What Every Child Welfare Trial Attorney Needs to Know about Appeals

This guide is designed to help trial attorneys who represent parents and children in child welfare proceedings gain a better understanding of the appellate process. Appeals serve many purposes. They can:

- develop the law; correct errors in specific cases;
- affect systemic changes when the agency or judges act contrary to existing case law, statutes, or rules; and
- lead to changes in unconstitutional statutes or court practices.

In short, appeals can help keep the system fair for our clients. This guide provides tools for trial attorneys to put into practice right away, even if they do not file an appeal in a specific case.

How to Make a Good Record for Appeal

When to start thinking about a possible appeal

From the moment you are assigned a case, think about setting up a possible appeal and preserving the record so important issues can be raised on appeal. Unless the record is properly preserved (see below), your appellate courts may not consider the important issues you would like to raise.

Preservation and waiver

Generally, any issue not raised in the trial court is waived and cannot be raised for the first time on appeal. There are some exceptions to this rule. For example, trial counsel might not have to raise:

- certain fundamental due process errors (no trial at all, a judge who refuses to take any evidence before ruling, improper striking of counsel, etc.)
- errors that counsel did not know about
- certain ICWA issues, and
- subject matter jurisdiction

But most issues must be preserved at the trial level.

Objections, Proffers/Offers of Proof, Motions

There are many ways to preserve an error for appeal. You can:

- Object to inadmissible evidence, including improper questions from judges.
- Move to strike improper answers from witnesses.
- Make an offer of proof, explaining what evidence would have been offered had you been allowed to ask about it and elicit that evidence.
- File substantive motions about visits, services, accommodations, interpreters, etc. For many issues in child welfare cases, if you don't argue about it and make it an issue for the trial court judge—early, when the judge or the agency might be able to do something about it—it isn't preserved for appeal.
- File procedural motions, including motions to recuse as soon as the judge's problematic actions or statements come to light.

Consulting appellate counsel to set up issues on appeal

In some jurisdictions, you may be able to consult with appellate counsel before trial in order to help set up an appeal. Some of our issues are complicated, and you may feel overwhelmed with tricky issues like child sexual abuse hearsay, competency of a developmentally disabled adult, the qualification or methodology of experts, or identification and handling of judicial bias.

Even if the issue itself isn't tricky, you may have a novel issue of law that you want to set up for appeal correctly.

Contact the agency or court administrators who appoint appellate counsel and ask whether they can give you "advanced" or "consulting" appellate counsel.

Practice Tips

- ✓ While oral motions and offers of proof may be sufficient, written motions and offers of proof may be better because they are easier for trial judges to consider and appellate judges to review.
- ✓ Avoid lobby conferences and sidebars that are "off the record." If you must participate in an unrecorded or off-the-record discussion with the judge and other parties, and something objectionable takes place, you must place that information on the record upon returning to the courtroom. For example, if the judge shows bias, or reveals an *ex parte* conversation, during an off-the-record lobby conference or sidebar, you must put that information on the record and immediately move to recuse the judge. If you do not, an appellate court will have no evidence of the objectionable conduct, and you may waive the issue on appeal.
- ✓ Make a record of logistical or procedural issues agreed upon outside of court. For example, tell the court if all parties agree to the timing of an expert's or GAL's observation of visits, or if all parties agree to the timing of the exchange of discovery.
- ✓ Consider putting on the record how a decision was made about *in camera* testimony.

How to Appeal a Final Order

Appeals as of right

In many jurisdictions, a parent, child, and the agency aggrieved by a final judgment in a child welfare case have the right to appeal. In some states, parents and children can appeal even if the appeal is meritless; in other states, either trial counsel or appellate counsel must determine if the appeal is meritorious, and only meritorious appeals can proceed. ("Meritorious" often means "colorable" or "worthy of argument," as opposed to "clearly a winner," but the law of each jurisdiction differs.) An appeal of a final judgment is generally reviewed by a panel of judges at the appellate courts.

If the client wants to appeal a final judgment, and the client has a right to appeal, you must advise the client of the right to appeal and file the notice of appeal even if you disagree or think the appeal is meritless. The appellate attorney will talk to trial counsel about possible issues to raise in the appeal.

