

# “CAN WE GO HOME NOW?”: EXPEDITING ADOPTION AND TERMINATION OF PARENTAL RIGHTS APPEALS IN OHIO STATE COURTS

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## I. INTRODUCTION

Two years ago, the Ohio Supreme Court amended its rules and those of Ohio’s intermediate appellate courts in order to fast-track appeals of cases involving termination of parental rights (“TPR”) and adoption of minor children.<sup>1</sup> Three of Ohio’s twelve appellate districts already had local rules to expedite or accelerate these types of appeals,<sup>2</sup> but in some districts, the amended rules established procedures that were entirely new.

The major impetus behind the court’s amendments to the rules was to move children out of foster care and into permanent adoptive homes more quickly.<sup>3</sup> Further, by amending the rules of

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1. See Ohio R. App. P. 11.2(C) (as amended West Supp. 2002); Ohio S. Ct. R. II, III, V, VI, IX, XI (amendments scattered throughout) (West 2000 & Supp. 2002). When used in this article “adoption” refers only to the adoption of minor children.

2. E.g. Ohio 2d Dist. Ct. App. R. 2.8(A)(5) (Anderson 2001); Ohio 4th Dist. Ct. App. R. 13 (Anderson 2001); Ohio 5th Dist. Ct. App. R. 7 (Anderson 2001).

3. See Ohio R. App. P. 11.2 staff notes (Rule 11.2 Adoption and Parental Rights Appeals); see also Evelyn Lundberg Stratton, *Expediting the Adoption Process at the Appellate Level*, 28 Cap. U. L. Rev. 121, 124-126 (1999); *Rules Expedite Adoption, Parental Rights Cases*, 3 Ohio L. Wkly. 1163 (Dec. 6, 1999).

the intermediate appellate courts, the court attempted to impose a greater consistency in the progress of these types of appeals across the state.<sup>4</sup>

Both sets of amendments expressly abbreviate the time allowed to complete various stages of the appeals process.<sup>5</sup> If the deadlines established by the rules were met, both courts would achieve the goal of accelerating the resolution of TPR and adoption cases.<sup>6</sup> The amendment to the intermediate appellate court rules also prescribes a more consistent process across the twelve appellate districts. But, substantial differences in the progression of TPR and adoption cases from one appellate district to another persist because courts implement the amendments with their own internal operating procedures and practices.

This Article analyzes the mechanisms for expediting TPR and adoption appeals in Ohio. Part II discusses the background and the rationale for promulgating the amendments to the rules. Part III describes the amendments to Ohio's Rules of Appellate Procedure and the Rules of Practice of the Supreme Court of Ohio. This section also evaluates the success of the amendments in meeting the declared goals of speed and consistency. Part IV concludes that Ohio's bold decision to promulgate amendments that detail the progression of expedited appeals<sup>7</sup> should be followed by state-wide efforts to define and measure their

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4. See Stratton, *supra* n. 3, at 123-124.

5. See *e.g.* Ohio R. App. P. 11.2(C)(5) (time for filing judgment entry reduced to thirty days from a guideline of sixty days for non-expedited appeals); Ohio R. Superintendence App. A (West 2000) (setting sixty-day guideline); Ohio S. Ct. R. Prac. II(2)(A)(1)(a) (time for appellant to file notice of appeal and accompanying memorandum in support of jurisdiction reduced to twenty days from forty-five days for non-expedited appeals).

6. The speed of the appellate process may also affect the quality and depth of appellate review, but an analysis of whether the amendments to Ohio's court rules have had qualitative repercussions on developing case precedent is beyond the scope of this article.

7. Several other states expedite adoption and TPR cases, as well as other dependency cases, but most require expedition without specifying how that should be accomplished. *E.g.* Fla. Stat. Ann. § 39.815 (West Supp. 2002) ("The district court of appeal shall give an appeal from an order terminating parental rights priority in docketing and shall render a decision on the appeal as expeditiously as possible"); 18-A Me. Rev. Stat. Ann. § 9-309(b) (1998) ("An [adoption] appeal . . . under this article must be expedited."); Wash. Rev. Code Ann. § 26.33.260(2) (West 1997) ("Any appeal of an adoption decree shall be decided on an accelerated review basis."); see also Stratton, *supra* n. 3, at 126-130 (providing state-by-state summary of key statutory provisions on expedition).

success, for the amendments can best serve dependent children if their ramifications are carefully evaluated and considered.

## II. BACKGROUND AND RATIONALE FOR EXPEDITING ADOPTION AND TPR APPEALS

Moving children without undue delay from foster care into safe, permanent families—whether through reunification with the child’s biological family or through termination of the birth family’s parental rights and adoption—has been a focus of child welfare policy and legislation since at least the 1980s.<sup>8</sup> The resulting federal and state efforts to accomplish an appropriately swift resolution to child abuse, neglect, and dependency cases have come in many different forms. A patchwork of federal and state legislation, court rules, and internal operating procedures function together to set agency and court deadlines for evaluating and reporting on cases, filing briefs, scheduling oral arguments, and completing judicial decisions in TPR and adoption appeals.<sup>9</sup> Moreover, as in any statutory or regulatory scheme, new policies, goals, ideas, and needs regularly lead the courts and legislators to change and adjust the existing patchwork.

