legal services. And I am especially proud of that because it shows how far we've come over the years that the other branches now, especially the Governor, see the necessity and the virtue and the efficacy of legal services for the poor and think they -- they use the money well and have -- otherwise, he wouldn't have given us $4 million to help with wherever we need it but particularly with evictions.

And the Access to Justice Foundation went right to work within hours to make sure that the money was going to get distributed to grantees and the work was going to get done, so we're very grateful to

Governor Abbott for that.

We imagine that the eviction crisis is only going to worsen, both in Texas and across the country. And we're not exactly sure how we're going to contend with that as a judiciary, let alone a society, so it's good to have some resources at this point dedicated to that.

One of the other emergency orders that we issued was just the renewal of our general emergency order that we first issued on March 13th, which was just 35 weeks ago that we've been in this situation. But the order seems to be working pretty well, and courts are trying to work through how to change procedures, what changes are good, when can you do remote hearings, when is it not so good to do them.

And Justice Bland and I -- and I think Justice Busby's going to join us, and I'm sure the Court will be anxious to involve itself as well -- we want to get the committee's views of these changes and procedures going forward so we can advise courts and direct courts on what's efficacious and what's -- what we ought to rethink.

And in that -- in those categories are jury trials, which we're trying just as hard as we possibly can to conduct in person, but it's just very

difficult. Houston has probably done the best. I think we're up to close to 60 jury trials, but that's since March.

Last year we tried 9,000 jury cases to verdict, and so we're about 5- or 6,000 behind at this point. And we still don't have a really good, manageable way of conducting in-person jury trials. They can -- it can be done, but it just involves a whole lot of effort by court staff and lawyers and parties and everybody to -- to get it done, so -- but we're continuing to try.

And we're also encouraging courts to experiment with virtual jury trials. We had one, you probably know, in a Class C misdemeanor case in Austin not long ago, and -- it was just a traffic case -- and it lasted less than a day. But the whole proceeding was conducted remotely -- the jurors, the parties, the witnesses, the judge, everybody -- and got a good verdict that the -- everybody responded well to after the trial was over.

And you say, Well, so what? That's a traffic case. What about the big cases? Well, the big cases are going to be hard. But last year when we tried 9,000 cases to verdict, about a third of them -- not quite a third of them -- were in Class C misdemeanor

cases, so we're talking about a sizable number of cases that might benefit from virtual jury trials. And the justice courts are actively looking at these things and trying to figure out what they can do, and so we look for developments on all those fronts before long.

The bar exam was especially difficult, as you may have heard, and we had to cancel the July bar. The September bar went off well with very few complaints. We conducted it -- the persons taking it were in hotels, in each in a separate room, and it seemed to work pretty well.

The online -- the exam was given online in October here in Texas, as well as across the country -- I think about 30,000 takers altogether -- and the reports on that experience were pretty good, a few glitches here and there. But we're trying to carefully gather up reports and -- to see what we're going to try to do going forward.

I'm guessing the February bar will probably be in person, unless the pandemic gets a lot worse, which it is right this second. But we'll just have to see. I think we'll try to do it in person if we can. But the idea is to keep everybody safe and -- and give some assurance to takers that it's going to -- it's going to operate the way everybody expects it will.

The protective order registry that the committee discussed at considerable length, given the privacy issues and other issues involved, has been set up and is functioning. The form is very short. It's just one page, but lots and lots of work went into developing that form. And we are hopeful that it will work very well in this setting. There have been a few technical issues along the way, but we think we're pretty much on the road to operation.

And, finally, the Court ordered a referendum on proposed amendments to the disciplinary rules, the lawyer discipline rules. The vote will take place February 2 to March 4. These changes have been proposed into the process that the Legislature adopted during Sunset a couple of sessions ago.

And the debate and the changes originate in a special group in the State Bar and then are commented on, discussed by the board, then they come to us for -- to be sent to the membership for a vote, so there'll be that vote in a couple of months.

The most talked about change is the modernization of the advertising rules, which notably includes the removal of the prohibition against trade names. And it has gotten some discussion already in the bar and doubtless will get more.

There's several other important changes that are in that package of rules to vote on. And I won't go through them this morning, just out of respect for the work that we have to do, but I'm sure you and others will be wanting to look carefully at those as the weeks pass.

So that's the report from the Court. And we've -- I know we've got some important things on the agenda today so, Chip, that's it for me.

CHAIRMAN BABCOCK: Great. Thank you, Chief Justice Hecht.

The next item is comments from Justice Bland. So, Justice Bland --

HONORABLE JANE BLAND: Good morning.

CHAIRMAN BABCOCK: -- here you go.

HONORABLE JANE BLAND: Yeah, good morning. I have one further announcement. I know that as astute observers of the Court as you are, you have -- are fully aware of everything the Court is doing to help the state judiciary adapt to COVID under the leadership of Chief Justice Hecht.

What you might not be aware of is just how much work Chief Justice Hecht has put in on a national level to help all state courts adapt to COVID and to develop procedures to keep state courts moving

and open as -- as the head of the -- as -- of the Council of Chief Justices.

And just -- just a week and a half ago, the National Center for State Courts announced that they were going to honor Chief Justice Hecht with the Henry J. [sic] Carrico Award for his extraordinary leadership and judicial innovation.

And I can tell you that not only have we learned from the other states through the groups that Chief Justice Hecht has convened with chief justices from all over the state, but there has been so much that has been exported from Texas to other states to assist in their efforts to keep their courts moving. So I wanted to let you all know about his great honor because he will not, so -- that's my only announcement, Chip.

CHAIRMAN BABCOCK: Thank you, Justice Bland. And I think a round of applause, virtual applause, for the Chief.

(Applause)

CHAIRMAN BABCOCK: That is terrific news, and thank you, Justice Bland, for letting us know.

We're going to turn now to suits affecting the parent-child relationship and out of time appeals in parental rights termination cases. We are joined here by Judge Rob Hofmann of the 452nd District

Court. And I know he's on the screen somewhere because I saw him earlier. There he is, right below my box in the Hollywood Squares.

And Judge Rucker highly recommends and -- and says great things about Judge Hofmann. And I know, Judge, we're appreciative of your time in adding to our discussion today. And with that -- I know Pam's here, but I think Bill Boyce is going to lead us. Am I right about that?

HONORABLE BILL BOYCE: Yes.

CHAIRMAN BABCOCK: Great. Fire away, Bill.

HONORABLE BILL BOYCE: Thank you, Chip.

Good morning. This topic is one that we started discussing more than a year ago. We're taking it in small bites. The bite that we are on today pertains to determining whether or not there is a desire to appeal. I'm going to go through an overview of -- of kind of the overall project and this particular piece of it, and I'm going to make reference to three things that you should have in your distribution.

One is an August 24th, 2020, memo from the Appellate Rules Subcommittee. Within that memo is an imbedded proposed draft of a revised Texas Rule of Civil Procedure 306 addressing recitation of judgment

with proposed modifications to focus on the specific issues that we're talking about this morning.

Additionally, you should have a letter from Judge Rucker on behalf of the Children's Commission dated August 26, 2020. That was a comment on the memo that was previously circulated and the draft Rule 306 that was previously circulated.

Additionally, you have a stand-alone page in your materials today that Judge Hofmann was kind enough to distribute to us. This is a proposed revision of the proposed draft Rule 306 that's contained in the August 24th memorandum. And I'll certainly invite Judge Hofmann here in a moment to comment on these proposed revisions.

I'll offer this disclaimer because these arrived this week. The appellate subcommittee has not met, has not exchanged views in any length about the proposed revisions that Judge Hofmann circulated; so I would anticipate that part of our discussion today is going to be Judge Hofmann presenting his views and, I presume, the views of Judge Rucker and the Children's Commission, followed by further discussion.

But before we get to that point, I think it may be helpful to give an overview of the particular issue that we're addressing today. We've

touched on it in prior meetings. This was referenced at the last meeting, but we postponed the discussion today because -- because of the inability of Judge Rucker or Richard Orsinger to participate in the last meeting and talk about some of this -- these ideas.

But, in general terms, what we're dealing with today corresponds to Stage One (a) of the issues for discussion that are identified in the August 24th memo and, specifically, the concept of showing or determining authority to appeal. This goes to the issue that has been described in shorthand terms as phantom appeals. And it goes to the issue of trying to determine whether there is a desire to appeal on behalf of the parent or alleged father whose rights -- parental rights have been terminated.

We've -- I've given the overview a couple of times, so I'm going to give a shorter overview this time as we've -- we've already talked about this some. But I think, at its core, the issue that we're talking about today is a mechanism for determining whether there really is an appeal to be pursued.

This has been addressed in terms of whether there is an intent to challenge an order terminating parental rights. The draft rule that's imbedded in the memo approaches it more in a point of

view that asks whether there is good cause to discharge the attorney ad litem tasked with representing the parent or alleged father's rights.

The discussion that we've had to date highlights a couple of important considerations that need to be balanced. One is that there are -- there are costs -- there are systemic costs; there are personal costs -- to pursuing an appeal of a -- of a determination regarding termination of parental rights. That's why it's a very accelerated process. The process needs to have defined contours and not go on forever, leaving family situations in limbo.

There are costs in terms of court systemic costs that occur when it is unclear whether or not there's a desire to appeal and, as a result, a protective appeal or a, quote, unquote, phantom appeal may be pursued, in an abundance of caution, that sets the appellate gears to turning. Records have to be created, courts have to address it, and so on and so forth.

And so the questions, measured against a backdrop of a Constitutionally protected right with respect to continuing parental rights, is, How do we want to address this situation?

I've described this before as a question

that comes up in a number of different legal contexts, which is, If it's not clear about whether there is a desire to appeal a termination of parental rights, which way does the silence cut? How are courts going to address that? Is there going to be a default determination that the appeal is going to go forward? Is there going to be a default determination that the appeal is not going to go forward? How is that going to work? How is that going to be looked at?

When we talked about this before, I think there was consensus on the full Supreme Court Advisory Committee that channeling this discussion into the judgment was a good way to at least have the vehicle to have this discussion and make a determination.

This reflects the reality that in some circumstances, intent to appeal may not be clear. In some circumstances, the parent whose rights are being terminated may not be present. Maybe they were never present in the litigation. Maybe they've been intermittently present in the litigation. Maybe there's a change of mind. There's a lot of different possibilities.

And so the thought, as -- as a threshold matter, as a gateway matter, How do we start the appellate process and come up with some mechanism to

say, yes, the appeal is going to go forward with appointed counsel or, no, it's not, was to channel this into the judgment and the discussion -- have that discussion, have that threshold determination made as part of the judgment.

And so that was the process that led to a proposal to -- to have this appear in Rule 306. At a later time, we can talk about whether Rule 306 is the best place for this or not, but I'm going to put that aside to focus on the threshold issue.

If we're going to have a threshold determination about whether the appeal is going to go forward or not under circumstances where a desire to appeal a termination decision may or may not be 100 percent clear, what is that going to look like?

So the draft that's imbedded in the August memo that you have, the August 24th memo, set out a proposed mechanism to deal with that. And that appears at page 7 of the memo, [Draft] Rule 306 Judgment in Suit Affecting the Parent-Child Relationship.

And this was structured in terms of deciding whether or not the attorney ad litem is going to continue in the representation. The attorney ad litem either is going to continue, is going to be replaced, or is not going to continue.

And I think, really, the areas of discussion for today's purposes, if you compare the revised draft that Judge Hofmann had circulated against the proposed draft in the -- in the memo, you'll see in the helpful redlines in the revised draft from Judge Hofmann that there's some tweaking to make sure that we're using appropriate terminology terms of "parent" or "alleged father."

But the real area of discussion is that the proposal circulated by Judge Hofmann add subsections iii. and subsections iv. that are not reflected in the draft proposed rule that's in the memo. And so to focus everybody's attention, we're looking at proposal for the draft Rule 306 Judgment -- I guess it's subsection c., subsections i., ii., iii., and iv.

And these are going to be the circumstances where the determination would be made as to whether or not the attorney ad litem is going to continue the representation to pursue an appellate challenge of a decision terminating parental rights. And this goes to the issue of whether there's a desire to appeal; and, if there is desire to appeal, then the representation is -- is required and provided.

And so that's -- that's the long introduction to try to set up a discussion of what I

hope is a focused discussion on these particular issues.

I think it -- at this point, it's -- it's probably a good juncture for me to first ask the appellate subcommittee members whether there's any aspects of this that I haven't touched on that they want to highlight, and then I would ask Judge Hofmann to offer his perspectives on the proposed revisions to the proposed new rule and the rationale behind them.

But before we get to Judge Hofmann, I'll first ask any of the subcommittee members to chime in if there's a point that I haven't identified that they want to highlight for this discussion.

CHAIRMAN BABCOCK: Great. I assume everybody knows how to raise your hand electronically so we can call on you. I'm on another committee where people are not able to do that successfully. So if you're on the subcommittee and you want to say something, raise your hand now and -- and you'll be recognized.

And while you're thinking about that, I was neglectful in mentioning that I spoke to Judge -- Judge Rucker last week, and he very much regrets not being able to be here. But he said we're in good hands with Judge Hofmann, and we wanted everybody to know he's -- he's doing well, so I pass that along to the

committee.

And there's a hand up, and it is Pam Baron. So, Pam, take it away.

MS. BARON: Well, first, thanks, Bill. That was a great explanation of how we got here and where we are. And just we have struggled with this as a balance between the parent's right -- Constitutional right to appeal to protect their interests in their children and then the concern that we do have a lot of work going on to pursue appeals that no one is really that interested in.

But I thought that the comments we got very recently from the dean and from the professor, I thought, were very helpful, so I'll be interested in seeing what the discussion is on those. But they do try and figure out that balance but also make sure that the parental -- the parents are protected.

CHAIRMAN BABCOCK: Great.

Anybody else on the subcommittee want to comment before we go to Judge Hofmann? Well, I don't see anybody raising their hand electronically, and -- so unless somebody has something to say from the subcommittee, we'll go to Judge Hofmann.

Judge, thanks again for being here.

HONORABLE ROB HOFMANN: Sure. Thank you

very much, everyone. It's great to be here with you this morning. As you know, Judge Rucker wasn't able to be here, and so I'm going to do my best, as the other jurist in residence for the Children's Commission, to fill his shoes here today.

I wanted to point out a few things from his response to the memo before we get started. I will say that the excellent staff at the Commission, as well as Judge Rucker and I, have done a significant amount of kicking this issue around; and I believe that he did a good job of expressing those concerns and thoughts in his response. As I said, I'll just highlight two things, maybe in response to what Ms. Baron just said.

One of the sentences from his response is this: It's unclear why the late desire to appeal of a parent who is absent at a critical juncture would deserve more protection than a parent who appears at every stage of the case.

