FJI Appellate Attorney Practice Guide

This guide provides practice pointers for appellate counsel for parents and children in the child welfare system. Because every jurisdiction has different procedural rules, the guide offers general suggestions about best appellate practices.

Types of Appeals

Appeals of Final Judgments

- Appellate courts have jurisdiction to decide appeals from "final" orders and judgments of trial courts.
- In child welfare cases, there may be several final orders and judgments, and states vary on whether they consider certain rulings to be final. Examples of final orders and judgments may include:
  - Orders terminating parental rights.
  - Final adoption decrees.
  - Dispositions following a finding of abuse, neglect, care and protection, dependency, or that a child is in need of services.
  - Orders granting permanent guardianship or custody.
  - Orders that permanently deny a parent's right to visitation.
  - Certain permanency goal change orders.

Appeals of Interlocutory/ Nonfinal Orders

- During the course of a child welfare case, trial judges issue many orders that are not intended to be final orders (e.g., an order granting temporary custody to a party or a pretrial order modifying a visitation schedule). In some states, nonfinal (or "interlocutory") orders are not appealable at all; in others there is a process usually different from the process for appealing final judgments – for the appeal of nonfinal orders.
- In many states, nonfinal orders "merge" into the final judgment. Depending on the jurisdiction, this merger may mean the nonfinal order is no longer appealable at all. Or it may mean it can be appealed along with, or as part of, the appeal of the final judgments.
- Most jurisdictions do not allow (or strongly disfavor) interlocutory appeals of orders made before trial, such as discovery orders, because the appellate courts dislike "piecemeal appeals"; that is, they want only one appeal per case instead of several. Moreover, in the final appeal, the appellate court can usually review and correct any erroneous nonfinal orders, making multiple appeals unnecessary.

Other Appeals

- Some jurisdictions allow other types of appeals, including emergency appeals. Although the usage and requirements may vary by jurisdiction, generally emergency appeals are appropriate where government or judicial officers exceeded their authority or refused to exercise it.
- Asking a higher court to order the lower court judge or clerk to do something is often called a Writ of Mandamus.
- Asking a higher court to order the lower court to refrain from doing something is often called a Writ of Prohibition.
- These are rarely granted because the standard of proof is high.

Other Key Appellate Principles

Standing

- A party that is aggrieved or harmed by an order or judgment generally has "standing" to appeal it. If the party is unaffected by the order—not harmed or helped in any way—that party lacks standing. For example, one parent may not have standing to appeal an order regarding services given or denied to another parent; or a parent of one child may not have standing to appeal an order regarding placement or custody of a child that is not his child.

Stay Pending Appeal

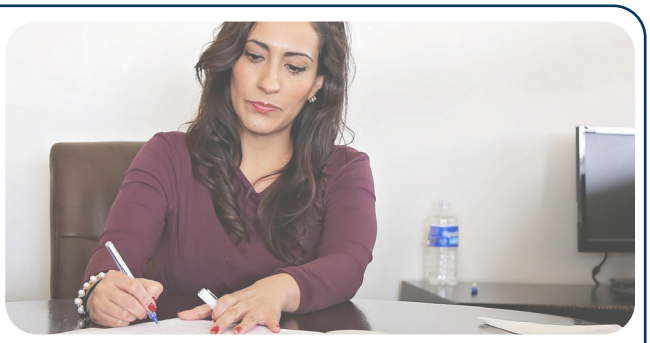
- Depending on the jurisdiction, filing an appeal may stay (or stop) the order of the trial court pending resolution of the appeal. But in many jurisdictions, an appeal does not stay a change of custody, the termination of parental rights, or even an adoption. While unstayed orders/judgments may be vacated following a successful appeal, they may not be. Counsel should consider seeking a stay of the order/ judgment pending appeal, and counsel must seek a stay if an adoption (or other order) pending appeal will render the appeal moot.
- Many states require that a request for a stay be made first in the trial court.
- Common requirements for stays include the likelihood of success on the merits, irreparable injury if a stay is denied, and a showing of no (or less) harm to opposing parties if the stay is granted.

Mootness

- Appellate courts ordinarily decide only live controversies and actual disputes between parties. If an event occurs while an appeal is pending that renders relief impossible or unnecessary, that event likely renders the appeal moot. For example, a termination appeal filed by a parent is moot if that appellant-parent or the subject child dies during the appeal. A custody appeal may be moot if the aggrieved parent later gets custody from the trial court. An appeal concerning placement of the child is moot if the agency, during the pendency of the appeal, places the child where the appellant wanted the child placed. When any of these things happen, appellate courts will usually dismiss the appeal as moot.
- Three exceptions to the mootness doctrine are when the issue, although moot in the particular case, (a) is capable of repetition and the appellate court should address it to correct systemic errors, (b) is of the sort that will always or usually evade review (usually because of duration of the wrong or duration of the case), and (c) has future consequences.