### A. Changes in Federal and Ohio Legislation

The recent changes to Ohio’s court rules follow on the heels of landmark federal legislation, the Adoption and Safe Families Act (“AFSA” or “federal Act”)<sup>10</sup> and Ohio’s complementary state legislation aimed at reducing the time abused, neglected, or dependent children spend in foster care.<sup>11</sup>

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8. See e.g. Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 Minn. L. Rev. 637, 642-652 (1999) (providing brief history of federal involvement in child-welfare policy).

9. See National Center for State Courts, Presentation of Survey Results, *Expediting Dependency Appeals* (2001) (copy on file with author) [hereinafter *NCSC Survey*]. The National Center for State Courts is undertaking a comprehensive survey of state practices for expediting dependency appeals including TPR and adoption appeals.

10. *Adoption and Safe Families Act of 1997*, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of Title 42 of the United States Code).

11. 1998 Ohio Laws 203 L-1897 (*Ohio’s Adoption and Safe Families Act*, codified as amended in scattered sections of the Ohio Revised Code).

In 1997, Congress enacted AFSA in order to reduce the number of children in foster care by doubling the number of adoptions, measured annually, by 2002.<sup>12</sup> To achieve this increase in adoptions, AFSA accelerated key procedural requirements at the trial court level. Among other things, AFSA requires the first permanency hearing to be held twelve months from the time a child first enters foster care, rather than the previous duration of eighteen months.<sup>13</sup> Further, it requires, with some exceptions, the child welfare agency to move to terminate the parental rights of parents whose children have spent fifteen of the last twenty-two months in foster care.<sup>14</sup> In some circumstances, AFSA allows the agency to plan simultaneously for reunification and adoption<sup>15</sup> or to forego entirely attempts at reunification with the birth parents.<sup>16</sup> AFSA also encourages state agencies to move cases to conclusion by offering them incentive payments for successful adoptions<sup>17</sup> and technical assistance with the adoption process.<sup>18</sup>

In 1999, Ohio also amended its adoption laws.<sup>19</sup> These amendments require Ohio courts to consider “the best interest of the child” when deciding whether to return abused, neglected or dependent children to their parents,<sup>20</sup> making the “child’s health and safety” the “paramount concern.”<sup>21</sup>

The Ohio legislation set deadlines resembling AFSA’s provisions, requiring, again with some exceptions, children’s services agencies to move for permanent custody<sup>22</sup> after a child

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12. See Administration for Children and Families, *Adoption 2002 Initiative* (available at <<http://www.acf.dhhs.gov/programs/cb/initiatives/adopt2002/>> (accessed Feb. 26, 2002; copy on file with Journal of Appellate Practice and Process)).

13. 42 U.S.C. § 675(5)(C) (2000 Supp. V).

14. *Id.* § 675(5)(E).

15. *Id.* § 671(a)(15)(F).

16. *Id.* § 671(a)(15)(D)(i-iii).

17. *Id.* § 673b(d)(1) (states receive \$4,000 for each foster child adopted beyond a base number of foster-child adoptions established for that state).

18. 42 U.S.C. §673b(i).

19. See 1998 Ohio Laws 203 L-1897 (Ohio’s *Adoption and Safe Families Act*, codified as amended in scattered sections of the Ohio Revised Code).

20. Ohio Rev. Code Ann. § 2151.42 (West Supp. 2002).

21. *Id.* § 2151.412(G).

22. In Ohio, placing a child into the child welfare agency’s permanent custody is the act that “divests” parents of their rights and privileges over that child. See *id.* § 2151.011(B)(30).

has spent twelve out of the past twenty-two months in the temporary custody of a public or private children's service agency.<sup>23</sup> The Ohio act also set out a clear method for determining the date on which a child enters the temporary custody of the agency.<sup>24</sup>

### *B. The Gap Left by AFSA and the Ohio Legislation*

Criticism of AFSA and the corresponding change in Ohio law has come from many fronts. Some critics express concern that AFSA pushes too aggressively and successfully for adoption over family reunification, to the particular detriment of low-income and minority families, and directs insufficient financial and other resources to bringing birth families back together.<sup>25</sup> Overly burdened child welfare agencies and trial courts required to implement the new provisions without additional support systems argue that increased funding is needed to assist with reduction of case backlog and with the implementation of computerized tracking systems, training, model courts, and other programs.<sup>26</sup>

However, some of the most vocal criticism in Ohio was not that the legislation accomplished too much change, but that it accomplished too little.<sup>27</sup> Both the federal and Ohio AFSA alter the pace of a case at the trial court level, but leave unchanged

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23. *Id.* § 2151.413(D)(1). Exceptions include situations where permanent custody would not be in the child's best interest and when the agency has not made reasonable efforts to return the child home. *Id.* § 2151.413(D)(3)(a), (b). *See also* 42 U.S.C. § 675(5)(C) (permanency hearing required to be held twelve months after child enters foster care); *id.* § 675(5)(E) (with some exceptions, TPR petition must be filed after a child has been in foster care for fifteen of the previous twenty-two months).