So I think, in our response, we've done our best to make sure that the rights of these phantom parents would be protected to the same extent as a parent who would perhaps appear for trial but then no more, so that's one issue perhaps to think about as we move forward.

And then, also, just a note from

Judge Rucker's response, he says it's -- in response to something from the memorandum -- the memorandum states that it is not uncommon for parents in these circumstances to re-establish contact with counsel after trial when their circumstances have stabilized and expressed a desire to challenge a termination order on appeal. That would be a parent who never participated in trial or was absent at trial.

There are anecdotes of that, but I believe Judge Rucker is correct when he says that the Children's Commission is unaware of any study on legal representation in CPS cases in either Texas or nationally that would support this assertion.

So we do have anecdotes of folks coming back after termination from time to time, a phantom parent re-appearing and asking to challenge that decision, but I don't think that they are frequent. So with that said, I'll jump into it.

We did do quite a bit of kicking this issue around. A lot of thought went into what our response would be to the memorandum. And I think we all agree that the memorandum did an excellent job of getting us where we needed to be. We spent a significant amount of time talking about Rule 306, as Justice Boyce pointed out already. And I'll just run

through and tell you, I think, what our revisions do and then certainly would be able to answer questions if you had any.

So at the conclusion of trial, the judgment would be required to contain one of the following express statements regarding an appointment of an attorney ad litem to pursue the parent or alleged father's appeal.

The judgment would state that, a., that that ad litem would continue to represent that parent for appellate purposes and, b., that a different attorney would be appointed to replace the trial attorney to represent the parent for appellate proceedings or, number c., which is the focus of our discussion here today, that the attorney ad litem that had previously been appointed for a parent would be discharged upon a finding of good cause.

And there are four subsections that we have proposed, and I believe that they would cover every single circumstance for any parent in a CPS termination trial that had an appointed attorney, whether they were served by personal service or by alternate service.

Number i. would be for a parent or an alleged father served by personal citation, so proper personal citation. If that parent or alleged father

failed to appear or respond, was in a default situation, that would be good cause for the appointed attorney to be released. And the other three sections would be with regards to parents who were served by alternate service.

Section ii. would be that the attorney ad litem that was appointed for a parent or an alleged father wasn't able to, despite diligent efforts, identify or locate the parent or alleged father. So as required in Section 107.0132 and 107.014, after the attorney did due diligence, they were never able to identify or locate that parent, that attorney would be able to be released at the end of trial through the judgment.

Subsection iii. would be in the event that that attorney was able to locate the parent or the alleged father but, after locating that parent or alleged father, that parent or alleged father did not appear at trial on the merits.

So the attorney ad litem did their due diligence, they actually accomplished what they were supposed to do, they found their parent, but even after finding that parent, that parent did not appear for trial. If that was the circumstance, at judgment, that attorney would be released.

And then number iv. would be the last

proposed subsection and that being that that attorney did their due diligence, they found their parent or alleged father, that parent or alleged father participated in the case, maybe even participated in trial, maybe even participated through the conclusion of trial but, at the conclusion of trial, the attorney ad litem could report to the court that that parent or alleged father had never expressed a desire to exercise the right to appeal the judgment to the court of appeals or to the Supreme Court of Texas. And I believe that language is properly tracking there.

So we have talked about every single parent or every single alleged father in this subsection. No parent or alleged father of any child would not be covered by this section. And, at the conclusion of trial, then, if there was not contact, the attorney ad litems, then, could be released. So I believe that deals with every phantom parent that we would have in the entire universe up until the conclusion of trial.

Now, what this process would not cover -- and I'm sure Justice Boyce has discussed this before -- would be a parent who, subsequent to trial, would then come back within the proper period and request an appeal.

So any parent that had been appointed an attorney ad litem who would be seeking to have an appeal would be treated as any other parent in the case who may be indigent. Within the proper time period, that parent could petition the court for a court-appointed attorney for appellate purposes. So we felt like this was a little bit of an expansion on a very well-written draft, and I believe that it covers everything appropriately.

Justice Boyce, I believe that's everything I had to say, but I'll certainly be able to answer questions if I can.

CHAIRMAN BABCOCK: Judge, if I could ask just a couple of questions. On your c.i. through iv., is that meant to be an exclusive list? In other words, good cause means only these things?

HONORABLE ROB HOFMANN: Yes, I believe that's correct. You can see there in the draft there is a strike-through of "either of." That was Judge Rucker's proposal, and so I believe it would be exclusive, yes, sir.

CHAIRMAN BABCOCK: Okay. And then on c.iv., when you -- when you were describing it, you said that the parent or alleged father expressed, and then you -- I wrote down you said "at the conclusion of the trial." But this paragraph c.iv. doesn't say "at the

conclusion of trial."

So I wonder, if a parent says at the beginning of trial, "Hey, by the way, if I lose this thing, I want to appeal," and then goes through an entire trial, which is whatever it is, but doesn't renew that statement at the conclusion of trial, does that -- does that trigger c.iv., the very preliminary expression of desire to appeal at the beginning of the proceedings, or does it matter when the parent or alleged father makes that -- makes that statement?

HONORABLE ROB HOFMANN: I believe, sir, the way that it's written is that at any time during the appointment, if a communication is made between a parent or alleged father to their attorney that they express a desire to appeal, then that would mean that the attorney could not assert this as a good cause.

So on the day that the attorney first meets with their client, if the client says, "No matter what happens, I want to appeal," and then that parent disappears and is never seen again for six months, at the conclusion of trial, that -- that attorney would not have good cause to be removed under those circumstances.

I think that that answers your question. I hope it does.

CHAIRMAN BABCOCK: It does answer my

question. It raises another one. If the -- if the parent or alleged father says at the beginning of trial, "No matter what, I want to appeal," and then participates in some or all of the trial and, at the end of the trial, says, "By the way, what I said before, I don't want to appeal; I withdraw and retract it," how does the rule treat that situation?

HONORABLE ROB HOFMANN: I would think that that would -- it may -- the way it is written may not be accurate to reflect those circumstances and may need to be tweaked. But I would hope that the rule would allow for that express direction to the attorney to be able to move forward with good cause and the attorney would be released.

CHAIRMAN BABCOCK: Yeah. Okay. Great.

Bill, do you have -- where do you want to go? Do you want to call on members of the committee or -- since it's your -- it's your show?

HONORABLE BILL BOYCE: I think -- I think going in two steps would be helpful. Make sure I'm not on mute.

CHAIRMAN BABCOCK: No, we hear you.

HONORABLE BILL BOYCE: All right. Two steps would be helpful. Number one is the sense of the committee as a whole with respect to whether this

general approach, doing this through Rule 306, or whatever number it's given, in this way and structuring it around good cause for continued representation, is that generally -- are folks on board with that?

And if we get that sense, then I think we can drill down and talk about any comments, questions, concerns, or tweaks that the full committee has for particular subparts or sub-subparts of this proposed draft.

CHAIRMAN BABCOCK: Yeah, that's great.

On that -- on that topic, what's everybody think about this approach? You can either raise your electronic hand or you can just dive in, but electronic hand would be better.

Frank Gilstrap.

MR. GILSTRAP: Well, what other approach is there? I don't know that we've talked about it. Bill talked about this particular approach in global terms. What other type of global approach would be available? I'm not aware of that.

CHAIRMAN BABCOCK: Okay. Robert.

MR. LEVY: I wanted to maybe go back to a general question, and it was triggered by the proposed rule, the new cause, subsection iii. And what exactly is the role of an ad litem? Is it to find the

non-located parent, the father typically, or is it to represent the absent parent's interests?

And I think that that is an important distinction in terms of how the ad litem's role should apply and how that issue should be addressed in terms of pursuing an appeal.

CHAIRMAN BABCOCK: Bill, do you want to respond to that? Or Judge Hofmann?

HONORABLE BILL BOYCE: I'll take an initial swing at it, and then Judge Hofmann may have additional thoughts. And I'm -- I'd like to take a swing at answering both questions.

In terms of another approach, what else -- you know, what would be another approach? I think that what we had talked about in prior discussions was some kind of a trial court determination of intent, of the parent's intent.

And I think there were concerns about trying to go that way because of difficulty in determining intent, either because intent is unclear, because the parent or alleged father is absent or only intermittently present, and so on and so forth. So I would offer that as a response to Frank's threshold question.

The -- the thought was, if what we're

trying to determine -- determine is whether or not the appointed attorney ad litem is obligated to continue with an appeal, that that was a more -- that was more manageable procedurally to get at it that way as opposed to trying to make the trial courts make intent findings. And so maybe this is an attempt to make this a little more objective.

CHAIRMAN BABCOCK: You just muted yourself, Bill. You just muted yourself. We can't hear you, Bill.

HONORABLE BILL BOYCE: The attorney ad litem's representation of the interests of the parent or alleged father is going to continue. And it really is -- you know, my perspective is we're talking about the attorney ad litem's representation of and obligation to represent the parent or the alleged father and whether or not that is -- that obligation is going to continue or not.

And I'm not sure if that's a -- if that's a full or a satisfactory answer, but that's -- that's my thought process. Judge Hofmann may have additional thoughts.

CHAIRMAN BABCOCK: Judge, either question, you can address if you have thoughts about it.

HONORABLE ROB HOFMANN: Sure. Thank you.

I'll just speak as to the second question there. So I think, once an attorney ad litem is appointed for a parent who is not served by personal service, their duty under Chapter 107 is to do their very best to locate that parent and, if they do not locate their parent, they continue to represent that parent and protect their rights moving forward.

If they do locate the parent, then they're obligated under 107 to report that to the court. And if that parent seeks to continue to have a court-appointed attorney, then a hearing will be held under 107.

And if the parent -- the parent is found to be indigent, the court can appoint a different attorney or certainly can continue that same attorney in their representation, which, practically, I would -- I would think happens across the state in most circumstances. It certainly does in our court.

So if the parent has not been located, that attorney represents their rights. If the parent is located and the court continues that representation, then their attorney -- that attorney is client-driven as any other attorney would be.

CHAIRMAN BABCOCK: Great.

Kennon, you had your hand up, but it

doesn't look like it's up anymore. Did you lower your hand?

MS. WOOTEN: I lowered it because my comment is more about the text of one of the subdivisions than the general concept, so --

CHAIRMAN BABCOCK: Great.

MS. WOOTEN: -- I don't want to prematurely speak.

CHAIRMAN BABCOCK: All right. Well, save that thought.

Roger.

MR. HUGHES: Yeah. Thank you.

First, I just wanted to say Hofmann's suggestions are very good, and I recommend them. But when you asked about what were the two basic approaches, my -- what I saw at the beginning of this discussion months and months ago was we could either find a way that would allow the judge to justifiably presume that the absent parent really didn't wish to continue the litigation or was never interested in it, and the other way, which is also another proposal, is for the ad litem to basically, as part of the notice of appeal proceeding, have to say whether or not the client ever wanted the appeal.

And I see the proposal now on the table,

which could be a belt-and-suspenders approach -- we could adopt both -- is that the notice of appeal by the ad litem must state or represent that the father, or the parent, wants the appeal. And, if they don't, I don't know whether the -- that means the notice is bad or whether it's just defective, and court officials or the opposing party can challenge it.

I think there was some concern over requiring certification by the ad litem as a breach of the attorney-client confidentiality. I leave that for other people to think through.

But I think the problem with what we're discussing right now about good cause is, When can we have a realistic presumption that is based on whatever circumstances you choose that would allow a permissive inference to the judge? And that is a matter of expertise and I don't have that, so I'll let other people talk about that.

Thank you.

CHAIRMAN BABCOCK: Thank you, Roger.

Pete Schenkkan. Pete? Pete, are you there?

MR. SCHENKKAN: Yeah, I am. Sorry. I had raised my hand on a vote, not on a comment. No comment.

CHAIRMAN BABCOCK: Okay.

Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Yes. I was wondering why we needed to have this in the judgment rather than as a change to perhaps Rule 8 or Rule 10.

And I was trying to remember why -- you know, at what point -- I know there was a Supreme Court opinion that said counsel has to appeal all the way to the Supreme Court, which is different from the way it is in criminal cases with an appointed counsel.

But it just seems to me a lot cleaner to have a separate order rather than putting it in the judgment, so I was wondering why the committee felt the judgment was the best place to put it.

CHAIRMAN BABCOCK: Great.

All right, Justice Gray.

HONORABLE TOM GRAY: To follow on that, I've just written myself a note. What if this statement is not in the judgment? That always presents the problem. We just had oral arguments this week on a temporary injunction where there wasn't a bond and there wasn't a trial date in the -- in the order; what does that mean? And we're going to have the same thing, dragging out these appeals, if that's -- if that's where

you put it.

HONORABLE ROB HOFMANN: My thought would be if that statement was not in the judgment, finding good cause and releasing the attorney ad litem, that that attorney ad litem would continue to represent as they move forward.

CHAIRMAN BABCOCK: All right.

Lisa Hobbs.

MS. HOBBS: I think Justice Boyce might be about to say the same thing, but I think the reason why it was included in the judgment is that's the one thing that gets physically sent to the parties. But to answer Judge Christopher's questions, I think that was the thought.

But, Judge Boyce, you tell me if I'm wrong on that.

CHAIRMAN BABCOCK: Justice Boyce and then Justice Christopher.

HONORABLE BILL BOYCE: No, I think that was the -- to follow on the comment, yes, that was the rationale. And the discussion we had in prior meetings about the vehicle for trying to make whatever determination we're telling courts to make was that there was -- there's got to be a judgment. That's logical and a safer place to put this determination

because if it's a separate order or involves a separate hearing, there are more opportunities for someone to fall away, to not be available, for the order to not get made.

It seemed like wrapping it up in the judgment was a more -- I don't know if this is the right term -- efficient way to go about it with fewer opportunities for something to go -- to go wrong. I think that's the short answer to Justice Christopher's inquiry.

CHAIRMAN BABCOCK: Great.

And now Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Yes, I agree with Judge Gray because the rule, as written, says the judgment must contain one of the following express statements. So if I don't have that statement, I do not have a final judgment, and it's going to come up or we're going to have to send it back and it's problematic.

CHAIRMAN BABCOCK: Go ahead, yeah, Bill.

HONORABLE BILL BOYCE: Judgment may be wrong. I'm not sure that makes it interlocutory with the mandatory language. Now, maybe further consideration about what happens if the required language isn't in there certainly is appropriate, and

maybe that justifies some additional tweaks or provisions of the rule, but I'm not sure that would make it interlocutory.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I'd like to make a specific comment and then the general comment. To eliminate the problem we're just discussing, we could turn 2.a. into a default presumption, or a default rule, that the appointment will continue unless the decree says what's included in b. or c.

