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IN THE SUPREME COURT STATE OF ARIZONA

In the Matter of PETITION
TO AMEND RULE 91,
ARIZ. R.P. JUV. CT., 17B, A.R.S.
TO PERMIT SUMMARY DISPOSITION
OF APPEALS FOR ABANDONED OR
MERITLESS APPEALS

Supreme Court No. R-05-0032

The Office of the Attorney General submits the following comments on the amendments to Rule 91, Arizona Rules of Procedure for the Juvenile Court, proposed by the Court Improvement Program (“Program”). The Program’s proposals reflect an effort to expedite the processing of appeals in adoption, dependency, guardianship, and termination matters by (1) permitting counsel representing an appellant in such cases to file an affidavit in lieu of an appeal brief, avowing that (a) the appellant has abandoned the appeal, and/or (b) after having reviewed the entire record on appeal, counsel

sees no nonfrivolous issue to raise on appeal, and (2) permitting the court of appeals to summarily dismiss the appeal upon the filing of such an affidavit.

This Office agrees with the Program that amendments are needed to clarify that appellate counsel is not “compelled to file an opening brief” in those cases in which “the appellant has abandoned the appeal.” (Petition at 4.) Indeed, it is the client who has “‘the ultimate authority’ to determine ‘whether to . . . take an appeal.’” *Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 560 (2004) (quoting *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983) and *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1, 97 S. Ct. 2497, 2510 n.1 (1991)). “Concerning [this] decision[], an attorney must both consult with the [client] and obtain consent to the recommended course of action.” *Nixon*, 543 U.S. at 187, 125 S. Ct. at 560. “A lack of consent is shown when the parent, through his or her actions, demonstrates no true interest in preserving parental rights.” *In re Asia L.*, 132 Cal. Rptr. 2d 733, 736, 107 Cal. App. 4th 498, 505 (2003); *In re Sean S.*, 53 Cal. Rptr. 2d 766 767, 46 Cal. App. 4th 350, 352 (1996). As explained in *In re Sean S.*, “a trial attorney has no legal or ethical duty to file a notice of appeal on behalf of a parent who has not consented to its filing [and], when there is no demonstrated interest, to permit attorneys (on behalf of nonconsenting parents) to exhaust every avenue of appellate review would defeat the

purpose of the law,” which is designed to protect the child, not to prosecute the parent. 53 Cal. Rptr. 2d at 767, 46 Cal. App. 4th at 352.

This Office further agrees with the Program that amendments are needed to clarify that appellate counsel is not “compelled to file an opening brief” in those cases in which “there are no meritorious issues.” (Petition at 4.) Our ethical rules provide that appellate counsel is prohibited from asserting a frivolous appeal. *See* Ariz. R. Sup. Ct. 42, ER 3.1 (stating that “[a] lawyer shall not bring or defend a proceeding or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so that is not frivolous, which may include a good faith and nonfrivolous argument for an extension, modification or reversal of existing law.”).

However, currently, there is no Arizona case law or procedural rule that sets forth the procedure that appellate counsel should follow after a conscientious review of the record reveals that there are no nonfrivolous issues to pursue on appeal from an order affecting parental rights. *Cf.* Ariz. Sup. Ct. Order No. R-05-0019 (filed January 20, 2006) (revising both Arizona Rule of Procedure for the Juvenile Court 89(B) and Form VI, effective July 1, 2006, to require counsel to discuss the merits of the appeal with the client before the notice of appeal is filed). The Program’s proposed amendments, permitting counsel to file an affidavit in lieu of an appeal brief when he or

she has found no nonfrivolous issue to raise on appeal, would provide such a procedure.

The Office accordingly urges the Court to adopt the Program's proposed amendments permitting appellate counsel to file an affidavit in lieu of an appeal brief, avowing that (1) the appellant has abandoned the appeal, and/or (2) after having reviewed the entire record on appeal, counsel sees no nonfrivolous issue to raise on appeal.

Dated this 22nd day of May, 2006.

Terry Goddard
Attorney General

by _____
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A copy of this comment has been mailed or delivered this 22nd day of May, 2006, to:

The Honorable Robert M. Brutinel
Chairperson, Committee on Juvenile Courts
1501 West Washington
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Petitioner

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