24. Ohio Rev. Code Ann. § 2151.413(D)(1) ("[A] child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated [abused, neglected, dependent] or the date that is sixty days after the removal of the child from home").

25. *See e.g.* Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. Pa. J. Const. L. 112 (1999).

26. H.R. Subcomm. on Human Resources of the Comm. on Ways and Means, *Strengthening Abuse and Neglect Courts Act of 2000—Hearing on S. 2272*, 106th Cong. H8693-H8694 (Oct. 3, 2000) (testimony of Rep. Pryce (Ohio)); H.R. Subcomm. on Human Resources of the Comm. on Ways and Means, *Child Protection Issues*, 106th Cong. (Mar. 23, 2000) (testimony of Hon. David E. Grossman, Hamilton County (Ohio) Juv. Ct.; Chair, Expedited Adoption Comm., Natl. Council Juv. & Family Ct. Judges).

27. *See e.g.* Stratton, *supra* n. 3.

the progress of a case after it leaves the trial court. Neither the federal nor the Ohio act addresses the delays that can—and do—occur after a judgment is entered in the trial court, and a notice of appeal is filed. So, despite the new legislation, even cases that progressed through the trial court in twelve months could still linger for years on appeal.<sup>28</sup>

### III. THE AMENDMENTS TO OHIO'S APPELLATE AND SUPREME COURT RULES OF PRACTICE: AN EFFORT TO REDUCE DELAY IN THE APPELLATE PROCESS

To reduce the delay that remained inherent in the appellate process even after the new laws were enacted, Ohio amended both the Rules of Practice of the Supreme Court and the Rules of Appellate Procedure in 2000.<sup>29</sup> By doing so, Ohio joined the thirty-seven other states that expedite TPR appeals and the nineteen that expedite adoption appeals.<sup>30</sup> The amendments to the practice rules, along with the internal operating procedures that implement them, and, in three of Ohio's appellate districts, the local rules on expedition, compose the core of Ohio's approach to reducing the potentially lengthy appeals process.

#### *A. Expediting Appeals in Ohio's Intermediate Appellate Courts*

Appeals of TPR and adoption proceedings to one of the state's twelve intermediate appellate courts are governed by the Ohio Rules of Appellate Procedure and the local rules of each

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28. See e.g. *In re Maloney*, 1999 WL 342766 (Ohio App. May 18, 1999), *appeal dismissed*, 715 N.E.2d 566 (Ohio 1999) (table) (notices of appeal filed with Ohio intermediate appellate court in October 1995; court of appeals issued decision in May 1999; Ohio Supreme Court dismissed appeal in September 1999).

29. Although several Ohio legislators and judges have shown a special interest in this issue, see e.g. testimony of Rep. Pryce and Judge Grossman, *supra* n. 26, changing the appellate rule was a project spearheaded by Ohio Supreme Court Justice Evelyn Lundberg Stratton. Among other things, Stratton authored and advocated for the change to the Rules of Appellate Procedure. Stratton, *supra* n. 3; *Associate Justice: Help Speed Up Appeals in Adoption Cases*, 5 Ohio L. Wkly. 1009 (Oct. 15, 2001). She continues to provide leadership on reform of state practices as chair of the Expedited Adoption Committee of the National Center for State Courts. See *Justice Stratton Chairs National Adoption Committee*, 5 Ohio L. Wkly. 64 (Feb. 12, 2001).

30. *NCSC Survey*, *supra* n. 9.

appellate district.<sup>31</sup> Ohio Rule of Appellate Procedure 11.2(C) is the recent amendment to the appellate rules that expedites adoption and TPR appeals.<sup>32</sup>

The number of all Rule 11.2(C) appeals filed each year varies widely among the appellate districts, from a reported low of about ten per year in the districts serving the cities of Cincinnati and Dayton to a high of sixty-five in the Fifth Appellate District in east-central Ohio, with a mean average of about ten to twenty cases per year in eight of the twelve districts.<sup>33</sup> Since all of Ohio's appeals courts have several hundred new cases filed each year,<sup>34</sup> Rule 11.2(C) appeals are but a small percentage of the appellate caseload overall.

### *1. Initiating the Appeal: Filing the Notice of Appeal and Transmitting the Record*

In Ohio appellate courts, preparation and transmission of the trial court record can follow one of three tracks.<sup>35</sup> In an ordinary appeal, the appellate rules require the record to be

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31. Three of Ohio's appellate districts also have local rules that expedite TPR and adoption cases specifically. These rules are consistent with Rule 11.2(C). Two districts require simply that adoption and TPR cases be expedited and, thus, given priority. *See* Ohio 2d Dist. Ct. App. R. 2.8; Ohio 5th Dist. Ct. App. R. 7. The Fourth Appellate District assigns these cases to its "accelerated calendar" which requires transmission of the record in twenty days, gives parties fifteen days to file their briefs, and, if no oral argument is requested, submits the case for decision upon filing of the briefs. Ohio 4th Dist. Ct. App. R. 13.

32. Ohio R. App. P. 11.2(C).

33. Connie R. Crim, *Survey Regarding Implementation of Ohio Appellate Rule 11.2*, at 1 (unpublished report Mar. 2001) (copy on file with author).