Final judgment

A final judgment is one that finally determines someone's rights. Final judgments in a child welfare case might be:

- Termination of parental rights;
- Finding a child is "dependent," "abused or neglected," "in need of care and protection," "in need of services," or a similar determination (even though the parties continue to litigate in the trial court);
- Permanent guardianship, permanent custody, or other disposition; and
- In some states, orders terminating reunification efforts or approving a new permanency goal.

Become familiar with your state's definition of final judgments and final orders.

Orders during the course of the case regarding the emergency custody hearing, reasonable efforts motions, and motions for a finding that the agency "abused its discretion" in the exercise of its custodial powers are generally not final; they are "interlocutory." Interlocutory orders may not be appealable in your jurisdiction. If they are appealable, they will almost certainly follow a different procedure than for appeals of final judgments, discussed below.

Keep in mind that there may be concurrent jurisdiction while an appeal is pending so the trial court has jurisdiction to enter orders as necessary and appropriate. Check your local authorities.

How to Initiate an Appeal

Advising the client

Advise your client of their right to appeal an adverse final judgment in a child welfare case. The client might want to challenge every adverse aspect of the judgment or only one part of it, such as an order denying placement with a relative, the decision to approve the agency's adoption plan or an order for post-adoption contact or sibling contact. The laws of each state differ on what can be appealed and which party has standing to raise certain issues. For example, in some states, parents have standing to propose an adoption plan and appeal the selection of a different plan. In other states, they lack that standing.

The necessary contents of a notice of appeal differ by state. In some states, a notice of appeal need not specify or challenge every aspect of the judgment the parent wishes to appeal; all that is necessary is a notice of appeal indicating the client is appealing the "trial court's judgment dated X." In other states, the notice of appeal may need to specify exactly which aspects of the final judgment the client wishes to appeal, and a faulty notice of appeal may be fatal. In some states, the client must sign the notice of appeal. In that case, counsel should secure the client's signature as quickly as possible after entry of the final judgment.

Counsel for parents and children should explain to the client:

- that appeals may take a long time (see below),
- the chances of success for appellants,
- that long appeals may delay permanency for the child, and
- whether the case can be settled.

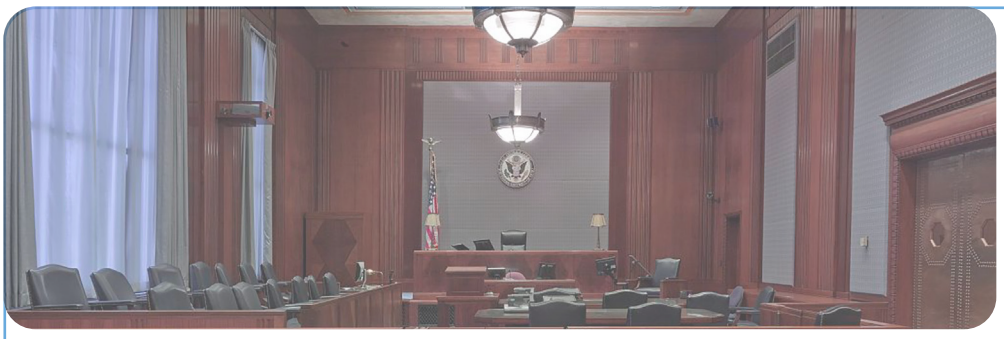
It is prudent to advise a client that a win on appeal almost never means the children come home immediately. In a given case, these factors may influence the client's—and the adverse parties'—willingness to settle.

Timeline of the appeal

The length of an appeal varies by jurisdiction; it may take a few months or a year or two. After you or your appellate office files the notice of appeal, transcripts must be ordered. In some states, the trial court clerk's office automatically orders trial transcripts. in other states, that task falls to trial counsel. In many states, obtaining the transcripts causes the longest delays in an appeal. You will have to help appellate counsel ensure that all necessary transcripts are ordered and made by the transcriber.

When the transcriber finishes the transcripts, and the judge issues findings/conclusions of law, the appeal is ready to be "assembled." If you receive the transcripts, tell the appellate counsel immediately. In some states, the trial court clerk's office may send copies of the exhibits and/or transcripts directly to the appellate court; in other states, the appellate counsel will file them along with the brief.