Issue Preservation

- Most issues must be "preserved" in the trial court for the appellate court to address them. If the party complaining of error on appeal did not preserve the issue by arguing it at trial, then the appellate court may deem the issue waived.
- In most jurisdictions, there are many ways to preserve trial court errors for appeal, including objections and offers of proof/verbal proffers by counsel.



Objections

- Making objections in a timely, specific, and clear manner is ideal.
- An objection on one ground will often not preserve a challenge on another (e.g., an objection on hearsay grounds will not preserve for appeal an argument that the testimony or written statement was inadmissable based on a privilege).
- If the judge sustains your objection, know whether you need to move to strike.
- If another party objects, know whether you also need to object to preserve the issue.

Proffers/Offers of Proof

- If the judge will not let you put on certain evidence (whether it is a witness or a document), make a proffer about what the evidence would have shown, and state why it is important to your case.
- Make your proffer right away orally; courts may let you submit a written proffer right after the hearing/trial.
- *Note:* Proffers are often essential to show that the ruling by the trial court was not a harmless error.

  Motions to strike and substantive motions regarding the issue may also preserve the issue for appeal. In some jurisdictions, simply discussing the issue on the record may preserve an issue.
- Some issues may not need to be preserved, such as subject matter jurisdiction, certain issues under the Indian Child Welfare Act, and certain fundamental due process violations.
- If trial counsel has failed to preserve an issue that needed to be preserved, in some jurisdictions that failure waives the issue for appeal; that is, appellate counsel cannot raise it at all. In other jurisdictions, appellate counsel may still be able to raise the issue but must prove that the error constituted a substantial risk of miscarriage of justice, a "plain error," or a grievous error by another name. In any event, it is a very high hurdle that is rarely met.

Standard of Review

Basic Principle

- Review by an appellate court is rarely a "second bite at the apple," which counsel must explain to the client. An appellate court reviews trial court orders and judgments based on different types of "standards of review." The standard of review is the level of deference the appellate court gives to the trial court's determinations.

Questions of Law: De Novo

- Appellate courts do not give deference to trial courts' interpretation of the law. They decide legal issues de novo, that is, afresh, using their own independent judgment about what the law is and whether the trial court properly applied it.
- Pure legal determinations usually involve interpretations of statutes, rules, or case law.

Questions of Fact: Clear Error

- Appellate courts generally review a trial judge's findings of fact for clear error. That means the appellate court will affirm a trial court fact-finding unless there is no evidence to support it or, if there is some evidence to support it, the evidence refuting the finding is overwhelming. In some jurisdictions, clear error may be called "plain error." Generally, if there are multiple views of the evidence, and none is overwhelmingly supported by the evidence, the trial court's choice between them cannot be clearly erroneous.
- When reviewing the trial court's fact findings, appellate courts usually consider the evidence in the light most favorable to the prevailing party, give great deference to the trial court in weighing witness credibility, and allow courts to draw reasonable inferences from the evidence.
- Fact findings based on witness credibility and demeanor are almost impossible to challenge on appeal,

because the appellate court cannot see and hear the witness's tone and demeanor.

- On the other hand, fact findings based on written documents are sometimes reviewed de novo, because the appellate court is in the same position to review the records as was the trial court.

Discretionary Matters: Abuse of Discretion

- Trial judges make many discretionary decisions during a case, such as which temporary third-party custodian serves the child's best interests, or whether sibling visits should take place once or twice per month (or whether the agency decision in this regard serves the child's interests). Appellate courts are limited to determining whether the trial judge abused that discretion. In looking at whether a trial court abused its discretion, the appellate court may ask:
  - Did the trial court exercise its discretion within the range of permissible alternatives, based on all relevant factors and no improper factors?
  - Was the trial court's decision supported by substantial reasoning and drawn from a firm factual foundation in the record?
  - Did the trial court base its exercise of discretion on correct legal principles or legal standards?
  - Did the trial court actually exercise any discretion, or did it improperly refuse to address the issue or erroneously believe that it lacked authority to address the issue?
  - The abuse of discretion standard applies to review of most motions, such as discovery motions, motions to continue, and many postjudgment motions.