So, that way, the court can't omit a.; the court can simply say nothing, in which event the appointment continues, or the court can say b. or c., in which -- in which event the appointment doesn't continue, and we can avoid this debate. That was my specific comment.

My general comment is that the House Bill 7 proposal focused on the notice of appeal as the operative event to decide whether there would be a lawyer for appeal.

This work product has changed that focus to the judgment as at least impliedly being the event that determines whether there's an attorney on appeal. This rule, though, only decides whether the existing trial court attorney ad litem has the continued duty to

pursue the appeal. And if b. or c. apply, the trial attorney is discharged. But we still haven't made a rule or a decision about whether another lawyer should be appointed for appeal alone.

So the House Bill 7 provision encompassed the question of whether the trial court ad litem should go forward or a new lawyer should be appointed for appeal, and this rule only decides whether a trial court lawyer should go forward.

We still are going to need to have some decision made about whether the court appoints a new lawyer after discharging the trial lawyer -- appoints a new lawyer to appeal. So I -- this -- as a general rule, I think that this approach on the trial court as far as the trial ad litem is -- is fine, but our job is not done until we've handled the question of whether there's a duty on the court to appoint someone on appeal.

Another thing is that under House Bill 7, this appellate inquiry, which is triggered by the filing of the notice of appeal, was focused on the appellate lawyer coming forward and verifying with the court the nature of the communication or lack of communication with the client.

And what has happened in this rule is

that this is more of a focus on -- on defaults, circumstances that speak for themselves, and not so much an inquiry into what the specific lawyer in question has done to find the client or find out what the client wants.

Another thing that's interesting to me is that in this proposal, under subdivision iv., the very last paragraph, it doesn't say that the client said they didn't want to appeal; it says the client never said that they wanted to appeal.

There's a difference between never saying you want to appeal and saying you don't want to appeal. And I'm not sure that I have a strong feeling about that distinction. I don't think it's just an intellectual distinction. But I think we should recognize that, I believe, if I remember correctly, the House Bill 7 proposal was focused on whether the client actually expressed a desire to appeal or not.

And -- so this a little bit different to say that they never said they wanted to appeal to say that they -- I explained it to them and they said they didn't want to appeal. Different level of guaranteed due process. I hope that that fits in the context.

Thanks.

CHAIRMAN BABCOCK: Now, that's -- that's

helpful, Richard, as always.

Bill, do you want to -- do you want to take a vote at this point or -- about the general approach, or what's your pleasure?

HONORABLE BILL BOYCE: Well, the short answer is yes. But, before we do that, I wanted to follow up on Richard's comments a little bit because I think, as reflected in the memo and as reflected in prior discussions, we -- we keep coming back from various angles to the same basic problem, which is, If it's unclear or if the parent or alleged father can't be located at deadline time, which way does the silence cut? What do we do about that?

And so I think the concern with respect to the certification as part of the notice of appeal was that it was putting the attorney in the potentially difficult position, if the -- if the client was not able to be located, about making a certification or not making a certification.

I'm not sure that squarely confronts the issue about which way do we want the silence to cut as a policy matter, balancing all of the choices and all of the considerations that are bound up in this discussion.

And I'm speaking in real broad strokes. I think that the sense of the subcommittee, from prior

discussions, is that channeling this inquiry into a discussion in the trial court and in the judgment when folks are still more likely to be involved was a way to do that without leaving it to defaults when it comes time to file the notice of appeal and requiring representations about an intent that a lawyer just may not be able to make.

So that -- in broad strokes, that was why the discussion went off more into what does a trial court ruling or judgment or determination look like and what's the vehicle for that.

I think the point that Richard highlights about the -- Judge Hofmann's draft, paragraph 2. sub c. sub iv. is certainly on point. And if we continue down this path of -- of trying to channel this into a judgment language, then we probably need to talk about whether we want -- whether the absence of an expression of desire to pursue the right of appeal is enough or whether we want something more.

But I think we're still at the -- the first level, which is, Is there consensus? Is there appetite on the part of the committee as a whole to channel this towards a judgment discussion, at least conceptually in the way that the current draft Rule 306 as -- with the proposed modifications from Judge Hofmann

contemplate?

CHAIRMAN BABCOCK: Okay. We got Frank and then Richard wanted to say something.

Go ahead, Frank. But unmute yourself first.

MR. GILSTRAP: I'm unmuted, I think. Okay.

CHAIRMAN BABCOCK: You are.

MR. GILSTRAP: I have a comment on the specific language and then a larger comment on some of the -- what Bill was talking about.

First of all, having gone back and looked at this after some time away from it, I'm very troubled by our reliance on the word "locate" in c.ii., iii., and iv. We're proceeding as though, if you locate someone, you're in communication with them.

And even in the modern connected world, that may not be true. We don't have a slow boat to China, but we do have people on a supertanker on the way to the gulf -- Persian Gulf that we might know where they are, but we can't communicate with them.

And so let's take that hypothetical. It's real easy for me and -- to apply c.iv. Yes, he's on a -- I located him. He's on a slow boat to China. And he never expressed his desire to appeal. Well, of

course not because I couldn't talk to him. So I think the concept of locating someone has got to be re-examined.

On the larger issue of, you know, the policy, which way does the default cut, Bill Boyce put it more eloquently than I do. But, you know, the members of the committee, we don't -- we don't generally do this type work. And we're kind of traditional lawyers, and we believe in due process and notice, so we craft a rule that tends to bend over backwards to give this parent, who may or may not be interested in -- really interested in losing his child but he's losing his child, the benefit of the doubt because, to all of us, losing a child is probably the worst thing in the world.

But the judges have come in and they've raised another point, and that is, In almost all of these cases, the people never communicate. You know -- and if you're -- if you're tying up the system to make sure that all these people get -- get some, you know, exceptional level of notice, you're tying up the decision on the custody of the child, and that child maybe loses six months in which it could be with the parent that -- the ultimate parent, but yet we're still trying to locate this parent and the parent doesn't even

care. So which way does the balance cut there?

CHAIRMAN BABCOCK: Thanks, Frank.

Richard Orsinger. Unmute yourself.

MR. ORSINGER: Okay. I would like to say that which way it should cut, I think, depends on our confidence that the notice we're giving is due process of law.

What I mean by that is that if the citation adequately explains the right to an appointed lawyer on appeal and the party defaults, then the failure to participate, I think, should cut against a free appellate lawyer, even a free trial lawyer.

So I'm -- I would like to eliminate the phantom appeals. It's a waste of resources, and it delays disposition -- final disposition of the child's living circumstances, which I think the Legislature has considered is an important policy.

The thing that -- and I'm -- and I'm perfectly fine with this solution. Having been a member of House Bill 7, of course, I went through all those thought processes that went into that report. Refocusing away from the notice of appeal to the final judgment, I think, is a great idea for the court-appointed appellate -- the court-appointed ad litem.

I do not think that it is adequate to dispose of the dangling question of, When the trial ad litem is dismissed, then what? Do we just have the appeal vanish because of the failure to file a notice of appeal within the requisite time? Because that's -- that means that in discharging the trial lawyer, we're impliedly eliminating an appeal by eliminating any person who would file the notice of appeal. I don't know that that's -- that I'm on board with that.

I think that there should be some clear determination by the trial judge that there will not be an appellate lawyer rather than just an inference that we can draw that by discharging the trial lawyer and not appointing an appellate lawyer that the trial judge has impliedly decided that there's no right to appeal.

So I support this proposal as written, but I have qualms if we don't do something about the assessment of whether there's a right to appoint -- appoint a lawyer on appeal other than this ad litem. But other people who thought more about it and may feel like this -- this trial court determination with an implied ruling about the appeal is fine. To me, I'd like to see something explicit.

Thank you.

CHAIRMAN BABCOCK: You bet.

Roger.

MR. HUGHES: Well, maybe it's my unfamiliarity with the family law process, but I'm curious to know whether there is any requirement that -- that, so to speak, a judge switch horses; that is, that there's some requirement that the judge, in fact, appoint new counsel to prosecute an appeal after the trial is over.

I mean, it would seem to me -- and maybe I don't know the Family Code all that well -- that if -- if nothing changes, the trial attorney continues on and, you know, whether he prosecutes an appeal, he does or he doesn't. But then I'm not -- I mean, maybe there is, but I don't know that there's a requirement -- and I can stand corrected -- but I'm not aware of a requirement that the judge, after entering a judgment, must then relieve the trial counsel and appoint a new counsel to handle the appeal. I mean, that might be his prudential reasons, it might be a good idea, but I'm not sure it's required.

And, even then, I don't think the judges want to get in the business of deciding whether or not the -- to grant or deny a right of appeal. I mean, I think it's up to them to decide whether to appoint or remove the counsel, but to tell the counsel -- I mean,

it seems to me a great deal of judicial energy is going to get lost if we devise a process that we -- first we remove the trial lawyer, and then we have to appoint a new lawyer, and then the judge has to tell the new lawyer for appeal, "Unless you have some positive indication from the client, don't appeal." Just seems to me we're wasting an awful lot of energy and not accomplishing anything. That's my observation.

CHAIRMAN BABCOCK: Thank you, Roger.

Bill, back to you. Do you want to vote on something or do you want to go into another topic?

HONORABLE BILL BOYCE: I think Judge Hofmann may have a comment.

CHAIRMAN BABCOCK: Okay.

HONORABLE ROB HOFMANN: I've forgotten how to raise my hand using Zoom because usually I don't have to raise my hand.

CHAIRMAN BABCOCK: Well, in here, you do, so -- and then Richard Munzinger will have a comment.

HONORABLE ROB HOFMANN: I'll have to figure out how to do that again.

I just wanted to point out a couple of things. The language with regards to location that was mentioned in subsection iii. and iv., the attorney ad litem's duty to locate, the reason that we used that

language is because that came out of the statute, the duties of those attorney ad litems from Family Code Section 107. For example, 107.014(b) -- (3)(b) requires an attorney ad litem to identify and locate a parent. So that's where the "locate" language came from, from the statute.

And, secondarily, I would hope that the draft is written in this way. And, if not, I would hope that it could be written in a way to allow that appointed attorney, at the conclusion of trial, at the judgment, to be relieved from the necessity of filing an appeal without direction.

As I said earlier, I think, if we have a presumption in any other way, as Judge Rucker wrote in his response, we may be giving a parent who is absent completely from the proceedings more protections than other parents if we change that presumption. We don't make folks file a notice of no appeal. I think the requirement is a notice of appeal, so it is a requirement there.

And so, like in any other case, if an -- if a parent does not have an attorney, the day after the judgment is signed, any parent, including these parents, would have the right to petition the trial court for an appointment of an attorney for the purposes of appeal.

So I think rule as written would put our -- all parents on the same footing.

CHAIRMAN BABCOCK: Okay. Thank you, Judge.

Richard Munzinger. You got to unmute yourself, Richard.

MR. MUNZINGER: I just wanted to comment that some of the discussion is merging the concept of losing the right of appeal with the concept of appointing an attorney for the appeal. The rules of procedure, as I understand them, would be that a final judgment is entered. And let's just pretend for a moment that it recites something regarding the appointment or non-appointment of an attorney ad litem on appeal. No attorney ad litem on appeal is appointed.

A notice of appeal still could be filed in the Court of Appeals by either the person pro se or hiring some other attorney. And I -- it just seemed to me that we were merging the two concepts. You're not really depriving anybody of the right of appeal. As a practical matter, you're making it most probable that the person would not appeal. And I think that Judge Hofmann's last comment pointed that out.

That's all I had to say. Thank you.

CHAIRMAN BABCOCK: Great. Thank you,

Richard.

Bill, back to you.

HONORABLE BILL BOYCE: So I think where we are is at a juncture to have the up or down vote on continuing with this concept as reflected in the draft Rule 306 with the proposed revisions from Judge Hofmann. And if we cross that threshold, then I think we start drilling down into particulars of the way this draft might operate. And I think there may be some additional things to say.

I'm very mindful of Richard Orsinger's comments about perhaps having greater clarity. But, before we get to that, I think we're at the threshold juncture of, Do we want to continue down this path with a draft rule that looks something like this with this concept?

CHAIRMAN BABCOCK: Yeah. Great.

Before we get to that -- and we'll get to that in two seconds -- but Justice Gray had his hand up.

HONORABLE TOM GRAY: To make an intelligent vote on what is proposed, I am curious if we have any data on how many cases we are talking about because the -- if we don't know how many we're talking about, it really makes it difficult to understand the

gravity of what we're voting on.

The part of the process that I have seen most affected from what we've experienced at the Waco Court of Appeals is -- has nothing to do with the phantom case. It is the lawyers that are appointed that miss the deadline because there are special rules that apply to termination cases; specifically, the 20 days and that motions for rehearing do not extend the time period for filing the notice of appeal. That's what we see.

Now, that may not be prevalent across the state. But if we're talking about a few cases, this kind of procedure will take two years, at least, to work its way through the judicial system, and there'll be a whole nother bevy of problems that come out of it, I assure you. It always does.

And I'm fearful that making a change to the system that we have now that is somewhat working, working most of the time, in my view, is not what we need to be doing. And so that's why I will be voting for not this proposal and probably not any proposal that changes the system that is in place now.

CHAIRMAN BABCOCK: Great. Thank you.

Okay. Richard -- no, you don't have your hand up. Anybody else want to comment? Okay. Seeing

no hands, Bill, we get to vote finally.

So everybody that is in favor of this approach, even though we can have more discussion about the specifics -- but everybody that's in favor of this approach, raise your hand.

MR. STOLLEY: Chip, this is Scott Stolley. I vote in favor. I can't figure out how to raise my hand.

MR. JEFFERSON: I'm in the same -- I'm in the same boat.

CHAIRMAN BABCOCK: Your hand is raised somehow, so somebody figured it out for you.

MS. BARON: Can I explain how to raise your hand?

CHAIRMAN BABCOCK: Yes.

MS. BARON: Okay. If you go to the bottom of your screen, there's something that says "participants." If you click on that, it opens a dialogue box. And at the very bottom of that, there are three options: invite, mute me, lower hand and raise hand. So it's in the participant window.

CHAIRMAN BABCOCK: Okay.

PROFESSOR ALBRIGHT: And this is Alex. If you're on an iPad, it's on the three dots that say "more" at the top right corner.

CHAIRMAN BABCOCK: Right. Thanks, Alex.

Okay. Has everybody figured it out?

MR. ORSINGER: Chip, do you have a provision for a mail-in ballot?

CHAIRMAN BABCOCK: We do. We're going to get to that next week.

MR. RODRIGUEZ: I've not figured it out, but I'm in favor.

CHAIRMAN BABCOCK: Okay. You'll be the 28th vote.

Anybody else still having trouble?