Once the appeal is "docketed" (entered in the appellate court), the appellant has a limited time to file their brief, usually 30 or 40 days. The appellate attorney may be able to ask for an extension. Even when authorized, extensions are usually not very long, and they are often disfavored. After the appellant files their brief, the appellee—the party seeking to defend/maintain the trial court's judgment—usually has 14-30 days to file a responsive brief. Again, appellate counsel sometimes asks for extra time, and the appellate court may grant it. After the appellees file their briefs, the appellant has a limited time to file a "reply brief" that responds to the



arguments—and any inaccuracies—in the appellees' briefs.

After the case is fully briefed, the appeal will be assigned to a panel of appellate judges. They will read the briefs, the record, and the transcripts. In some jurisdictions, the appellate court will hear from the parties at an oral argument. Trial counsel is usually welcome to attend oral arguments if scheduled. After oral argument, the judges consider the case and usually issue a decision within a few months. Most appellate court decisions are unpublished, but a small percentage each year are published.

A party who loses in the appellate court may be able to request further appellate review in the state's Supreme Court, depending on the jurisdiction. These courts only accept a small number of appellate review applications. If they deny the application, the case is over. If the state's highest court accepts the application, the parties may be permitted to re-brief the case.

What to file to initiate an appeal

What you must file to start an appeal depends on the jurisdiction. You must generally file the following documents in the trial court (or directly in the Appellate Division, depending on your state):

- Notice of Appeal
- Motion for Appointment of Appellate Counsel
- Motion for Fees and Costs Related to the Appeal (some states exempt indigent parents and children)

Motion for a stay (maybe)

After you've filed the necessary court documents, send them to your state's appellate unit, along with any supporting documentation required by your state's agency.

Be sure to include any important information about the case or the client that you think appellate counsel will want to know (the client doesn't speak English, the client is homeless, the client's foster parents are distrustful and discourage contact with counsel, and so on). The appropriate agency will appoint certified appellate counsel and send notice to all attorneys of record.

If you have filed an appeal, but you haven't heard from appellate counsel within a few weeks, contact the assigning agency right away to ensure they have received the notice.

Notice of appeal

Timing and Signature. An aggrieved party generally has no more than 10-30 days to file a notice of appeal by right. This time period usually starts to run on the date the decision is entered on the trial court's docket but may be triggered by another event. Double-check your state's filing deadline.

Write down your state's notice of appeal deadline here: _____

_____

Statutory or rule governing this deadline:

_____

An appellant-parent must sign the notice of appeal in many states; make sure you know whether this is required in your state. In some states, both the parent and the parent's attorney must sign the notice. In most states, appellant-child clients do not have to sign the notice of appeal; their counsel can sign it on behalf of a child client. Each appellant must file their own notice of appeal. If your client wants to challenge any aspect of the judgment, file a notice of appeal.

Statute or rule governing signature on notice: _____

_____

Client/attorney/both required?

Late Notice of Appeal. If your client does not file a timely notice of appeal within your state's allotted time frame, there may be an opportunity to file a late notice of appeal.

Late notices of appeal are not available where the appeal period is statutory. You cannot ask for more time, and the trial judge can't give you more time. If the appeal period is governed by the Rules of Appellate Procedure (or a statute that expressly permits a late notice of appeal), then you can request to appeal "out of time."

So how do you get permission to file a late notice of appeal? Late notices of appeal are generally allowed if the party shows "excusable neglect" (or, in some jurisdictions, "good cause"). Excusable neglect means more than just the attorney or client forgetting or getting confused, or being too busy. The facts regarding why the notice was (or will be) late must be compelling. In some jurisdictions, the request is rarely granted.

Where do you file the motion? Depending on timing - that is, just how late it is - you will file it either in the trial court or in the appellate court. Reach out to your state's assigning authority if you have questions. In some circumstances, the assigning authority may be able to give you a mentor or assign the motion to an appellate attorney.

Ordering the transcript

Depending on your state, the trial court clerk's office or you as counsel may be responsible for ordering the trial transcripts for child welfare appeals. If the clerk's office is responsible, follow up with the clerks as soon as possible to see if they need more information from you.

When the clerk's office is responsible for ordering transcripts, it may order only transcripts of the trial dates. If there was an important hearing date—a motion *in limine* hearing, a *voir dire* hearing, a hearing date regarding an important visitation or placement motion, or a hearing at which important procedural decisions of some kind were made—be sure to request the transcript from that hearing. Appellate counsel might not realize that they need it until many months have passed. By then, it might be too late.

If you receive the transcripts, contact the appellate counsel to ensure that they, too, got a copy.