The Concept of Harmless Error

- Trial judges make all sorts of errors, often dozens (if not hundreds) in every case and at every trial. But most of those errors don't make a difference to the outcome. Generally, appellate courts will not reverse an order or judgment if the error was harmless, that is, it didn't make a difference to the outcome or prejudice the client in any way. Some appellate courts will not even address the error if they believe it was harmless. In appellate opinions, appellate courts often say, "The appellant argues X. We decline to address the issue because, even if we agree X was error, that error was harmless because there was ample other evidence to support/the totality of the circumstances supports the judgment."
- Therefore, when raising an error on appeal, counsel must always explain to the appellate court how the error prejudiced the client, and how the outcome of the case might have been different had the trial court not committed the error.
- Some trial court errors may be so egregious, or constitute such a fundamental violation of due process rights, that the appellate court does not conduct a harmless error analysis. In many jurisdictions, failure to appoint counsel, improper striking of counsel, the failure to give notice of the proceeding to a parent, failure to allow the parent to participate meaningfully at trial, and certain egregious procedural missteps may be grounds to vacate or reverse the judgment without analyzing harm to the client. Harm in such cases is presumed.

Procedural Issues for Appeals

Initiating an Appeal

- When representing parents in jurisdictions with a right to appeal all final judgments, always advise your client about the right to appeal. If there is no appeal as of right, or that right is limited to "meritorious" issues, explain the appellate process (and any screening/assessment process) to your client.
- Depending on your state's rules about representing children, you may need to speak with older child clients about the right to appeal. In a "best interests" or "substituted judgment" jurisdiction, you may also need to file an appeal on behalf of a younger child.
- Depending on the jurisdiction, trial counsel may also serve as appellate counsel, or counsel may need to file a motion to withdraw or for the appointment of appellate counsel. In either case, counsel is usually responsible for filing the notice of appeal and any required accompanying motions. Counsel should ensure the client is aware of all rules requiring client signatures or other participation in the appellate process.
- Counsel should explain to the client the nature of the appellate process, the client's involvement in that process, the timeline for appeals, and the relief that appellate courts can and cannot (or rarely) grant. Counsel should also discuss potential settlement with the client in light of the appellate timeline and the nature of appellate review and relief.

Notice of Appeal

- Your jurisdiction's statutes and procedural rules govern the contents and timing of notices of appeal. Typically, the notice of appeal must specify who is appealing, the date(s) of the judgment(s) being challenged, the nature of the judgment(s) being challenged, and a signature by the appellant/petitioner or their counsel.
- Check your rules to determine how deadlines are calculated for filing the appeal. Your jurisdiction may give extra time for notices that are mailed to the court, while its rules for notices that are electronically filed may differ. Correctly calculating deadlines is essential.
- Certain post-trial motions may toll (that is, halt or delay) the deadline for filing

a notice of appeal, but other post-trial motions will not. Check your rules carefully.

- Missed deadlines for notices of appeal may be fatal to the appeal, or you may be able to file late upon a showing of "cause" or "excusable neglect." Review your rules and governing law as to whether, and how, you can file a late notice of appeal.
- Check your rules to determine whether you or the court clerks are responsible for serving the notice of appeal (and any accompanying motions) on the other parties.

Transcripts

- Transcripts are the written record of what was said and done at trial (or other hearing) based on audio recordings or, in some cases, a stenographic record. Transcripts are an essential part of almost all appeals.
- In some states, the appellant's trial counsel orders transcripts; in others, they are ordered by appellate counsel; and in other states, they are ordered by court clerks or other court personnel. When court personnel order transcripts, counsel should ensure that the dates ordered are correct and may need to order other dates (usually of key pretrial hearings). Counsel for appellees should ensure all relevant dates have been ordered, as well.
- Where counsel is required to order the transcripts, there are often specific order forms and deadlines for ordering them. Find out if the transcriber will send the transcripts to appellant's counsel, all counsel, or the court; if the transcriber will send them only to the court, find out from the clerk how the court will provide them to counsel. The failure to order transcripts, and the failure to abide by other transcript-related deadlines, may lead to dismissal of an appeal.

The Record

- The "record on appeal" (or just the "record") is generally the written record of what happened at the trial court. While jurisdictions differ as to what the "record on appeal" comprises, in most courts it is the docket sheets and the exhibits filed at the trial or other hearing. It may also include any motions or other pleadings filed and the transcript. In some jurisdictions, the record on appeal is called the "record appendix."
- Counsel for the appellant must generally give the appellate court a copy of the record along with its brief. (In some jurisdictions, the trial court clerk may provide some or all of the record to the appellate court.) The rules for what must be in the record, how counsel must paginate and order it, and the manner in which counsel must submit it to the appellate court differ in each jurisdiction. The failure to submit a proper record in the proper manner may lead to dismissal of the appeal.
- Counsel for the appellee should ensure the appellant's record is complete and accurate. If it is not, most jurisdictions allow appellees to file a motion to supplement the record. In some cases, appellees may consider moving to dismiss an appeal where the record submitted by the appellant is incomplete or inaccurate.
- Some jurisdictions require or encourage appellants and appellees to file a joint or agreed-upon record appendix. Even if your jurisdiction does not require it, it is good practice to ensure that all parties agree on the record's contents.