All right. Everybody that is opposed -- now everybody lower your hand that voted. And everybody that is opposed to the -- to the general approach that we're taking, raise your hand now.

Okay. The ayes have it by a vote of 28 to 3. So, Bill, you have an overwhelming majority for this -- for this approach.

Now, take us through where you want to go next, if we need further discussion because, of course, what we just talked about did deal with some of the specific.

HONORABLE BILL BOYCE: I think -- I think a fruitful next step is to work off of the draft that Judge Hofmann had circulated. We started talking about

some of this. I've been making notes and, obviously, we'll have the transcript.

I guess what I would hope for is -- is a level of certainty that we've identified the potential areas for tweaks on this -- on this draft, and then I guess we can see if there's more to vote on for that or if it's more profitable for the subcommittee to revise it based on the comments and bring back something more refined for a real vote.

CHAIRMAN BABCOCK: Okay. Well, let's see what everybody has to say, if anything. So any -- any comments?

Justice Gray.

HONORABLE TOM GRAY: I know that the phrase "alleged father" is included in a statute somewhere, but why would it not be better to use "alleged parent" every place that we use "alleged father"? It would obviously cover the alleged father, but it would also include any other alleged -- person that is alleged to be a parent.

CHAIRMAN BABCOCK: Okay. I guess Judge Hofmann would be the appropriate person to answer that question.

HONORABLE ROB HOFMANN: This statute needs to cover folks who are not just alleged parents

but folks that are actual parents, including mothers and established, presumed, adjudicated fathers as well. So someone who signed a birth certificate is not an alleged father. They're now a presumed father, and they would need to be covered by this statute as well.

HONORABLE TOM GRAY: And that -- that sort of takes me in the direction I'm going is the non-traditional parent. I'm thinking of the children that have two mothers, an adoptive parent, a parent that is maybe adoptive, maybe not. It just -- it seems to be unnecessarily restrictive to say "parent" and "alleged father" instead of "parent" or "alleged parent." And it seems to need to be broader rather than narrower.

One another comment about the specific wording, I would change the word in 2.c., "'good cause' means the following," a word of limitation, to be "'good cause' includes the following" because I guarantee that there are going to be situations which we haven't thought about that need to be the "good cause" exception.

CHAIRMAN BABCOCK: Judge, on the -- on the issue of "parent" or "alleged father," there probably is not much dispute at the moment of birth who the mother is. But are you saying that as time goes on, there could be an issue about who the actual mother is?

Is that -- is that where you were going with that?

HONORABLE TOM GRAY: Well, yes. I mean, you've got court challenges to adoptions, you've got putative adoptions, or at least we used to. I don't know if they're still out there anymore. You've got all kinds of medical advances where you've got surrogate mothers.

And there are real questions, I think, coming before the judiciary of who are the alleged parents that we're trying to terminate. And I don't see any down side to changing every place that we put "alleged father" to be "alleged parent."

CHAIRMAN BABCOCK: Yeah. It sounds too complicated for me. I don't know about you, but -- no, that's -- that's a good point.

Bill.

HONORABLE BILL BOYCE: I think Justice Gray's -- Chief Justice Gray's observations are on point in terms of some of the potential issues that may come up at some point. I guess my question and my concern is that the further we depart from terminology that currently exists under the statutes, the more opportunity there is for disconnect between what this rule does and how things operate under the statutes.

And Judge Hofmann may have additional

thoughts about that. But that -- I'm -- my thought would be that the opportunities for problems are reduced if we stick closer to existing statutory language; and if that existing statutory language needs to be modified to address new circumstances, then the better way to do that is to amend the statute than to have the disconnect between the rule and the statute.

CHAIRMAN BABCOCK: Professor Albright and then Justice Christopher.

PROFESSOR ALBRIGHT: I was just -- you know, just to add to the complications on "parent" versus "father," you know, I believe that male to female -- or female to male -- I can't remember now. I'm getting confused. Anyway, when you have a sex change, you can still -- if you're a female and you were a male, you could still be the father of children.

So -- I think I raised this last time. I just thought maybe somebody should check with an organization that might be more knowledgeable about these things than we are. But I think these things are getting to be more and more prevalent, and we should probably take them into account instead of being criticized for not doing it.

CHAIRMAN BABCOCK: Thank you, Professor Albright.

Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I would like something in this rule that says the failure to include the statement does not render the judgment interlocutory.

I would also like -- I think c.iv. needs a little tweaking. I mean, what if the problem is that the attorney ad litem failed to ask? Right? I mean, are we -- does this rule create a duty on the attorney ad litem to ask, you know, as soon as he has met the parent or father -- alleged father, "Do you want the right to appeal? Here's what it is."

I mean, just the way -- the way it is written there, "never expressed to the attorney" -- well, I mean, most clients would not express it to an attorney unless the attorney brought it up first.

CHAIRMAN BABCOCK: Okay. Judge Hofmann and then Lamont Jefferson.

HONORABLE ROB HOFMANN: If you -- in response again to the alleged parent issue that Justice Gray raised, at the conclusion of trial parentage will have been adjudicated, and so there will be an adjudicated mother and an adjudicated father unless this -- an alleged father is the only father that's out there.

The Code allows termination under one section of adjudicated parents and under a separate section of alleged father, so the only parent that could be terminated by this judgment would be a parent or an alleged father.

An alleged mother could not be terminated. That person would have to be adjudicated first and then be terminated. So the only person that a judgment would refer to would be a parent or an alleged father.

CHAIRMAN BABCOCK: Great.

Lamont and then Frank Gilstrap.

MR. JEFFERSON: First, thanks for the hand-raising lesson. I needed that.

Secondly, on the additions, I'm -- Judge Hofmann's additions, I share the concerns that -- I don't -- that somebody raised about having to assess whether or not the client expressed an intention one way or the other.

And I've got -- I've got a couple of problems with that. One is determining, you know, whether that happened. But, secondly, it seems to me like the ad litem should independently be able to determine whether an appeal should be -- should go forward without regard to -- not without regard to --

taking into consideration the client's -- the client's desires, but that shouldn't drive the boat.

If the ad litem thinks that regardless of what the client wants, an appeal, under the circumstances, would be either frivolous or improper, for whatever reason, then the ad litem should not -- there should not be a presumption that the ad litem must appeal nevertheless. And so I would -- I think that I agree that that language ought to be tweaked.

And I also agree with the comments about, you know, how -- what -- what is the magnitude of the problem that we're dealing with here, because the rule already allows for the ad litem, even if he's not -- even if the ad litem is not in contact with the client, the rule allows the ad litem to make the judgment that I'm going to appeal this judgment.

And that's -- you know, so 2.b. says -- or 2.a. says the ad litem -- the ad litem can continue the appeal even if there's no contact. But the ad litem ought to also be free to not appeal if the ad litem thinks that they should not, and especially if they're not in with contact the client, for whatever reason.

So I'm -- and I thought the real -- the rule as originally drafted addressed all of the concerns that I would have, for due process purposes, of

determining whether or not the -- making some kind of an assessment about whether an appeal should go forward. The person in the best position to do that is the advocate for the client who would have appeal. It's not the court. I mean, the advocate's got to assess the entire situation and make a call.

So I'm -- and it's -- you know, it's not even necessarily the client, again. And I think the ad litem ought to have some discretion on that point, so -- I like -- I like the draft as it was originally drafted. I'm -- I'm a little uncomfortable with the changes could maybe be brought around there, but -- and I -- and I also think that having this in the judgment is the right place for it.

CHAIRMAN BABCOCK: Okay. Great.

Frank, then Bill, and then Kent Sullivan.

MR. GILSTRAP: Well, when I -- when I raised the issue of "locate" versus "communicate," Judge Hofmann correctly pointed out that Family Code Section 107 says "locate." And that -- that maybe raises the problem to a different level, but I don't think it solves the problem.

If "locate" means "communicate," then we ought to say so. If "locate" does not mean "communicate," then we have due process problems as

witness the examples that I gave earlier.

In c.iv., even if -- and I think someone touched on this -- even if, there, we assume that "locate" implies "communicate," as someone pointed out, it says, Well, he expressed no desire to exercise his right to appeal. Well, was he asked?

When we had a meeting on this earlier -- it was sometime ago; it was at a hotel in Austin, I believe -- we had a discussion where we had some type of statement that the parent had to sign saying, I understand the State's about to take my child, that type thing, and I -- I complained about it because it wasn't strong enough.

Well, we've got to have something like this. I mean, when -- the person, before expressing his desire to appeal or not to appeal, has got to be told about his rights, and that's not in the rule.

CHAIRMAN BABCOCK: Thanks, Frank.

Bill.

HONORABLE BILL BOYCE: A couple of partial answers to the questions that were raised. I'll start with Frank's. I think the assumption that I'm operating on is that this rule-drafting that we're trying to accomplish now follows on an improved citation of service that communicates the rights.

I think this may have been the point that Richard raised earlier. That's probably not a complete answer to Frank's concern about knowledge about what the rights are, but that may partially answer it.

For the question that's come up a couple of times with respect to data, I'm aware of no effort to quantify the degree of the so-called phantom appeals. I would invite Judge Hofmann or Richard Orsinger to speak up if -- if there's some specific data out there that I'm not aware of.

And I guess the other point I would make -- and this goes to Lamont's point about what if the attorney doesn't -- the attorney ad litem really doesn't think there's a valid appeal here -- I think it's contemplated that later on, we're going to delve into whether and how to fashion some sort of an *Anders*-type procedure to address those circumstances. So I just wanted to put that as a placeholder.

CHAIRMAN BABCOCK: Thanks, Bill.

Kent Sullivan.

HONORABLE KENT SULLIVAN: Thanks.

First, my compliments to Judge Hofmann. I think this is a great effort in a very difficult situation. Couple of quick comments. I wanted to echo Justice Christopher's comments. I think it would be a

great idea for the rule to eliminate any ambiguity about a judgment being potentially interlocutory. I think that's a practical plus that should be considered.

And I shared the concern about c.iv. with respect to using the standard of, you know, quote, never expressing the desire to appeal. That concerns me in that, from my perspective, it looks like potentially being invited to a swearing match and a lot of ambiguity in terms of somebody potentially appearing and saying at some point that they did express such a desire. And then you've got -- it just lacks clarity. It's a process that lacks a bright line, while I readily concede it's -- it's all very problematic.

The last point I'll make is just one that concerns me -- and let me note clearly that, you know, I'm concerned that I'm not sufficiently schooled in family law to add much here, but it's just a general concern -- and that is that, you know, we've had -- I noted various comments along the way.

Justice Boyce framed this in terms of which way we want the silence to cut. Frank has discussed it in terms of this issue of are we talking about locating someone versus actually communicating with someone.

And I want to just, I guess, add to that

discussion because my concern is, Haven't we really identified various stages in the process in which we have a lawyer who has no client, they are not able to communicate with anyone, and we are expecting them to make decisions unilaterally for that client? And that just strikes me as extraordinary and unprecedented.

To what extent do we -- are we effectively saying that a lawyer must make a decision for this client? And, you know, as a -- as a matter of due process, to what extent are we saying that that lawyer can unilaterally, without discussion, without communication, make a decision for that client?

It's -- it's very problematic, and I just wanted to add my two cents on those points.

CHAIRMAN BABCOCK: Thanks, Kent.

Bill, no other hands are raised, so is there any -- anything specific you'd like a vote on, Bill, for further direction?

HONORABLE BILL BOYCE: I think at this point what would probably be most useful is to digest this morning's comments and bring a revised draft back, in consultation with the subcommittee, in consultation with Judge Hofmann and the Children's Commission, to -- to have specific language that's been hashed out. And I think that would tee up a vote a little more cleanly at

this juncture.

CHAIRMAN BABCOCK: I think so, too. The -- next month's meeting is going to be devoted to deep thoughts in advance of the legislative session, so this would not be brought back until the new year.

Is that -- is there any timing issue with respect to -- I guess I'd invite the Chief's comments or Jackie's thoughts about it. So is there any -- any time imperative that we're working under here, other than we want to try to get it done, obviously?

CHIEF JUSTICE HECHT: No, I think that's just it. So it doesn't need to be on a special meeting or the December meeting. It can just come back in due course.

CHAIRMAN BABCOCK: Okay. Great.

(Simultaneous speaking)

CHAIRMAN BABCOCK: Mr. Orsinger wanted to -- yeah, I'm going to --

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Just take it easy.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Gee whiz.

First of all, we've got a comment on whoever it is Kent Sulluvan's got up on the screen right now, some sort of wood etching of his face that makes

him look like he's 22, but other than that --

MR. ORSINGER: It's from the Wall Street Journal. It's a Wall Street Journal drawing, isn't it?

HONORABLE KENT SULLIVAN: Listen, don't make fun of me. I need all the help I can get.

CHAIRMAN BABCOCK: Well, now that I know we can use our Wall Street Journal without fear of copyright infringement, then that's what you're going to see from me.

But, Richard, what do you have to say?

MR. ORSINGER: What I wanted to say is a parting shot to Bill and also to put in the record is that this proposed rule kind of drives the statements of the attorney ad litem underground.

In the House Bill 7 report, anyone could challenge the filing of the -- of a notice of appeal, and then there would be a hearing in which the burden of proof was on the attorney ad litem to prove that they had client authority to go forward with the appeal.

In the current proposed rule, subdivision 2.c.ii., iii., and iv., the court is making a recital which presumably is on evidence provided by the attorney ad litem because unless the attorney ad litem informs the court, the court will not know whether he -- whether the ad litem was unable to locate or whether, after

locating, they failed to appear or whether they had a communication or series of a communications in which the desire to appeal was never expressed.

So I just want to comment that we are not giving anybody any guidance about how the attorney ad litem is supposed to inform the court about the nature of the communications between the attorney ad litem and his client or potential client.

And I'm not criticizing that. I'm just pointing out that there's a difference between the House Bill 7 proposal which puts the attorney ad litem on the spot to come forward with evidence, and this one kind of has all these implied duties.

The final comment I wanted to make is that in subdivision 2.c.i., "The parent or alleged father failed to appear after proper personal citation," that's not going to apply by intent to any substitute service. I think that's what "personal" means there.

And I'm a little troubled by the word "proper" because I don't know if that opens the door for some challenge about the propriety of personal service. You know, if you have personal service and you file the citation, you file the certificate of the officer who did the service, it's presumed to be valid.

I'm a little nervous about the word

"proper" there because I think we just are assuming, if somebody is personally served and they don't file an answer and they don't file a motion for new trial, they're out. So I don't know if we need that word "proper." I'm not criticizing it. I'm just saying let's be thoughtful about it.

And this is -- this is great work. I thank you, Bill and Judge.

CHAIRMAN BABCOCK: Yeah.

Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Yes. I'm sorry. I have one other thought on the way the rule is written. It doesn't require the ad litem to file a motion to be discharged, and so then I -- so what I assume is that the judge could discharge the ad litem for the failure of the parent or the father to appear at the trial on the merits, whether the lawyer wanted to be discharged or not.

And, you know, I -- I think we have to think about that a little bit. I mean, sometimes fathers or mothers don't show up because they're in jail and through no fault of their -- well, usually through fault of their own, they can't actually appear at trial, even with a proper bench warrant, because sometimes, depending on the conditions at the jail, even if you do

a bench warrant, if you're -- if you are in trouble and are segregated, they don't bring you.

So, you know, I just think that that's something that we have to think about. Is it an automatic thing: You're not here, you don't get the ad litem?

CHAIRMAN BABCOCK: Thank you.

If there are no other hands -- and I see none -- we'll take our morning break.

Teri, are we -- have we exhausted you, or are you okay?

THE REPORTER: I'm okay. Thank you for asking.

CHAIRMAN BABCOCK: Yeah. Well, we're going to -- in deference to you -- and I hope you haven't had any trouble reporting this -- but we'll take a 15-minute break, and be back at 10 minutes after 11:00. So if everybody can "simonize" your watches, we'll see you then. Thanks.

(Recess from 10:51 a.m. to 11:10 a.m.)

CHAIRMAN BABCOCK: It is 11:10 and we have completed our discussion for today on suits affecting the parent-child relationship and out-of-time appeals in parental rights terminations cases, so let's -- let's turn to probate court policies

prohibiting pro se executors.

And, for that, Justice Pemberton.

HONORABLE ROBERT PEMBERTON: Great. Thank you, Chip.

And good morning, everyone. I hope everybody's had a chance to look at our report from our subcommittee, which is, along with myself, Evan Young, Pam Baron, and Nancy Rister -- small in number but hopefully helpful in impact -- and the accompanying materials we gave you and found them helpful in getting your arms around this issue that the Court has charged us with answering.

As the Court notes, a number of these statutory probate courts have adopted policies that restrict or prohibit independent executors -- that is, the people named in a will to administer or settle out an estate -- have restricted them from prohibiting without the representation of a lawyer.

Incidentally, when we talk about the statutory probate courts, we're talking about a fairly small subset of all the courts in Texas that have some sort of probate jurisdiction, which, in the first instance, would be the Constitutional county judge or a court delegated from there by statute. We're talking about mainly the large urban areas. An example of such

a policy we provided you was from the Travis County probate court, and it kind of shows you a lot about how the policies work and some of the underlying rationale.

We also provided you -- we thought it was pretty helpful in framing up both some of the background and, also, some of the basic legal arguments competing amicus briefs in the *Maupin* case. That was an attempt to challenge this Travis County probate court policy brought by a pro se litigant who attempted to proceed in that fashion as the executor of his late wife's estate. On one side, you have the Texas Access to Justice Commission. On the other side, you have the statewide entities representing these probate court judges.

Also, the Court, in giving us this charge, referred us to a *Law Review* article. I had intended that y'all get that before this morning. Didn't work out that way. But it's there. We cite to it several times in our report. And it's there if you want to do some deeper driving either today or later subsequently.

We gave you some key cases from the courts of appeals in this area. It appears a big impetus toward the development of these policies was a 2006 -- and I'll emphasize for the benefit of our colleague -- Chief Justice Tom Gray's split decision

over his vehement dissent, the *Steele* case in -- out of Waco, which held that a gentleman attempting to prosecute an appeal could not do so pro se to the extent he was doing -- he was trying to do so in his capacity as independent executor, citing cases both from other states and, also, Texas cases involving pro ses attempting to represent corporations. The Court reasoned that the executor was representing others, not merely acting pro se, and was therefore engaging in the unauthorized practice of law by proceeding in that fashion.

Steele has been followed by other courts, including the court of -- the Corpus Court of Appeals in the *Maupin* case and, also, by the Amarillo court in *Guetersloh*, applying that rationale -- that basic rationale to trustees generally. Executors are, of course, a -- in essence, a type of trustee.

So against that background, the subcommittee endeavored to answer the question posed by the Court, Is there a right under Texas law for these executors to proceed pro se? And we understood that to be a discrete question of law. We basically put on our hats as appellate -- primarily appellate practitioners and -- or judges and answered yes or no. There are obviously some important and weighty policy

considerations that may come into play.

On one hand, you have Texas's long history of allowing somewhat distinctly historically independent -- access to independent administration of estates. If a testator wants to -- wants to have that done, it's -- the idea is to be -- not involve the courts, be fairly inexpensive, user friendly. The Access to Justice Commission, among others, perceived that as dovetailing with broader concerns about allowing Texans of all means some reasonably affordable ways to order their legal affairs.

On the other side, you have the probate judges, you know, their concerns about, you know, the potential for, at least when an estate -- settling an estate can be somewhat complicated -- really making a mess of things, both for themselves and others, beneficiaries affected. And, of course, they'd be some burdens on the courts themselves in these proceedings by -- by allowing pro ses.

We just tried to answer the legal question posed, not what the law should be, not whether there ought to be safeguards or how you set up forms or anything like that or whether they shouldn't.

As best we can tell from where we're sitting, the -- our subcommittee concluded that the

answer under current Texas law is yes, and there are three basic reasons for that.

First, although colloquially folks often speak of the, quote, estate of a deceased like it's an entity like a corporation, that's not the way it is under Texas law. It just simply refers to the property to which there are some fiduciary duties that arise that the executor owes. Consequently, efforts to analogize the position of an executor relative to an estate to a pro se attempting to represent a corporation ultimately don't -- don't hold.

The second reason addresses what seems to be the more precise rationale of these probate court policies, at least as articulated in -- both in the Travis County policy and in the brief they filed in *Maupin*, is that it's twofold. One is that a person who is named as an executor really wears two hats. They've got their individual capacity and their capacity as the executor. No one disputes that.

The second part, though, is more problematic. The reasoning is that because the executor in that capacity owes fiduciary duties to others, they are representing others when they attempt to proceed and, therefore, unauthorized practice of law.

And this -- this thinking is very similar

to what the *Law Review* article by Professor Hatfield identifies as the, quote, Minnesota rule. It basically holds that an executor is a transparent legal agent of the beneficiaries and, therefore, acts only on their behalf, represents them, doesn't -- doesn't act really on their own behalf.

We think Texas law as it currently stands is to the contrary. A key consideration is the Texas Supreme Court *Shaffer* case where the Court held that an independent executor sued in that capacity had a right to represent themselves in court and cannot be compelled to hire a lawyer.

With this scenario, you know, there could be an argument made that being sued, albeit in their capacity as executor, may be different than the broader issue what we're talking about here, but the Court sure didn't emphasize that.

Second, you have the *Huey* case where the Court distinguished or held that a trust -- a trustee, the broader class of fiduciaries -- a lawyer who represents a trustee is not representing the beneficiaries but the trustee, the fiduciary himself or herself. And that is -- that seems contrary to this Minnesota rule idea that the trustee, or executor, more specifically, would be simply this transparent

agent.

And, third, are our -- there's a broader notion that strikes us that -- we don't normally say that because someone may owe fiduciary duties to a third party, that means that if you proceed in some way, you're representing them in some sense. You know, marital relationships are a fiduciary relationship. Does that mean that married people cannot proceed pro se in Texas court if you're implicating a marital estate? I don't think that's our understanding.

And, finally, even assuming this notion that fiduciary duties owed equals representing others, you know, in the probate process, the first step is that the executor named in the will has to go probate the will and get appointed, you know, prove letters testamentary. They're not in the role of owing the fiduciary duties until that happens, so it seems like, in the very least, they would be able to proceed on their own behalf at that stage.

So that is our -- our best conclusion. We have -- we hasten to admit none of us have any particular expertise in probate law. We hope we're not missing something, but -- but that seems to be the answer under current Texas law from where we're sitting.

I offer -- I'd urge that if any of my

subcommittee colleagues have anything to add, clarify, correct on anything I've said, please feel free.

CHAIRMAN BABCOCK: Any subcommittee members want to weigh in on this? Okay. They're -- they're either slow on the button or they have nothing to say, so we'll open it to discussion. Anybody have any comments about this really excellent memo and presentation?

Well, should we call for a vote?

Frank Gilstrap. You'll have to unmute. We don't care if we see you or not.

MR. GILSTRAP: Okay. It seems to me that we're -- we may be approaching this problem the wrong way. As lawyers, we're approaching it as a legal problem: What does the word "person" under Rule 7 mean? Well, that's for the court to decide.

What we've got here strikes me as an administrative problem. The Access to Justice people say, Look, there are a lot of small estates out there that have maybe one asset, and these people shouldn't have to hire a lawyer because they may be poor. For example, I've been taking -- the last 20 years taking care of my aging mother. She didn't have any money, I don't have any money, but she left me this house and I need get it in my name. Why should I have to hire a

lawyer?

The probate judges, on the other hand, say that, Well, it's going to be an administrative problem with the -- if we have too many pro se litigants out here. And this is not something that's, I think, limited to probate judges. It's limited to any judge in a court with probate jurisdiction.

Well, this is -- there's not a good solution here via litigation. If you say that the estate is -- that -- that the person can proceed pro se, then that applies to every state -- every estate, even a billion dollar estate. I can show up and say, I'm the independent executor, and I want to probate the will. And then if you say that, well, the other example -- the other solution means that nobody can proceed pro se.

This is like the problem that the landlords dealt with a few years ago in justice court. In justice court, we now have a provision in the Probate Code -- excuse me -- the Property Code which says that anybody in an eviction can proceed pro se or can be represented by some -- by their authorized representative. That's often the property manager, but it also applies to the tenant as well.

So what we need here is maybe some type of similar administrative remedy which the Court can

give through its rule-making process. And what we need to do is to take Rule 7 and amend it, which we -- we can suggest the Court do. Take the current Rule 7 and make it Rule 7a, and then 7b becomes a rule specifically dealing with probate of a will.

And how would you say that? Well, you might start out and say, Well, any person can offer a will for probate and if you go down and get it probated and have letters testamentary issued.

Well, that's far too broad. So maybe we limit it to any person who's named as an independent executor in a self-proving will. That makes it much narrower, and it makes -- it reduces the headaches of the probate judge.

But you can also limit it further. You might -- one of the suggestions in the materials we've seen is, well, we limit this to persons where they're the sole beneficiary or legatee. I'm not sure what the proper term is. You could do it that way. But they're small estates where maybe more than one person is the legatee. Me and my brother want to -- want to own this house.

And, finally, it seems to me the way that you really could do it would be this, that you could put some type of cap on the valuation of the assets. And I

don't know -- there would be some procedural headaches as to how to do it, but we say that a person can offer a will for probate if he's named an independent executor in the will and he can proceed pro se provided that the assets appear to be worth less than, say, $15,000.00. I think something like that would solve the problem administratively.

That's all I have.

CHAIRMAN BABCOCK: Thanks, Frank.

Richard Orsinger.

MR. ORSINGER: Thank you, Chip.

So from my perspective, we should not lightly dismiss the role of attorneys in the probate process. And I say that from the perspective of having tried two forged will cases. It's -- it does happen that people try to commit fraud in the probate process.

And, right now, if a lawyer is involved, the lawyer has a legal obligation to the society at large not to put forward false evidence and false testimony. And so, to a -- to the degree that the lawyers are ethical collectively, there is -- there is someone who is looking from a close view as to whether the evidence that's being proposed is -- is genuine and whether the testimony is true -- truthful.

When you take the lawyers' valuative role

out of a proponent of a will, then you just have the individual's morality or fear of prosecution that govern promulgation of forged or revoked wills.

Now, from a -- from a procedural standpoint -- and I don't do these often, and it's been a while since I did one -- but my recollection of an independent administration is that, really, you have to file an application to probate the will, along with the proof of claims, and then you have to go to court and get an order admitting the will to probate, all of which is very perfunctory.

And I don't see that there's a lot of procedural complexity there. I don't think there's going to be an overwhelming burden on the trial courts being -- having orders thrust upon them that are inadequate or improperly drafted. So, you know, filing the application for probate, getting the order admitted to probate is fine.

Maybe there's some issue here because we have to have some follow-through and get the oath taken because, without the oath, you can't get your letters testamentary. And then, as I understand it, your final duty is to file an inventory, appraisement, and list of claims under oath. And there's no -- you know, that is -- you can get that approved if you want to. There's

no punishment if you don't. And you don't ever close the estate. In my experience, there's not final approval of anything.

So it's up to the executor to give notice to creditors, if there are any, and then to decide which claims are going to be paid voluntarily and which ones are not. If all claims are paid, then they're supposed to distribute the assets in accordance with the will. But if there's a contest of a claim, the executor has to reject the claim, and then there's going to be a lawsuit over the claim. And that's more in the nature of an adversary proceeding.

So I don't have very much discomfort with saying we're just going to let people pro se try to probate a will. I think that does increase the risk that we're going to get improper wills put forward. But if we just live with that risk, I'm okay with that.

But when we start getting into complex litigation, when we start getting into a will contest over competency or over forgery or when we get into claims involving creditors and the dead man's statute and the complexities that go along with probate litigation, I have misgivings about that.

And none of that is based on an interpretation of the law as to who is entitled to go in

court. I'm just speaking from a practical matter. Probating a will and getting in and out with no controversy, I don't see that there's an important need for a lawyer there.

But a complex litigation including a will contest or including fights with creditors, I do see a problem. But, again, none of that is based on law. That's just kind of my perspective of the practical issues.

Thank you.

CHAIRMAN BABCOCK: Thanks, Richard.

Roger and then Kent.

You got to unmute, Roger.

MR. HUGHES: All right. There we go.

I really only -- I had two questions. Is it correct that this is -- this is only being proposed for independent executors and not other estate representatives? Because -- and it makes a difference because if you're an independent executor, that means the deceased went to all the trouble to -- probably to visit an attorney who drafted a will.

I mean, I don't know what's in these, you know, will kits that you get over the Internet; but, generally speaking, if there's an independent executor, that means the -- there was a will drafted by an

attorney somewhere.

And the next thing is, Is this problem solvable by a rule? I mean, are there -- I would've just said, for want of a better term, criminal statutes that can't be overridden by a rule about the unauthorized practice of law?

So I guess those are my two questions, whether we're only addressing independent executors and, second, even if we adopt a rule, in whatever form, can it still be challenged? That's it.

CHAIRMAN BABCOCK: Thank you.

Justice Pemberton, you want to respond to that?

HONORABLE ROBERT PEMBERTON: I can respond to the first question, and it's in one of our footnotes. There is a distinction, at least in some context, between independent executors who, as -- who, as Roger references, are named in the will and the idea is you set up the independent administration and do some planning so it's an easier process for getting it all done and an independent executor in the sense of there's not an independent executor appointed under a will or there's -- you know, where the heirs can get together and other means get the court to appoint a different kind of independent administrator to do this. It's

similar work but it's just a different process at the front end.