34. In 2000, the number of new cases filed in each of Ohio's twelve intermediate appellate courts ranged from 445 to 1672. Report compiled by Ohio S. Ct., *Courts of Appeals; Overall Caseloads* (2000) (copy on file with author).

35. Ohio R. App. P. 10(A), 11.1(B), 11.2(C)(2). This procedural step has been identified as one of the primary culprits leading to excessive delay in adoption and TPR cases. *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* 39 (Nat'l. Council Juv. & Fam. Ct. J. 2001) [hereinafter *NCJFCJ Guidelines*]. Reported causes for the delay in transmitting the record in Ohio include backlogged work, conflicts with reporters' schedules, and non-receipt of payment. Crim, *supra* n. 33, at 6. And, with transcripts of up to 400 pages in TPR and adoption cases, that there is delay is not surprising. *Id.* at 12-13. Reducing this delay is a goal for many courts. One state that requires the court reporter to "give priority" to completing the record in adoption cases addresses one of the potential reasons for delay head on: The appellant is required to "make an agreement for payment" with the court reporter within five days of ordering the record. Md. R. App. P. 8-207(b)(3) (Michie 2001).

prepared and transmitted by the trial court clerk to the appellate court clerk within forty days.<sup>36</sup> If the appeal is “accelerated” (different from expedited), the trial court must transmit the record within twenty days.<sup>37</sup>

TPR and adoption appeals fall into the third category: expedited appeals.<sup>38</sup> In this type of expedited appeal, the court reporter is asked simply to “give[ ] priority” to preparation of the record.<sup>39</sup> Although relatively imprecise, this instruction seems to reflect the supreme court’s conviction that adoption and TPR appeals should progress at least as quickly as ordinary appeals and, possibly, as fast as accelerated appeals. Yet, most of the district courts report that completion of transcripts in these appeals takes from forty to sixty days, longer than the time allotted for either the ordinary or the accelerated track.<sup>40</sup>

This non-compliant result illustrates how an appeal can begin to stall in its early stages. It also highlights the difficulty that can accompany the use of language that is open to some degree of interpretation—such as the requirement that preparation of the record should be “given priority.” Here, even a reasonable interpretation of the priority requirement may result in delay beyond that envisioned by the rules.

To minimize delay, how should a court advise a reporter who is responsible for preparing the transcript? Does Rule 11.2(C) require the reporter to abandon her other commitments and prepare the TPR or adoption transcript immediately? Should the reporter attend to these transcripts after a current project is finished? Or, should the reporter watch carefully and look for an opening in the existing roster of transcripts awaiting preparation? Moreover, even if there were consistent guidance

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36. Ohio R. App. P. 10(A).

37. Ohio R. App. P. 11.1(B) (incorporating provisions of Ohio App. R. 10). Accelerated appeals proceed faster than ordinary appeals and the court’s decision may be in the form of a judgment entry that is never published. Ohio R. App. P. 11.1(A), (E). Ohio district courts of appeal are given the option of adopting an accelerated calendar. Ohio R. App. P. 11.1(A).

38. Abortion-related appeals from juvenile court are also expedited, but proceed at a faster pace than adoption and TPR appeals. Ohio R. App. P. 11.2(B)(2), (3), (5), (7).

39. Ohio R. App. P. 11.2(C)(2). Abortion-related appeals from juvenile court are expressly given higher priority status at this stage of the appeal. Ohio R. App. P. 11.2 staff notes (Rule 11.2 Expedited Appeals).

40. Crim, *supra* n. 33, at 6.



from appellate courts to reporters, variables such as demographic differences among counties in each district might still affect the results between regions.<sup>41</sup>

And, if a transcript is not transmitted within the time mandated by Rule 11.2(C), how should the court respond? Currently, only a few Ohio appellate courts report ensuring or enforcing a reporter's compliance with Rule 11.2(C) requirements by using motions to compel, fines, and show cause orders when reporters or attorneys miss deadlines.<sup>42</sup> But, even if such responses were employed in every appellate district, measures of this sort do not necessarily solve the problem of delay. By adding another procedural step, they may even defeat the purpose of Rule 11.2(C) by delaying the resolution of the appeal still further.

## 2. *Putting Arguments Before the Appellate Courts: Briefing and Oral Argument*

The briefing schedule for adoption and parental rights cases follows the twenty/twenty/ten schedule set for regular appeals: Appellant serves and files her brief twenty days after the clerk mails the notice of appeal to appellee, who serves and files twenty days later, and appellant serves and files the optional reply brief ten days after that.<sup>43</sup> Rule 11.2(C) attempts to accomplish expedition by restricting the granting of extensions and by requiring prompt oral arguments.<sup>44</sup> Extensions for filing briefs may be permitted only in "the most unusual circumstances" and for "the most compelling reasons in the interest of justice."<sup>45</sup> The appeal is ready for "immediate decision" once the briefs are filed, unless oral argument is requested by the parties or ordered by the court.<sup>46</sup> Oral

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41. As an example, some of Ohio's smaller counties have only one court reporter, who may have conflicting priorities at any given time. Crim, *supra* n. 33, at 6.

42. *Id.* at 6-7.