Entry/Docketing of an Appeal

- In most jurisdictions, filing a notice of appeal in the trial court does not actually start appellate proceedings in the appellate court. The appellant must "enter" or "docket" the appeal in the appellate court, and the appellant must do so by a rule-specific deadline (e.g., 14 days after the trial court clerk sends the transcripts to counsel).
- For nonindigent appellants, entry or docketing of the appeal in the appellate court usually requires the payment of an entry or docketing fee. For indigent appellants, the appellate court will waive the fee, but counsel may need to prove that the client is indigent by submitting proof of indigency (and often a "motion to waive the docketing fee"). The failure to enter or docket the appeal in the appellate court in a timely manner can be fatal. If the appellant does not pay the fee, or an indigent affidavit cannot obtain a fee waiver, the appellate court will not enter or docket the case, and the appeal will either automatically be dismissed or another party will move to dismiss it.

Motions

- As in the trial courts, parties often file motions in the appellate courts. These motions may be substantive, such as a motion to dismiss the appeal or to strike a portion of a brief. Or they may be procedural, such as a motion to extend a briefing deadline or a motion for oral argument. Your jurisdiction may require the other parties' assent to certain procedural motions.
- Your jurisdiction will have several rules governing the types of motions you can file, the formatting of motions, and the manner of filing.

Briefs

- Your jurisdiction will have many rules about the content, format, pagination and page limits, and font and font size for briefs. It will also have rules about deadlines for filing them.
- Your jurisdiction may follow the Bluebook for case citations, but it may have a style guide that supplements or overrides the Bluebook.
- If you have questions about which rules apply to your case, or whether a brief you intend to file complies with the rules, contact the appellate court clerk's office. Most appellate clerks are happy to help you file your brief correctly.
- In many jurisdictions, you must file briefs electronically. Give yourself additional time to learn how to e-file your brief. Well before the briefing deadline, sign up/register to participate in the e-filing system.
- In most appeals, the appellant files a brief within a certain number of days after a case is entered/docketed in the appellate court, and the appellee files a reply brief within a certain number of days after that. In some jurisdictions, the appellant can file a reply brief within a certain number of days after the appellee's brief is filed.

Calendaring and Argument

- After all briefing is complete, some appellate courts screen the appeal and decide whether to have oral argument. Some jurisdictions rarely hear oral argument in child welfare appeals; some hold arguments routinely; and some always hold oral argument in child welfare matters. In some jurisdictions, you must file a motion asking the court to hold oral argument

because your case is special in some way and merits oral argument.

- In some jurisdictions, appellate court clerks will call you to schedule oral argument; in others, they will send you an order or an email asking for available dates. Monitor your e-filing account, e-mail, and mail to ensure you do not miss a court order regarding any aspect of briefing or argument.
- If the appellate court holds oral argument, it usually proceeds in a time-limited, routine fashion according to appellate or court rules: a certain number of minutes for appellants (usually a set time to be shared by multiple appellants), then a certain number of minutes for appellees (also a set time to be shared by multiple appellees). Some jurisdictions permit rebuttal time for appellants. It is not a back-and-forth as it is in the trial court.

Result

- The appellate court will decide the case either shortly after briefing is complete or shortly after oral argument. (In most jurisdictions, appellate courts issue decisions fairly quickly in child welfare cases to speed permanency for the subject children, whereas in non-child welfare appeals the wait time for a decision is far longer.)
- The appellate court may affirm, modify, vacate, set aside, or reverse any judgment properly before it for review. It may remand the case to the trial court and direct the entry of what it deems to be an appropriate order or decision. Or it may order a new trial, that further trial court proceedings be held, or that the trial court take additional evidence.
- If your client loses—the vast majority of all appellants, not just appellant-parents, lose on appeal—there may be a higher state court to appeal to. Consult your appellate rules about further or higher appellate review.

Trial Proceedings While the Appeal is Pending

- In many child welfare cases, certain trial proceedings continue in the ordinary course even while an appeal is pending. If the appeal concerns a disposition other than termination of parental rights, trial proceedings may continue for all parties during the appeal. If the appeal concerns the termination of parental rights, often proceedings continue involving just the child and the agency. Be aware of the types of trial proceedings, and your parent-client's standing to participate in those proceedings, that take place during the pendency of an appeal.
- In many cases, the trial court lacks authority to reverse, modify, or even hold a hearing that affects a decision that is on appeal before the appellate court; the appellate court essentially "owns" the order or judgment. In some cases, everyone must simply wait for the appellate court to issue its decision. But in other cases, you may be able to seek leave of the appellate court to file motions or hold hearings that affect the order or judgment on appeal.