It involves some additional findings by the court of necessity for the administration, a few other hurdles. So we're not -- you know, we saw that distinction, and sometimes the terms are used interchangeably. We wanted to make clear we were addressing only executors. That is the question posed by the Court.

CHAIRMAN BABCOCK: Okay. Great. Thanks, Judge.

Kent.

HONORABLE KENT SULLIVAN: As I understand it, the committee's recommendation creates a default to allowing pro ses, and that's something that I would certainly support.

I take Richard's comment, which is a serious one, to be one that maybe there is some subset of this universe that should be recognized as sufficiently complex that would perhaps allow the discretion for the appointment or for the process to effectively insist upon the involvement of a lawyer.

And I think that that would probably be something worth considering. That is, if you met some requirements of at least a threshold level of assets and

some elements of complexity that there would be the discretion to insist on a lawyer being involved so that it didn't burden the entire process.

That said, I think we're always at risk of perhaps zooming by what may be one of the most important elements of this calculus, and that is to revisit the process as a whole -- which, of course, may require revisiting some of the statutory framework as well -- to ensure that it is uniformly user-friendly -- and, by that, I mean pro se friendly -- if, indeed, we're going to set up a system that will be disproportionately used by pro se litigants.

It needs to be something that -- you know, where there is the availability of plain-language explanation and instructions for people that otherwise want to access this system. And as several people have commented -- I don't have the data, but it would certainly be my assumption that the vast majority of these cases are represented by people with very, very limited assets and very straightforward wills that require disposition of assets.

And to the extent that that's what we're looking at, a simplified pro se friendly process, one that has reduced costs, is -- that ought to be what we're shooting for.

Thanks.

CHAIRMAN BABCOCK: Thank you, Kent.

Justice Christopher and then Roger.

HONORABLE TRACY CHRISTOPHER: Well, I was briefly reading the amicus brief of the probate judges -- because we don't have a probate judge here, do we, to talk on this issue -- and one of the things that they cite is the fact that they have an obligation to see that independent administrators meet their legal duties under the Texas Estates Code.

And they argue that the way they can see that done is by requiring a lawyer to make sure and that they are in a unique position of facing personal liability for judicial acts if they fall short through gross neglect in connection with the reasonable diligence standard of the independent administrators.

So I can understand why, as a matter of policy, the probate court judges would want to have lawyers instead of people pro se to make sure that the independent administrators meet their legal duties. And I think that that's what they have done through the use of these global rules.

So, you know, I don't know whether the committee looked at that aspect of it at all, had any recommendations, whether, you know, that's something

that ought to be taken up by the Legislature in terms of, you know, what does it mean to -- for the courts to use reasonable diligence to see that independent administrators meet their legal duties.

So, you know, I can understand why they passed the rule that they did, given the requirements that they have, which is different than most other judges.

CHAIRMAN BABCOCK: Justice Pemberton.

HONORABLE ROBERT PEMBERTON: Quickly.

I'm aware of that argument. I took a look at that statute. It refers to, looks like, court-ordered administration rather than the independent executor scenario we're talking about.

Admittedly, you know, we're not -- we've emphasized this all along -- we're not probate experts, and there may be a point in the process where you want to have more people around the table on all sides of this who can claim some real expertise. But I think that was -- that was -- well, it wasn't clear that provision applied to the situation we're talking about here, the independent administration by an independent executor.

CHAIRMAN BABCOCK: Thank you.

We got Roger and then David Jackson and

then Richard Orsinger.

MR. HUGHES: Well, I can't believe I was going to even say anything on this, and yet here again I am. Having recently been the independent executor of an -- of -- in a no muss, no fuss probate proceeding, I can tell you even when there's not going to be any contest, there's just still some technical things to do that even if you're an independent executor, such as filing tax returns and filing inventories with the court, et cetera, and especially in some of the larger counties where you have specialized probate judges who do nothing but eat, sleep, and breathe probate law all day long, I can understand, then, why they would even want the uncontested-issue ones handled by a lawyer. I certainly went to an attorney.

That said, this is Texas. Right now, we think pro se is wonderful. So all I can say -- my comment was this: Based on my own personal experience, if we increase the number of pro se independent administrations, what we're eventually going to have to start doing is what we did with family law.

They're going to start the -- the judges are going -- we're getting crazy orders, people aren't doing their job, they aren't meeting the deadlines to file their inventories, et cetera, et cetera, et cetera.

And, as a result, they're going to start saying, if you're going to have pro se people and we have to tolerate it, then we're going to want state-approved forms. And we're going to have to do for the probate courts on -- on these pro se cases what we have been pressed to do in the family law area. And maybe that's a good thing. But I'm saying, if this is the way we go, that's what may be down the road. We need to think about that. Enough said. That's my two cents.

CHAIRMAN BABCOCK: Thanks.

David Jackson.

MR. JACKSON: Well, unfortunately, I'm exactly in the position we're talking about. We buried my mother last Friday, and I'm the independent executor. I would be terrified to try to do this without a lawyer.

I think, if you do do this, you need to have limits on the amount of the trust -- or the estate. You need to have limits on the number of beneficiaries. I mean, there are so many things that kick in that -- you know, I've been around you guys for 29 years. I've been around lawyers for over 50 years. And this is overwhelming.

CHAIRMAN BABCOCK: Thanks, David.

Pam Baron.

MS. BARON: I guess I just want to point out two things. One is this is not a uniform practice. It's mostly a practice adopted in the specialized probate courts. So if you take your probate matter and you're an independent executor in some county that does not have a specialized probate court, you are likely to be allowed to proceed pro se; so we have disparate treatment of similarly situated litigants, depending on what court you're in.

And the second thing is, is complexity is not a factor. You either have a right to self-representation or you don't. I can represent myself in a very complicated business dispute on my own behalf, even though it might involve significant damages -- $10 million, whatever -- but that's not the criteria that we have generally used in deciding whether you're entitled to self-representation.

CHAIRMAN BABCOCK: Thanks, Pam.

Richard, you or somebody had their hand up. Justice Gray. There he is.

Justice Gray. You may be muted.

HONORABLE TOM GRAY: I am now unmuted.

I was going to stay out of the fray since I was unable to persuade my colleagues in the opinion that seems to have started this.

And, Bob, given the length of the opinions that you write, I was very pleased with the very succinct brevity of your excellent opening and presentation of the issue.

But this issue reminds me of one of Kinky Friedman's slogans when he was running for governor, and that is that the probate judges should be required to participate in the pro se fun just like the rest of us judges.

And so I -- you know, if we, as court of appeals judges, could write an administrative rule that said, "Hey, nobody gets to appear in the appellate courts pro se; they have to be represented by counsel," it'd make our job a lot easier. It would put the litigants at less risk. But Pamela was right on point about this is not about risk and rewards. This is not about what is good or advisable or anything of that nature.

David, I am -- you know, just express my sympathy for the loss of your mother and the process that you are embarking upon. It is -- it is not for the faint at heart. But the -- one of the things that we have not focused on -- nobody's mentioned this -- and I'm -- I'm even hesitant to bring it up.

And, first, let me do one little preface.

I did estate litigation for three years when I started in Corsicana with Dawson & Sodd. We did a lot of it. There was a firm there that had probably written 10,000 wills, and they wouldn't -- they would not get involved once there was any dispute among the heirs. And we were one of the firms that they would routinely refer contested estate matters to, and so we handled a lot of them in a lot of different situations. But we're the lawyer. That was fine.

I mean, it's -- you know, if you ask, you know, 100 probate lawyers whether or not this is a good idea, I suspect you're probably going to have at least 99 that say this is not a good idea. They need to have lawyers. That's the nature of the beast. Same with the judges; they're going to want lawyers involved. There's levels of protection that come with that.

But there are really two different types of representation by the executor that is at issue, and it was this second type in the *Steele* case that is in Bob's work. The -- Gene Steele was not attempting to represent himself in the capacity of -- to be an executor or of being an executor in a probate matter.

It was a piece of litigation that involved the decedent and, therefore, the decedent's estate. And he was -- because he was the executor of

that estate, he was attempting to represent the interest of the estate in that litigation.

And that is fundamentally different than the perception that I think most of y'all are approaching this with that we're talking about the -- the person representing themselves in the estate administration pro se. Two different situations but the same rule should apply. I go back to what Pam said. It is not about whether or not it's a good idea or not or -- it's about a right to do it.

In Texas, if you went to Baylor, you had trust and estates from Tom Featherston, former Baker & Botts attorney that -- you're talking about somebody that lived and breathed estate administration, he did. He still does. Amazing guy, extraordinarily knowledgeable, and it is his phrase that I included in my dissenting opinion that an independent executor can do anything that the person could do if they were alive.

And that is exactly what I was arguing in the dissenting opinion to the order in *Steele* is that the individual, a guy named Beau Duke, if he was alive, he would have been able to represent himself in the litigation that was going on. But Beau had died. There's a whole long story behind that. His -- and I won't get into it here, but it's very East Texas in its

nature.

The -- I'll just say, the footnote to get your interest, after years of being missing and litigation over this 900 acres, his remains were found in the bottom of a well on that property. So if that doesn't pique your interest in going back and reading some more, I'll leave it at that.

Point is, if Beau had been alive, he would have been able to represent himself in this litigation, ergo his independent executor that had been appointed to administer his estate should be able to do it. And Tom Featherston could find no prohibition against such a representation, and I can find no prohibition from such representation.

Whether or not it's a good idea, that is an entirely different matrix. Whether or not it can lead to liability on behalf of the beneficiaries of the estate, different matrix. That is not what we're evaluating. It may not be wise, but there is no legal prohibition to doing so.

I'll leave it with that.

CHAIRMAN BABCOCK: Thank you, Judge.

Nina.

MS. CORTELL: Well, I should know better than to follow Justice Gray. I don't have a story about

someone at the bottom of a well.

CHAIRMAN BABCOCK: Well, make it up.

MS. CORTELL: You know, this is so interesting. Right? Every time we deal with some type of opening up the system to non-lawyers, we -- we're always struggling with the same issues of the need to provide an easier option or greater access to the courts, and we always worry about all the rights that might get lost. And so I have to say I lean toward opening it up.

But I also am sensitive to Justice Christopher's reference to the amicus brief of the probate judges, and I do think it would be valuable to hear from a probate judge on this. And the specific question I would have is, If you were presiding and you saw some miscarriage or some problem going on or you were concerned for your own responsibility by statute, couldn't the judge in that particular situation go ahead and require counsel? I mean, is that not an option? Do we have to have a rule otherwise? Can't this be on a case-by-case basis?

CHAIRMAN BABCOCK: Yeah.

Justice Pemberton, do you want to address that or --

HONORABLE ROBERT PEMBERTON: Well, there

is a provision -- and we referenced this in the report -- giving the probate judge some degree of gatekeeping if, on various statutory grounds, why the -- the nominated executor -- I forget the term that's used -- but one of the six or seven categories, in addition to being felons and that sort of thing, is court unsuitable.

Now, what exactly that means or could mean, don't know whether that would come into play or not. And, again, we're not (audio disruption) on probate. The brief look we made in that area, it appears to be when you have an executor who's crossways or has some kind of conflict of interest with some of the beneficiaries.

But whether that concept could extend to, you know, the situation you're describing, I just don't know. But, you know, conceivably it could have that potential. And that's in the Probate Code, to be clear.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I would comment -- two comments. Nina, one of my concerns about going this route is that the probate judge will not know that there is a problem, most likely. If an executor doesn't file an inventory, appraisement, and list of claims, the judge will not have any idea whether it's a $100.00

estate or a $10 million estate, and so I'm not sure that that is much of a safeguard.

Again, I'm not making a legal argument; I'm making a policy argument. But when -- when the court appoints an individual as independent executor, the court is making them a legally appointed, legally approved fiduciary for other people.

And, you know, some wills are simple; there's one child and the house and the car, and the money goes to the child. Others are not simple. Sometimes trusts are supposed to be set up. There are other complexities that can occur.

And if we allow -- if we agree that the policy is that everyone has a right to be unrepresented in the probate, that applies to the big estates as well as the small ones. We won't even really know what the big estates are. And the fact that these people are legal fiduciaries and will have no -- perhaps will have no legal advice is -- is concerning to me as a practical matter.

And I think that we shouldn't just focus on the rights of the executor to go into court, but we should realize that the executor is, by law, a fiduciary for other people who are not represented and who are not in court. And so when we establish a right of one

individual, the designated independent executor, to go forward without attorneys in a trust position, perhaps with no legal guidance, we're -- we could be impairing the rights of the beneficiaries.

And so I don't think that it's just a clear-cut question that if I'm sued as an individual, I have a Constitutional right to represent myself. When you're asking, "Do I have the right to represent myself if I'm a fiduciary for others and none of us are represented?" I think the question is a policy question, admittedly.

But I think the legal decision should at least consider the policy, if not be driven by the policy, that this is a court-appointed fiduciary whose duty is to act for the benefit of others.

Thank you.

CHAIRMAN BABCOCK: Thank you.

Frank Gilstrap.

MR. GILSTRAP: Again, I think it would be a mistake to try to deal with this in terms of legal issues. Maybe there's a right to represent yourself; maybe there's not. Maybe that right does translate to representing an estate or maybe it doesn't.

If the Supreme Court says it doesn't, it seems to me it's a powerful argument to say that there

is no right in that situation. Similarly, with regard to liability, if the Supreme Court passes a rule that says you can proceed pro se, then I don't think the probate judges have got much to worry about in terms of being held liable for permitting the person to proceed in accordance with the rule.

That's it.

CHAIRMAN BABCOCK: Okay. Thank you.

Justice Gray.

HONORABLE TOM GRAY: And if I focus too much by -- on the terminology of the right of the executor or the person in that capacity to act as such, let me make it clear it is not about his right to do it.

One, it's about not being prohibited from doing it under the law. But it is the decedent's right to appoint someone to do that. That -- that's whose rights will be trampled on if we do not allow the independent executor, under current probate law, to do this because if the -- the executor -- I mean, the decedent can appoint whoever they want to with certain limitations in the statute, which I was looking for and couldn't readily find because they've codified the whole area now, and it used to be real simple but I can't find it. The point being the decedent has to understand.

And this is where the lawyer that is --

is writing that will has some real responsibility to explain to the person, to the testator, that you are appointing someone that can do all of this, and you need to be careful about who you -- but once done and once confirmed by the probate court, they can do it.

I mean, that's just the way that, at least at Baylor, we were taught and I think that's what the statute supports is that the independent executor can do that, and there's -- there is a -- in doing estate administrations, doing will -- estate planning, the flexibility that Texas gives an independent executor is a policy decision that was made in the 1800s. It is vital to the effective and efficient administrations of estates in Texas.