43. Ohio R. App. P. 11.2(C)(3), 18(A).

44. Ohio App. R. 11.2(C)(3), (4).

45. Ohio App. R. 11.2(C)(3). Appellate districts that have local rules on expedition use a similar standard. One district's rules indicate, for example, that requests for extensions in filing briefs "should be minimized"; and that continuances for oral argument are permitted only in "extraordinary circumstances." Ohio 5th Dist. Ct. App. R. 7.

46. Ohio R. App. P. 11.2(C)(4).

arguments are required to be heard thirty days after the briefs are filed.<sup>47</sup>

As a practical matter, the standard for granting or denying continuances appears open to broad interpretation. They are granted with widely varying degrees of frequency across the appellate districts. Five districts report granting continuances in five to ten percent of TPR and adoption appeals; one court reports doing so for twenty percent of these appeals; and four courts, for seventy-five percent or more.<sup>48</sup>

Not surprisingly, the length of time for briefing TPR and adoption cases in Ohio's twelve appellate districts also varies dramatically. Some districts report that Rule 11.2(C) appeals are fully briefed in as few as 20 or 30 days, while other districts report average briefing schedules of well over 100 days.<sup>49</sup> The longest average time reported for briefing an expedited appeal was 172 days.<sup>50</sup>

A number of factors could contribute to the discrepancy in treatment of these cases among the appellate districts. One consideration may be the appellate attorney's familiarity with the lower court proceedings. The trial attorney for an adoption or TPR case does not file the appeal in every appellate district. Five of Ohio's appellate districts report that the trial attorney typically does file the appeal, but three districts report that the appellate attorney is usually new to the case. Perhaps coincidentally, the appellate districts with the shortest average briefing schedules are those where the attorney on appeal also was the trial attorney.<sup>51</sup> Other factors may also affect the time necessary for briefing the case, including the attorneys' familiarity with the expedited scheduling requirements,<sup>52</sup> the

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47. *Id.* Presumably, this requirement would prevent additional delay caused by opposition to a request for oral argument. Review of the intermediate appellate court dockets is required to determine whether the rule is effective in preventing this type of delay, and that review is beyond the scope of this article.

48. *Crim, supra* n. 33, at 7.

49. *Id.* at 9-10.

50. *Id.* at 10.

51. Average briefing schedules in four districts where the trial attorney usually files the appeal are reported in the following ranges: twenty to thirty days; fifty to eighty days; sixty days; and 105 days. *Id.* at 5, 9-10. In districts where the appellate attorney was usually new to the case, average briefing schedules ranged from around 100 to 172 days. *Id.*

52. One appellate court administrator notes that as attorneys handle more expedited cases, they become more familiar with the deadlines, and are, thus, more likely to file

varying complexity of appeals, and scheduling conflicts that prevent attorneys from meeting the original briefing schedule.

Whatever the reason, when a rule allows for some discretion, there is bound to be tension between court rules that attempt to minimize delay and the idiosyncratic needs and practices of those involved in the appellate process. Variations among court practices—and in the practices of those who work within the court system, such as attorneys—in handling adoption and TPR appeals are to be expected since each appellate court may interpret and implement Rule 11.2(C) in its own way, using its own operating procedures. But, in this stage of the appeals process, these variations in internal court procedures and interpretations can also lead to widely inconsistent results.

### 3. *Reaching a Decision: Submission, Conferencing, and Entry of Judgment*

Ohio's appellate courts are required to enter judgment in TPR and adoption cases thirty days after the parties have submitted the briefs or presented oral argument, whichever is later,<sup>53</sup> although "compelling reasons in the interest of justice" can extend this time.<sup>54</sup> This is a very short deadline for courts with crowded dockets, particularly if a full opinion is written, as is typical in all but one of the appellate districts.<sup>55</sup> As a point of comparison, guidelines set by the Ohio Supreme Court for releasing decisions in other, non-expedited, appeals is sixty days after filing is completed.<sup>56</sup> Added to the short deadline is the reality that TPR and adoption cases are difficult to decide. The facts, the issues, the procedure, and the governing statutes are complex. And, the trial court proceedings are often numerous and long, requiring court personnel to review and consider extensive records and lengthy transcripts. Despite the challenge presented by the requirement of quick turnaround, however,

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briefs without great delay. Telephone interview with Bennett A. Manning, Adminstr., Ohio Ct. App., 12th App. Dist. (Feb. 19, 2002) (notes on file with author).

53. Ohio R. App. P. 11.2(C)(5).

54. *Id.*

55. Crim, *supra* n. 33, at 9. One district issues a memorandum decision in place of a full decision. *Id.*

56. Ohio R. Superintendence, App. A.

most of Ohio's appellate districts report issuing Rule 11.2(C) opinions within sixty days from submission of the briefs.<sup>57</sup>

*B. Amendments to the Rules of Practice  
of the Supreme Court of Ohio*

TPR and adoption cases appealed to the Ohio Supreme Court fall under the court's discretionary jurisdiction that allows the court to hear appeals that have "public or great general interest."<sup>58</sup>

*1. Determining Whether the Court Has Jurisdiction*

Most appeals to the Ohio Supreme Court are dismissed when the court declines to accept jurisdiction. Thus, for most cases, including TPR and adoption cases, any meaningful abbreviation of process should occur early on, with the appellant's filing of the notice of appeal, the memorandum in support of jurisdiction, and the appellee's memorandum in response.

