

#2019-001

Carolyn A. Koegler

From: Timothy Gudas
Sent: Thursday, February 21, 2019 4:51 PM
To: Carolyn A. Koegler
Subject: Referral to Advisory Committee on Rules

Carolyn,

The Supreme Court asked me to refer this matter to the Advisory Committee on Rules.

Background

When the court issues an opinion in a confidential case (e.g., termination of parental rights), the court's opinion is publicly available.

When the court decides a confidential case by 3JX order or other final order (as opposed to opinion), the court **does** not post the order to the court's website or otherwise make it publicly available, as it would do for a non-confidential case decided by final order. Final orders in confidential cases are issued only to counsel (or self-represented parties) and to the trial court.

In general, the reason that opinions in confidential cases are public is that the appeal turns on issues of law that need to be discussed for the benefit of persons beyond the particular parties to the case. In contrast, confidential cases that are decided by final order are, quite often, resolved in a fact-specific manner. When the court issues an opinion, the court is able to present the factual background in a way that does not compromise the confidentiality of the parties to the case. When the court decides a case by final order, however, the court often needs to discuss the specific facts in a way that could reveal the identity of the parties.

Issue

It has come to the court's attention that some trial judges and attorneys who have (properly) received final orders in confidential cases may be citing those orders in the context of other cases involving different parties. Their doing so creates the following issue: If I were the lawyer representing a parent whose rights had been terminated in a decision that relied upon unpublished legal authority, I would want to review that authority to determine its applicability and, perhaps, to distinguish it factually. If I am denied access to the unpublished authority, my ability to represent my client is being unfairly hampered; but if I am given access to the unpublished authority, the confidentiality of the parties in the cited case is being violated.

Proposal

Amend Supreme Court Rules 12-D and 20, so that they would read as follows:

Rule 12-D(3)

Non-precedential Status of Orders. An order issued by a 3JX panel shall have no precedential value, but it may, nevertheless, be cited or referenced in pleadings or rulings in any court in this state, so long as it is identified as a non-precedential order **[and so long as it was issued in a non-confidential case; provided, however, that an order]** ~~Such non-precedential orders~~ may be cited and shall be controlling with respect to issues of claim preclusion, law of the case and similar issues involving the parties or facts of the case in

which the order was issued. All citations to non-precedential orders shall identify the court, docket number and date.

Rule 20(2)

Non-precedential Status of Orders. An order disposing of any case that has been briefed but in which no opinion is issued, whether or not oral argument has been held, shall have no precedential value, but it may, nevertheless, be cited or referenced in pleadings or rulings in any court in this state, so long as it is identified as a non-precedential order **[and so long as it was issued in a non-confidential case; provided, however, that an order]** ~~Such non-precedential orders~~ may be cited and shall be controlling with respect to issues of claim preclusion, law of the case and similar issues involving the parties or facts of the case in which the order was issued. See also Rule 12-D(3). All citations to non-precedential orders shall identify the court, docket number and date.

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