Every time that we encroach upon that, it is a burden on thousands and thousands of estates that are opened and administered every year. And we need to keep it -- to the extent that we have anything to do with it in this subcommittee with regards to recommendations to the Supreme Court in a rule-making capacity, if there's going to be changes, let it be the Legislature. But, right now, it just needs to be clear that independent executors can do this.

I'm sorry. I'm a little bit passionate about this, among other areas of the law. But this is

important because if -- not only is it philosophically sort of -- we've talked about a lot of policy today, and it -- policy is not what we're -- should be doing here in the judicial branch. That's the legislative branch.

But if we're going to talk about why to do some rule, I'm telling you, we are -- we are going against over 100 years of legislative history if we circumscribe the authority of an independent executor.

I'll try to be quiet.

CHAIRMAN BABCOCK: Thank you, Justice Gray. No need to apologize for your passion. We love your passion. We live for it.

Judge Estevez, did you go to Baylor, by the way?

HONORABLE ANA ESTEVEZ: I'm just going to start off with, as another student of Professor Featherston, I will say that I -- I do wholeheartedly agree with Justice Gray. I think it's totally unwise. I mean, my -- when my husband passed, I hired a lawyer and I am a lawyer. But, I mean, it is unwise to do it.

However, the question, as every -- some of us have redirected us to, is not whether or not it's wise or not; it's whether or not there's a right to it. And, yes, you do have that right to go forward. I think it's clear.

And I think that some of the other policy -- let's think of the other policy sides. Who's going to pay for it? So are you saying that if we made this a requirement -- and maybe there is a whole bunch of complexity, but -- and maybe I'm the sole heir -- why should I give a lawyer $50,000.00, even if it's complex, of my money that I could have gotten through and done that full -- you know, gotten the estate all the way through probate?

I just -- I don't think it's fair to the -- to the beneficiaries. Perhaps there needs to be something at the Legislature. And maybe there is a rule somewhere that -- that allows a beneficiary to come forward and require a lawyer when the independent executor is having a position that is contrary to them.

I mean, I think usually they'll hire a lawyer, and then they start suing on fiduciary duties and things like that, so there's an internal one. But I -- just my -- my two cents is just you have that right. There's always that issue of whether it's wise.

And we have that every day in our pro se divorces, and we still -- I still struggle with that weekly because it's not always wise. Usually it's not at all, so -- that's all.

CHAIRMAN BABCOCK: Yeah, thanks, Judge.

Judge, you raised a point that the probate judges, in their amicus brief, raised in the *Maupin* case, which is they say the only source of the right to appear pro se is found in Rule 7.

Is there -- is there any other source of the -- of the, quote, right to represent yourself other than Rule 7, or is it derived from the Constitution? Maybe it's not fair to ask you. Maybe I should ask everybody. But what do you think about that?

HONORABLE ROBERT PEMBERTON: You're asking me? We didn't -- I'm sorry.

CHAIRMAN BABCOCK: I was asking Judge Estevez, but -- but you'll do.

HONORABLE ANA ESTEVEZ: I'm sorry. I didn't realize you were -- you were asking me. No, I don't -- I don't know where it is. I'm not going to -- I studied that in law school, and then I didn't go forward with that, so it's been a long time since I've done a lot of probate type of law.

But I -- but I will say that wherever it is, I mean, it's been clear. I didn't have any question that I could have -- and I had -- I have beneficiaries that would be, you know, stepchildren against my biological child when I hired a lawyer, but I don't -- I believe I could have gone forward -- I never -- it never

even dawned on me that I couldn't go forward as an independent executor representing myself or --

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: -- you know, going forward in that probate.

So I don't think there's -- we don't have a probate court here, so we have -- you know, it goes in to the county judge, but -- there's no question that people can represent themselves or the estate, the independent executor can do all of that.

CHAIRMAN BABCOCK: Yeah. Thank you.

Justice Pemberton, did you want to answer the question I posed or no?

HONORABLE ROBERT PEMBERTON: Not much further. My sense is that the notion of a person being able to represent themselves, in part, is with reference to the definition of the practice of law or the unauthorized practice of law. And if you're just representing yourself, you're not engaging in unauthorized practice of law. And there may be a Constitutional underpinning, although we didn't try to answer that extensively.

The *Law Review* article -- and, Chip, it may have been the footnote you mentioned earlier -- actually, 87 does speak to there possibly is an argument

for a Constitutional right to represent oneself, but we didn't try to answer.

CHAIRMAN BABCOCK: Okay. Thank you.

Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, when everyone was talking about the idea that the executor is -- can do the same thing that the decedent can do, I was sort of thinking outside the box and thinking, Well, perhaps we need to say in the will that an independent executor doesn't need a lawyer.

And, that way, I, as the decedent, know what I want my independent executor to do. Do I want them to hire a lawyer, or have I picked someone that I think is capable of handling my estate without a lawyer?

I mean, most wills have independent executors. They also have a provision that says an independent executor can hire a lawyer and the, you know, fees for the lawyer are paid out of the estate.

So, you know, it seems to me that we -- if we want to -- if it's a small estate or if the decedent wants to take the risk that whoever they have listed as the independent executor is capable of doing it without a lawyer, it ought to be in the will.

CHAIRMAN BABCOCK: Okay.

Lisa.

MS. HOBBS: That is a philosophically sound proposal but a practical nightmare. I mean, the amount of wills that currently exist with independent executors, I -- they all need to go get rewritten if they want to self-represent themselves?

Like, I just -- I feel like -- I hear what you're saying, Judge Christopher. I just don't -- I'm not going to go rewrite my will, even though it does set up an independent executor.

And even getting the word out that you would need to, even if you weren't a part of the 50 people on this discussion board -- I don't know. It just -- I just wanted to remind everybody that we're talking about a ton of wills in Texas that are currently written and that will at one point be administered.

CHAIRMAN BABCOCK: Okay. Great. Thanks.

Justice Pemberton, I will return to my -- sort of my question, which is, Would we -- if we -- if we decide to follow on the subcommittee's recommendation, would we be telling the Supreme Court that it should revise Rule 7 or do something else other than revision to Rule 7?

HONORABLE ROBERT PEMBERTON: Well, our charge -- as we understood our charge, we were simply answering, What is the legal status quo? Is there --

and I think Justice Gray stated this better than I probably did -- is there a prohibition against a person acting in their capacity as an independent administrator from proceeding pro se?

Where you go from here, you know, it isn't clear you'd need any kind of amendment to 7. And, my subcommittee colleagues, feel free to chime in as well. There are apparently some probate local rules that -- that have been adopted by the court that may be inconsistent with the conclusion that our subcommittee reached. And, you know, what you do with those, it's kind of up to the Court and, also, whether others, presumably those courts and others included, perhaps should be part of the -- a broader conversation.

So I guess to -- Chip, we're -- we -- we're at the disposal of whatever the Court would like us to do on this, whichever direction we should go.

CHAIRMAN BABCOCK: Okay. It seems to me that it might be appropriate, after I recognize Richard Orsinger, who's got his mechanical blue hand up, is to get a sense of the whole committee -- which way we fall, whether -- whether it should be pro se or acting pro se would be the unauthorized practice of law.

But, Richard, why don't you weigh in before we do that.

MR. ORSINGER: Chip, what I wanted to say was, just thinking through the process here, if we authorize a litigant -- an appointed executor to be pro se in -- in the ensuing probate litigation, that's one thing. But if a proponent to a will proposes the will for probate and there's a contest, then the appointment will not be effective until the contest is resolved.

And so I guess we have maybe a slightly different question from the one that Judge -- Professor Featherston addressed in his lectures to the various classes: And are you entitled to offer the will for probate before you're appointed; and, if there's a contest, are you entitled to represent yourself in the contest, because you're not appointed yet?

And so I think there may be a public policy we have to grapple with besides the testator's intent. I haven't litigated a case like that, and I haven't fully thought through that -- those thoughts, but there may be a reason for us in our discussion or our writing that distinguish those who have been appointed from those who have not yet been appointed.

Thanks.

CHAIRMAN BABCOCK: Thanks, Richard.

Scott Stolley.

MR. STOLLEY: Thanks, Chip.

I just want to comment that I think we've got to find a way to allow small estates to be handled without the necessity of paying for an attorney. It just eats up the estate funds. And if people are essentially indigent, we've got to have a way that they can get this done without having to pay for a lawyer.

I think sometimes, as a profession, we forget how much the general public mistrusts our profession; and so that -- this kind of thing just generates more mistrust if the public finds out that lawyers are requiring that lawyers be hired. That just doesn't help very much, I don't think.

And the other thing it's going to do, it's just going to drive this kind of thing underground. People are going to resort to self help to resolve who owns what after somebody dies. And I think we want to encourage them, even if they're pro se, to go to court and do it -- do it legally.

Thanks.

CHAIRMAN BABCOCK: When you say "self help," what do you have in mind?

MR. STOLLEY: Well, I don't know. They -- they just continue to live in the house or they move into the house or they -- they hide from the authorities who actually owns the house.

I don't know exactly what could happen, but they just don't take care of it. They don't retitle the car.

CHAIRMAN BABCOCK: Yeah.

MR. STOLLEY: You know, whatever might happen that they just -- they just decide, okay, well, I'm just going to go do what I need to do and disregard the legal system.

CHAIRMAN BABCOCK: Yeah. I gotcha.

Well, the subcommittee said in its memo that their view is that executors have the right to proceed pro se, both in initiating the proceedings and thereafter in performing their role. So everybody that thinks that's a good idea, raise your hand.

HONORABLE ROBERT PEMBERTON: Chip, to be clear, good idea policy or that's the legal --

CHAIRMAN BABCOCK: Well, yeah. "Good idea" is perhaps the wrong term. What we should recommend to the Court -- and I'm going to get to the mechanics of how that's effectuated in a minute -- but that it's the recommendation of this committee, full committee, that the subcommittee's view that executors have the right to proceed pro se, both in initiating the court proceeding and thereafter in performing that role -- that they're in favor of that.

So raise your hand if you're in favor of that.

All right. Everybody that's opposed, raise your hand. Everybody now lower. And everybody opposed, raise your hand.

HONORABLE ROBERT PEMBERTON: I'm trying to lower.

CHAIRMAN BABCOCK: Okay. Has everybody lowered that wants to lower and everybody raised that wants to raise?

So it's 18 to 3 in favor of the subcommittee's recommendation that executors have the right to proceed pro se, both in initiating the court proceedings necessary to effectuate their rights under a will and thereafter in performing that role. So that's the vote, and you can lower your hands now.

And now I get to the point where Chief and Justice Bland and Jackie and Martha -- what else do you want from us? Do you want us to propose a rule? Do you want us to debate whether you should keep your nose out of this, even though this is what we think is the best policy? What -- what's the Court's pleasure on this?

CHIEF JUSTICE HECHT: Well, I don't really know. And I wouldn't want to speak for them. So

maybe we should take what we've learned from this discussion back and discuss it internally and see.

CHAIRMAN BABCOCK: Okay. Justice Bland? You okay following the Chief's lead on that?

HONORABLE JANE BLAND: Always.

CHAIRMAN BABCOCK: Did you hear that?

HONORABLE JANE BLAND: Well, not always, but most of the time.

CHAIRMAN BABCOCK: I was going to say, we'll see no dissents from a Hecht opinion.

HONORABLE JANE BLAND: Sadly, no.

CHAIRMAN BABCOCK: Okay.

HONORABLE JANE BLAND: That's what we'll do. And it's not going to delay anything because we've got deep thoughts coming up, right, so we could get word back before January --

CHAIRMAN BABCOCK: Yeah.

HONORABLE JANE BLAND: -- I'm sure.

CHAIRMAN BABCOCK: Okay. We'll submit this for now.

And, now, Richard, I want to talk a little bit to you about these divorce forms.

MR. ORSINGER: Yes, sir.

CHAIRMAN BABCOCK: Was this on the original agenda?

Marti, maybe you can help me on this.

Or did it get added this morning?

MR. ORSINGER: Oh, no, it was -- it's been on for at least a week.

CHAIRMAN BABCOCK: Okay.

MS. WALKER: Yes, Chip, it was on original agenda. Yes.

CHAIRMAN BABCOCK: Okay. All right. I know it -- you gave us some stuff this morning, though, right, Richard?

MR. ORSINGER: Well, we've been here before, so this is more in the nature of an update than an action item. But let me explain and it'll make more sense. Okay?

CHAIRMAN BABCOCK: Well, we'll be the judge of that, but go ahead.

MR. ORSINGER: Okay. There was a -- and you may recall, some years ago, there was some controversy about the Supreme Court adopting forms for family law practice.

CHAIRMAN BABCOCK: Really?

MR. ORSINGER: Yeah. I remember that, just barely. And --

CHAIRMAN BABCOCK: We had our -- we had our one and only lobbyist -- our first and, in my

memory, only lobbyist lobby the Supreme Court Advisory Committee.

MR. ORSINGER: It was -- it was one for the ages.

But, at any rate, there's been a movement afoot coming, I think, from the grass roots to promulgate forms to allow people to prove up their divorce without having to go in front of the judge and raise their hand and swear to the grounds for the divorce and at least some evidence of what the arrangement is on the kids. And I'm talking about a default divorce or an agreed divorce.

Of course, now we don't even have live hearings. It has to be by Zoom anyway, and they put everybody under oath remotely and, you know, you prove your case up to the judge on Zoom and what have you.

But what's happened is this grassroots movement was to develop a form to allow you to prove up a divorce, by default or by agreement, by affidavit or unsworn declaration. And these forms were promulgated by various people. They were passed around; they were commented on.

And the family law section of the State Bar finally was satisfied with the condition that they were in, and so they informally endorsed them, and

they've included them in the family law practice manual, and these have been distributed to trial court judges around the state.

And, of course, they violate the hearsay rule; but, if there's no objection to the hearsay, then it comes in as substantive evidence. So as a practical matter, you know, there's very little difference between submitting an affidavit to support a divorce decree and getting on a Zoom conference or even going into court.

So what's happened is that these forms have taken a life of their own, and they're out there and they're spread around, and judges who want to can use them. So at this point, the people who were behind the effort are no longer pushing for Supreme Court approval because it's just -- it's emanating out at the trial court level on an optional basis.

So from the committee's standpoint or from the Supreme Court's standpoint, they need to decide whether they want to stop this or whether they want to endorse it or do nothing. If they do nothing, it'll just disseminate out there, and the judges that want to use it will and the judges that don't want to use it won't.