A quick glance at the changes in the supreme court schedule for TPR and adoption appeals shows that this is the case. The amendments to the rules nearly halve the time allowed for filing the notice of appeal and the jurisdictional memoranda by reducing the total number of days for doing so from seventy-five to forty.<sup>59</sup>

The parties must identify TPR and adoption appeals on the notice of appeal.<sup>60</sup> Once the parties have filed, the amendments require the court to "expedite its review and determination" of whether to grant or deny jurisdiction.<sup>61</sup> No other type of appeal is similarly expedited at the jurisdictional stage of the appeals

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57. Crim, *supra* n. 33, at 10.

58. Ohio Const. art. IV, § 2(B)(2)(e). TPR and adoption cases can also reach the supreme court through certification by the intermediate appellate courts, Ohio Const. Art. IV, § 2(B)(2)(f), and as original actions. Ohio Const. art. IV, § 2(B)(1). Use of these mechanisms in TPR and adoption cases is, however, comparatively rare.

59. Ohio S. Ct. R. Prac. II(2)(A)(1)(a), (3)(b); III(1)(A), (2)(A) (providing this schedule for expedited appeals: twenty days for appellant to file notice of appeal and memorandum in support of jurisdiction, and twenty days for appellee to file memorandum in response).

60. Ohio S. Ct. R. Prac. II(2)(B)(1)(d)(vi).

61. Ohio S. Ct. R. Prac. III(6).

process, although felonies and death-penalty appeals must also be identified on the notice of appeal.<sup>62</sup> Moreover, the deadline and content requirements for filing the notice of appeal and memorandum in support are treated as mandatory. The supreme court dismissed nearly a dozen appeals between April 1, 2000, and August 31, 2001, for failure to timely file the appeal, failure to state on the notice of appeal that the appeal involved termination of parental rights or adoption, or both.<sup>63</sup>

By the time the parties' jurisdictional memos are reviewed by the court, they have already been flagged as TPR or adoption cases, and the chief justice of the supreme court has been notified that an expedited appeal was filed.<sup>64</sup> The appeal is usually scheduled for conferencing at the next meeting of the justices, which typically occurs about one month after the final jurisdictional memorandum is filed.<sup>65</sup>

If jurisdiction is declined by the supreme court, a copy of the judgment entry dismissing the appeal for lack of jurisdiction is sent to the clerk in about two weeks.<sup>66</sup> Based on this schedule, since the amendments became effective, appeals of a TPR or adoption cases have taken from four to eight weeks to move from appellant's filing of the notice of appeal to entry of the decision to decline jurisdiction.<sup>67</sup>

## 2. *Preparing and Transmitting the Record on Appeal*

When a discretionary appeal is allowed, the clerk of the supreme court issues an order to the appellate court clerk to transmit the record from the court of appeals within twenty

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62. See Ohio S. Ct. R. Prac. II (2)(B)(1)(d)(i)-(vii). In addition to TPR and adoption cases, these provisions require appellants to indicate on the notice of appeal that the appeal: (i) involves affirmance of death penalty; (ii) originated in court of appeals; (iii) raises a substantial constitutional question; (iv) involves a felony; (v) is of great public or general interest; or (vii) claims ineffective assistance of counsel.

63. E.g. *In re McCune*, 728 N.E.2d 1091-1092 (Ohio 2000) (table) (decided May 25, 2000); *In re Wright*, 754 N.E.2d 256 (Ohio 2001) (table) (decided Aug. 31, 2001).

64. E-mail from Connie R. Crim, Law Clerk to Justice Stratton, to Susan C. Wawrose, *Follow-up* (Feb. 12, 2002) (copy on file with author).

65. Ohio Supreme Court justices meet at least once per month to conference on appeals. *Id.*

66. *Id.*

67. Ohio S. Ct. PRDOCKT (4/21/2000-9/17/2000) (copy on file with author).

days.<sup>68</sup> In TPR and adoption appeals, this requirement is supplemented with a directive to the appeals court to “expedite[]” and “give[] priority” to preparing and transmitting the record.<sup>69</sup> It is still too early to know how this requirement will be implemented over time, but in the one TPR/adoption appeal that proceeded to briefing on the merits between May 1, 2000, and August 20, 2001, the record was prepared in twenty-three days.<sup>70</sup>

### 3. *Filing the Merit Briefs and Entry of Judgment*

The Ohio Supreme Court’s merit briefing schedule for expedited TPR and adoption appeals, like the schedule for filing jurisdictional briefs, has been drastically reduced. TPR and adoption appeals must be fully briefed in fifty-five days; the parties in all other ordinary appeals have ninety days.<sup>71</sup> With these changes, the court’s briefing schedule for TPR and adoption appeals (twenty/twenty/fifteen) has become one of the shortest in the country for dependency appeals of any sort.<sup>72</sup> The ultimate success of the new schedule remains to be tested, however, because the court has not released an opinion in a TPR or adoption appeal since the amendments became effective.

The docket of one appeal,<sup>73</sup> granted on a motion for reconsideration but ultimately dismissed as improvidently allowed, provides an indication of how long the supreme court might need to decide this type of case on the merits. The notice of appeal and memorandum in support of jurisdiction for *In re Campbell* were filed on June 28, 2000. Jurisdiction was originally declined, but on September 20, 2000, was granted on a motion for reconsideration. Merit briefs and a reply brief were filed on October 4, 2000 (appellant’s merit brief), November 8, 2000 (appellee’s merit brief), and November 27 (appellant’s

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68. Ohio S. Ct. R. Prac. V(3)(A).

69. *Id.*

70. See Ohio S. Ct. PRDOCKT No. 00-1176 (copy on file with author).

71. Ohio S. Ct. R. Prac. VI(2)-(4).

72. Wisconsin’s intermediate court of appeals has the most condensed briefing schedule at fifteen/ten/ten. Wis. Stat. Ann § 809.107(6)(a)-(c) (West Supp. 2001). In contrast, at ninety/twenty/ten, the Nevada Supreme Court’s merit briefing schedule for TPR appeals is one of the longest. Nev. R. App. P. 31(a)(2) (Michie 2001).

73. See *In re Campbell*, 740 N.E.2d 1103 (Ohio 2000) (table).

reply brief). The court dismissed the appeal as improvidently allowed on January 31, 2001. Judgment was entered on February 13, 2001, nearly eight months after the notice of appeal was filed. The pace of *Campbell* demonstrates that even with an abbreviated core briefing schedule, the cumulative effect of several procedural steps, each taking two or three weeks, can be an appeal that lingers for months waiting for permanent resolution.

Based only on the progression of *Campbell*, it is impossible to predict how the amendments will affect other expedited appeals that proceed on the merits. The pace of *Campbell* suggests that an appeal on the merits would take significantly longer than an appeal dismissed for lack of jurisdiction.<sup>74</sup> If the only goal of the amendments were deciding appeals promptly, this potential for delay could be considered a flaw. However, because of the consequences of the decision, avoiding delay may not always be worth the sacrifices necessary to accommodate a short schedule.

The longest delays in the progression of *Campbell* were thirty-seven days (time for supreme court to grant the appellant's motion for reconsideration on the determination of jurisdiction) and sixty-five days (time for court to dismiss appeal as improvidently allowed after appellant's reply brief on the merits was filed).<sup>75</sup> At over three months, this is a significant amount of the eight-month total the *Campbell* appeal spent before the Ohio Supreme Court. An easy answer would be to suggest that this pocket of delay should be the next step of the appeal process to be accelerated by an express schedule. However, the subject matter of the appeal, and, again, the consequences of a hasty decision, support an argument for retaining flexibility instead of requiring tight deadlines for the supreme court in reaching and releasing a decision that resolves the merits of the case.<sup>76</sup> In other words, making the right

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74. PRDOCKT, *supra* n. 70.

75. *Id.*

76. At least one court besides the intermediate appellate courts in Ohio has prescribed deadlines for judges issuing decisions. Md. R. App. P. 8-207(b)(5) ("The decision [of the appellate court] shall be rendered within 60 days after oral argument or submission of the appeal on the briefs filed.").

decisions about children's futures is as important as making them quickly.

#### IV. EVALUATING SUCCESS IN DECREASING DELAY AND INCREASING CONSISTENCY: THE NEED FOR DATA COLLECTION AND ASSESSMENT

The information needed to evaluate the success of either set of Ohio's amendments has yet to be fully assembled. The progress of appeals filed before and after the amendments has not been tracked for comparative purposes, nor has an overall goal—one that would indicate success if achieved—been defined.<sup>77</sup> Because increasing the speed of the appeals process was one of the prime goals of the amendments, determining the success of the amendments necessarily depends upon collecting data on the length of time required to complete each appeal.

Ohio's collection of this data could have important ramifications elsewhere in the country. The efforts of the National Council of Juvenile and Family Court Judges and the National Center for State Courts, among others, have informed state courts of the reasons for expediting dependency appeals.<sup>78</sup> But, because Ohio is the only state that has adopted expedited scheduling in both its intermediate appellate and supreme courts, the state's approach to expedition provides a rare perspective.<sup>79</sup> As state courts review their appellate court procedure, results from states, like Ohio, that have already implemented comprehensive rules for expedition can provide a shortcut for other states that are developing and refining the parameters of viable expedited appeals processes.

Another potential benefit of collecting and analyzing data on the progress of Ohio's TPR and adoption appeals is the identification of the procedural steps that harbor unnecessary

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77. Some states have set those goals. California, for example, sets an outside goal of "determination within 250 days of the filing of the notice of appeal." *See* Cal. R. Ct. 39.1A(g) (West Supp. 2002).

78. *See e.g. NCJFCJ Guidelines, supra* n. 35.

79. There are states, such as South Dakota, that have no intermediate appellate courts but expedite adoption and TPR cases in their sole appellate court. *E.g.* S.D. R. Civ. App. P. §§ 15-26A-75(1)(b), (2)(b), (3)(b), (4)(a) (2001) (time for serving and filing briefs: twenty-five/twenty-five/fifteen).



and avoidable delay despite promulgation of the amendments. With its head start, Ohio's adoption of the amendments discussed here can function as a test case for determining what succeeds, what falls short, and what can be improved. This information would benefit Ohio's dependent children, certainly, but might also be applied to the appeals processes of other states for the benefit of their dependent children as well.