If the Supreme Court adopts these rules and includes them in the divorce packet, that means that

judges are going to be required to accept these. You know, even if they don't like the hearsay, even if they don't like an unsworn declaration, they're going to be required to accept them if the Supreme Court endorses them and includes them in the divorce packet.

So first question is whether the Supreme Court wants to oppose the dissemination and voluntary use of these forms by judges, and the second one is, Does the Supreme Court want to force judges to use them, even if they don't want to?

And I feel like that's what remains to be decided because they've been accepted by the practicing lawyers, they're being promulgated informally, and they're being used by judges on a voluntary basis.

CHAIRMAN BABCOCK: And the family law section has a view on forcing judges to use it?

MR. ORSINGER: I haven't been able to -- since -- since this got put on the agenda, I haven't been able to get the executive committee to correspond with me, so I don't have the answer to that question.

CHAIRMAN BABCOCK: Okay. And what about on the first question, whether the -- I think you said in the last meeting, maybe, or maybe informally when we talked that the family law section likes these forms.

MR. ORSINGER: Yes. They -- they've

basically vetted them and they've approved them, and they put them in the form book that they sell for use. And it's available in public libraries, and they're -- they're disseminating around. I mean, friendly judges are using them in their court because this speeds things along, and they -- they like it and they don't mind the fact that this is hearsay. It's sworn to.

And we have a historical aversion to proof by affidavit in a trial on the merits. But, as a practical matter, there isn't really a functional difference between going under oath on a piece of paper in an uncontested divorce or a default divorce and raising your hand on a Zoom.

There -- it's a little more live and it's maybe a little more persuasive that you should tell the truth when a judge is looking at your image on a TV screen, but it's all very abstract.

And so I think people are saying, look, as a practical matter, let's not bother to clog the courts with waiting in line or having Zoom conferences in a series of uncontested divorces just so they can swear to perfunctory information.

CHAIRMAN BABCOCK: Got it. So you think our discussion should focus on two questions: one, whether the Supreme Court should adopt these forms as

its own; and then, two, if adopted, whether the Supreme Court should require trial courts to use these forms. Those are the --

MR. ORSINGER: I agree because --

CHAIRMAN BABCOCK: -- questions?

MR. ORSINGER: -- I don't think that we're going to contribute anything in this discussion today to improve the form itself. I think the form has been vetted by the people that use it every day, and what we just need to decide is whether we want to stop it or force it or just let it be what it -- whoever wants to on -- at the judicial level can use it and those that don't are free to reject it.

CHAIRMAN BABCOCK: Okay. Judge Estevez. You have to unmute.

HONORABLE ANA ESTEVEZ: I just -- I wanted to add, you know, we -- we started using the -- or allowing the testimony by affidavit right when the pandemic shut us down right at the beginning before we were even really high on the Zoom.

But just -- we have them only uncontested and they've signed off on the decree. So I want to make it a little clearer that when he's talking about, you know, one side proves up the whole divorce by affidavit, but both the husband and the wife both signed off on the

decree.

And so there's not -- I mean, even though it's hearsay, it's clear that everybody's on the same page. At least somebody's testifying the same as they would have testified in court, so there's not any harm that I think the judges feel would come from these being adopted.

So, you know, we're allowing it. We've done -- we've done plenty of them. And so I think it's a good thing. If they -- if that's the way they want to present it and it's clear it's totally uncontested, then I think it's a good, easy, faster way to get people divorced, you know, without having to take up a lot of the court time and a lot of the lawyer time and, also, the litigant's time.

CHAIRMAN BABCOCK: Great. Thank you.

Richard Munzinger.

MR. MUNZINGER: Do I understand that these forms take the place of a certified copy of the -- of an original divorce decree? So --

MR. ORSINGER: No, they don't.

MR. MUNZINGER: Go ahead, Richard.

MR. ORSINGER: This is just an offer of proof in order to get the judge to sign the judgment, but this doesn't alter the judgment at all.

MR. MUNZINGER: I got the impression it was to prove up a past divorce. I got the wrong impression.

MR. ORSINGER: Right. It's to prove up a current divorce. And, as Judge Estevez pointed out, the last line of it is that the spouse is -- both spouses have signed the decree.

MR. MUNZINGER: Thank you.

HONORABLE ANA ESTEVEZ: And we're given a proposed order, so the order comes at the same time; so when we're looking in our electronic file, we see the affidavit in there, and then we see the decree. So -- and it has both of their signatures.

CHAIRMAN BABCOCK: Great.

Does that answer your question, Richard?

MR. MUNZINGER: Yes. Thank you.

CHAIRMAN BABCOCK: You bet.

All right. Well, Richard Orsinger, do you want us to have a vote on whether the Supreme -- we recommend that the Supreme Court adopt these forms?

MR. ORSINGER: Sure. And I want to correct. I said that it could be used for a default, but the form -- the last sentence in the form saying that the other spouse has signed, I think, as Judge Estevez pointed out, it would preclude the use

in a default, so that means that a default judgment, meaning it may be agreed but it's not signed by the other spouse, would have to have conventional proof.

Do you agree with that, Judge Estevez? Okay.

HONORABLE ANA ESTEVEZ: Yes --

MR. ORSINGER: I think we just have to decide, Chip, whether the Supreme Court wants to do anything and, if they do, you know, what should it be, to stop it or to expand it or mandate it.

CHAIRMAN BABCOCK: Yeah.

Justice Gray.

HONORABLE TOM GRAY: Richard, is there a sentiment from the practitioners that they would rather just not have the Supreme Court blessing or opposition to this so that it can maintain its flexibility and not be an adopted form and the form can morph as the law that's passed by the Legislature may change?

MR. ORSINGER: I see your point, Justice Gray. I don't think that there's any conscious sense that the Supreme Court should not do something. I think that the pressing need was met and people have moved on to the next problem.

So, at this point, I feel like the family law bar, to the extent that they've expressed their

views to me, is indifferent. They don't take a position one way or the other. The problem is solved as far as they're concerned.

But I -- I do understand what you're saying is that once you officially promulgate something, you're stuck with it until you officially change it. And we're at the very front end of this process, and it could well morph. I think that's a valid point to do nothing, at least for the time being.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I'm fine with doing nothing or just letting the judges that want to do it do it. I will say that a positive thing that can come from the form -- some of the affidavits I've gotten weren't legally affidavits or unsworn declarations or, you know -- or sworn declarations, so it would be helpful for even some lawyers to know how to draft an affidavit, and definitely any pro se litigants that wanted to use it.

So I've sent them back, you know, and just wrote something on it saying, "Insufficient affidavit. Please submit a legal affidavit." So that would be a positive reason why the Supreme Court may want to look at an overall very skinny type of form to aid both litigants and pro se -- well, lawyers and

litigants, pro se.

CHAIRMAN BABCOCK: Thank you, Judge.

Lisa.

MS. HOBBS: Richard, have we heard even anecdotally that trial judges don't think that they have the ability to use affidavits in lieu of live testimony?

MR. ORSINGER: Specifically, I can't say, Lisa. But I will say that it's been my experience generally that judges will reject affidavits. We struggled with that years -- for years in Bexar County where we have an extraordinary number of distant military divorces that are uncontested but neither party can appear live.

And, for a long time, they -- the pro se -- the staff attorneys that were helping the pro ses would actually send -- the petitioner would send interrogatories to himself or herself and then answer them, and then we would use those interrogatories to prove up the divorce.

It's -- I don't know what the current practice is, so I can't say. But it's just, historically, we don't use affidavits for final trials.

MS. HOBBS: Yeah. I mean, I guess I would counsel in favor -- if there are judges who are hesitant to think that they are able to use an

affidavit, then that would counsel in favor of the Court approving something.

I'm sorry I don't have the form either, but I would like it -- if the Court were to approve something, I would like it in the form of a sworn declaration as opposed to an affidavit or maybe both. Just sometimes getting a notary is a pain and, also, not required under the law anymore.

MR. ORSINGER: There are actually three forms, Lisa. And one of them is an affidavit, and two of them are unsworn declarations.

MS. HOBBS: Okay.

(Simultaneous speaking)

MR. ORSINGER: I'm sorry. One is -- they were unsworn declarations.

CHAIRMAN BABCOCK: Well, a declaration, by nature, has to be sworn.

MS. HOBBS: It's sworn. It has to be sworn, under penalty of perjury.

MR. ORSINGER: Well, I -- okay. I won't fight with you about that, but I think that the declaration is not sworn -- well, never mind. We can discuss that privately.

CHAIRMAN BABCOCK: Yeah.

Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I think it might be useful to find out whether judges would allow the affidavits, but my guess is that there are, you know, a fairly large number of judges that don't, just because of the opposition we had the last time to doing divorce forms. A lot of that came from the judges, in addition to the practitioners. So I would be in favor, if the Court -- if the committee thinks it's a good idea, to have the Supreme Court bless this.

CHAIRMAN BABCOCK: All right.

Justice Kelly, before you make your comment, Judge, we'll need to -- we'll need some illumination on what the picture is of. And you'll have to unmute to tell us.

HONORABLE PETER KELLY: I didn't realize I didn't have my camera on. Actually, that was a mistake. I did not mean to make a comment. It was -- that was a typo. That is the Alhambra, the Generalife Gardens in the Alhambra.

CHAIRMAN BABCOCK: There we go. Very nice. Thank you.

Well, that's -- that's it in terms of hands up, so let's -- let's see about taking a vote.

How many people are in favor of the Supreme Court adopting these forms? Raise your hand if

you are in favor.

All right. Everybody lower your hand. And everybody opposed to the Supreme Court adopting these forms, raise your hand. Anybody else?

Okay. The vote was 22 in favor and 3 against, so the committee recommends that the Supreme Court adopt these forms. So now you -- three of you lower your hands.

And let's vote, if there's not going to be any discussion, on the issue of whether the Supreme Court should require trial courts to use these forms that it adopts.

Everybody in favor, raise your hand. Anybody else? All right. Lower your hands.

And everybody opposed to the Supreme Court requiring trial courts to use these forms, raise your hand. Anybody else want to vote? Everybody finished?

Well, in a -- in a razor-thin vote, there are 12 in favor and 13 against. There will be a recount in the morning, but that's -- that's our thought for the -- for the Supreme Court on that issue. You can lower your hands unless you want to speak.

And, Marcy, do you want to say something?

MS. GREER: Sorry. No, I was trying to

lower it.

CHAIRMAN BABCOCK: Okay. All right. Great.

Richard, anything else -- Richard Orsinger, anything else you want to talk about on these forms?

MR. ORSINGER: No, I think that's it, Chip. If the Supreme Court wants us to do more, just tell us what to do and we'll do it.

CHAIRMAN BABCOCK: Okay. Great.

Well, that completes our agenda, everybody, in record time, as far as I know. So let me just make a couple of brief comments about our next meeting, our deep thoughts meeting.

One thing I think we should discuss -- and, frankly, I'd like to see it discussed in some detail because I have a personal interest in this -- and that is the issue of judicial selection. By the time of our next meeting, which will be Marti, December --

MS. WALKER: December 4th. December 4th.

CHAIRMAN BABCOCK: December 4th.

MS. WALKER: Yes.

CHAIRMAN BABCOCK: So by the time of our next meeting, the committee on judicial -- Commission on Judicial Selection will have only one more meeting

before it has its final report to the Legislature and to the Governor. And we might send a copy to the Supreme Court and the Court of Criminal Appeals. Of course we will.

But it'd be great to get this committee's views on that. My plan is to have somebody from the commission present to us the thinking at the time on December 4th about where we're headed and some of the ideas we've heard about. We've had committee meetings every month except for March and April. We did not have a meeting for pandemic reasons.

We've had three public meetings around the state: one in Corpus, one in San Antonio, and one in Midland-Odessa. I don't know if we're going to have any more public hearings or not. We've collected an enormous amount of information, and we're getting additional information as well.

So we've heard from a lot of people, and -- but we haven't sat down and talked collectively about what our collective views are on what should be done, if anything. So I'd like everybody to think about it, and I propose devoting as much time as necessary to that issue. So that's number one.

Number two, if anybody thinks that we could profitably hear from somebody on another topic

other than judicial selection, please let me know and I'll try to arrange to have that person present. I'm also going to try to arrange to see if some members of the Legislature will attend our meeting and provide whatever thoughts they have.

And what the Chief said at the outset is really true, at least in my experience, and that is that our three branches of government work together very well, and the state is much better off for that. That has not always been the case in our state, but it certainly has been in the last -- in the last couple of decades.

And, frankly, this committee has played a role in that; maybe not a huge role, but certainly a role, because I think the Legislature has confidence in this committee that we will try to give our best advice to the Court and that we'll do so fairly and honestly and thoughtfully.

And I certainly appreciate everything that you-all are doing, all the hard work and the hours that you put into this project. And I think we're making our state a better place because of it. So there's a pat on the back for all of us, if nobody else wants to pat us on the back.

So unless there's anything else, we

will -- we will stand in recess. And thanks, everybody, for everything.

MR. RODRIGUEZ: Can I say something?

CHAIRMAN BABCOCK: Yeah, certainly, Roger, or whoever.

MR. RODRIGUEZ: This is Eduardo Rodriguez.

CHAIRMAN BABCOCK: Eduardo. Sorry. Roger was raising his hand.

MR. RODRIGUEZ: Your comments about -- about our three branches of government working well together, I would like -- because of my being involved with the Access to Justice and going to Washington to lobby for that, I would like to let you-all know that a lot of the reason why they're working together is due to our Chief Justice and the work that he has done in regard to making sure that we have adequate funding for Access to Justice on the state level and on the national level.

And so I think a lot of the good that is -- we're benefiting from is due to the hard work of the Chief. And I just think that you-all should know because you may not know of the difficulties he's had when we go to Washington and talking to some of our congressmen to fund legal services. But those of us

that have gone there with him know that he's -- he sat down with some of the most conservative congressmen we have and has changed their minds about -- about that, so I'd just like y'all to know that.

CHAIRMAN BABCOCK: Yeah. And the great thing about Zoom is we can see the Chief blushing there.

CHIEF JUSTICE HECHT: Thanks, Eduardo.

CHAIRMAN BABCOCK: Anything else, Nathan, that you'd like to say?

CHIEF JUSTICE HECHT: No. Thank you.

CHAIRMAN BABCOCK: Yeah. Yeah, don't tear up on us, now.

CHIEF JUSTICE HECHT: Right.

CHAIRMAN BABCOCK: Anybody -- anybody else before we recess?

All right. Well, thank you-all, everybody, for coming. And we will see you on December 4th. Bye-bye.

(Meeting concluded at 12:41 p.m.)

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MEETING OF THE

SUPREME COURT ADVISORY COMMITTEE

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I, TERI LYNNE WORKMAN, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 6th day of November, 2020, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $1,064.75.

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Given under my hand and seal of office on this the 24th day of November, 2020.

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