Even with a full complement of data, it will be difficult to measure whether Ohio's Appellate Rule 11.2(C) leads to a more consistent, faster appeals process across the state's appellate districts. In this regard, Ohio's courts serve as a microcosm in which the general challenges posed by attempting to evaluate methods for expediting TPR and adoption appeals in state courts nationwide can be assessed.

Ohio's appellate districts begin with the same general goal: expediting TPR and adoption appeals. However, the courts differently implement,<sup>80</sup> interpret, and respond to failures to comply with the rule.<sup>81</sup> The appellate courts' ability to meet deadlines imposed by Rule 11.2(C) should be assessed against the methods used for achieving compliance. Results of this sort of comparison are likely to yield insights into the most effective practices for Ohio appellate courts. Further, adoption by other Ohio courts of practices that have proved effective in one district or region would test the efficacy of those practices in varied settings.

Finally, beyond speed and consistency of progress, there remains the question of the effect, if any, of expediting appeals on the quality of attorneys' performance, on judicial decisions and, by implication, on precedent. Answering this question is a much larger task than collating empirical data, but one that should not be overlooked, because any impact that the abbreviated schedules may have on results and quality demands close attention.

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80. Internal operating procedures used by the Ohio appellate courts to implement Rule 11.2(C) include the following: red flagging the file; reminding attorneys of deadlines; keeping a checklist of Rule 11.2(C) cases that is checked weekly; making special notations on docket sheet and computerized docket; and supervising expedited cases by a staff attorney or other staff member. Crim, *supra* n. 33, at 2-4.

81. *Id.* at 6-7.

## V. CONCLUSION

Establishing time limits for the progression of TPR and adoption appeals is a relatively recent trend that balances the desire for quick decisions to benefit unsettled children against the need for sound decisions based on a careful review of the record and the merits of each case. The amendments to Ohio's appellate and supreme court rules attempt to prevent the excessive delay of some past appeals while retaining the flexibility necessary to accommodate the particulars of individual situations. The recent implementation of the amendments presents an opportunity to track and measure results, both quantitatively and qualitatively, that should not be bypassed. The experiments of individual state courts, like Ohio's, that become unofficial models for reformers elsewhere may well be the key to improving adoption and TPR procedures across the states. But, the experiences of these courts can only inform if their successes—and shortcomings—are tallied, evaluated, and communicated to decision makers throughout the country. Ohio's expedited appeals initiative seems to have the potential for success. Ohio courts should act now to take the steps necessary to produce a full analysis of their new procedures, and then share that important information with other interested state courts for the benefit of foster children and families in all states.

**COMPARISON OF EXPEDITED APPEALS SCHEDULE WITH  
STANDARD APPEALS SCHEDULE IN THE OHIO SUPREME COURT**

<b>Procedural Step*</b>	<b>TPR &amp; Adoption Cases</b>	<b>Other Non-Expedited Appeals</b>	<b>Days Saved</b>
Appellant files notice of appeal & accompanying memorandum in support of jurisdiction**	20 days from entry of judgment being appealed	45 days from entry of judgment being appealed	25 days
Appellee files memorandum in response	20 days after appellant's memorandum in support filed	30 days after appellant's memorandum in support filed	10 days
Determination of jurisdiction by Ohio Supreme Court	"Supreme Court will expedite its review and determination."	"Supreme Court will review" the memoranda and "determine whether to allow the appeal."	Varies
Transmittal of record on appeal	Preparation and transmission of the record shall be "expedited and given priority" over record in other cases	Record must be transmitted to clerk of supreme court within 20 days.	Varies

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\* Rules related to cross-appeals are not depicted, but can be found at Ohio S. Ct. Prac. R. III(4)(A), (B) (filing jurisdictional memoranda); and Ohio S. Ct. Prac. R. VI(5)(A)-(D) (filing merit briefs).

\*\* If a motion for an immediate stay of the judgment being appealed is filed with the notice of appeal, the memorandum of jurisdiction does not need to accompany the notice of appeal. Ohio SS. Ct. R. II(2)(A)(3)(a).

<b>Procedural Step</b>	<b>TPR &amp; Adoption Cases</b>	<b>Other Non-Expedited Appeals</b>	<b>Days Saved</b>
Appellant files merit brief	“[W]ithin 20 days from the date the Clerk of the Supreme Court receives and files the record”	“[W]ithin 40 days from the date the Clerk of the Supreme Court receives and files the record”	20 days
Appellee files merit brief	Within 20 days after appellant’s merit brief is filed.	Within 30 days after appellant’s merit brief is filed.	10 days
Appellant’s reply brief	Within 15 days after Appellee’s merit brief is filed.	Within 20 days after appellant’s brief is filed.	5 days
Scheduling oral argument	“[A]t earliest practicable time.”	Scheduled and heard after case is briefed.	Varies
Entry of judgment	“Supreme Court will expedite”	N/A	Varies