Working with appellate counsel

After you file the notice of appeal and accompanying documentation, do not withdraw from the case or close your file, even if you represent a parent whose rights have been terminated or a child who has achieved permanency. You are still responsible for any necessary trial court advocacy, and you must help appellate counsel find the client and gather documents for the appeal. In addition, there may be post-judgment motions to file or settlement negotiations. Appellate counsel might also ask you to file motions urging the trial judge to issue their findings faster or amend their findings. Trial counsel and appellate counsel should collaborate. For most motions in the trial court, it doesn't matter whether trial or appellate counsel files them so long as both lawyers are on the same page about the client's goals. Many judges insist that only one lawyer appear and argue a trial motion; that is up to trial and appellate counsel to determine. Behind the scenes, both can work on the motion and deal with the client, witnesses, etc.

Trial counsel for a child client—appellant or appellee—continues to represent the client in all trial proceedings (which may, depending on the jurisdiction, include review and redetermination, permanency hearings, sibling visitation motions, etc.) until the case closes or the child is dismissed from the case.

Please send the appellate attorney the client's file upon request. The "file" belongs to the client, not the lawyer (except for billing records), so please be sure to send the appellate counsel everything, including notes. Documents should be free of any writing or notes on the margins, Appellate counsel should work with you to make this file transfer as painless as possible

Appellate counsel will need to get the client's contact information from you. In most cases, appellate counsel will want you to share with them your thoughts about the case. Please return the appellate counsel's calls promptly.

> *Most conflicts can be resolved between counsel through respectful communication and keeping the interest of the client in mind.*

Conflict between trial and appellate counsel

Occasionally conflicts arise between trial counsel and appellate counsel. Most conflicts can be resolved between counsel through respectful communication and keeping the interest of the client in mind.

Sometimes, conflicts are harder to resolve. Perhaps trial and appellate counsel disagree on the child client's position. For example, trial counsel is substituting judgment, but appellate counsel is client-directed. Or both counsels are substituting judgment but have reached different conclusions. In such cases, research whether your state's appellate administration division has a policy on resolving such conflicts. If no written policy addresses such issues, consider contacting the appellate division

directly. They may be able to help you reach a consensus. If that isn't possible, sometimes both trial and appellate counsel must withdraw, and a single lawyer who is both trial and appellate certified takes over.

Or perhaps the appellate counsel raises ineffective assistance of counsel claim. In such circumstances, trial counsel should consider whether withdrawal is necessary. If uncertain, trial counsel should contact their governing or appointing office to learn what they should and should not do in such circumstances.

> *If the appellate court affirms the trial judge's decision, the appellant has a limited time to seek further appellate review in the highest court.*

If the conflict is not about a position to be taken on appeal but rather involves the interactions between the appellate and trial court attorneys (such as a disagreement over getting a copy of the case file or documents from the trial court, over who will negotiate and draft settlement papers, or who will file a motion for relief from judgment), consider contacting your state's appellate unit. They may be able to help mediate the dispute.

What happens if the appellant wins on appeal

A win on appeal can mean different things. The appellate court can reverse the judgment, or remand for a new trial or further evidence on a limited issue. Or it can remand and order the trial judge to make additional findings. At best, it usually means that they will get a new trial. Accordingly, they should prepare for that new trial by continuing with services, keeping notes about important meetings or conversations, and attending any offered visits.

What happens if the appellant loses the appeal

If the appellate court affirms the trial judge's decision, the appellant has a limited time to seek further appellate review in the highest court. Such relief is rarely granted. The highest courts usually decide whether or not to accept the case within a couple of months.

Reviewing an Interlocutory Order

What are interlocutory orders?
Orders or judgments that are not final are "interlocutory." This includes most orders that judges make during the course of a case leading up to trial. In some states, interlocutory orders may not be reviewable at all. If they are reviewable, they will follow a different procedure, such as a petition or writ of certiorari. They may go to a different reviewing court or to a single appellate judge rather than to a panel of appellate judges.

Some common interlocutory orders that might be reviewed include:

- Awarding temporary custody following an emergency hearing, shelter hearing, or temporary custody hearing
- Denying a motion for visitation
- Determining whether the agency made reasonable efforts
- Granting temporary guardianship
- Denying a request for disability accommodations
- Denying (or granting) an "abuse of discretion" challenge to agency decisions.
- Placing a child out of state under the ICPC.

In your jurisdiction, the interlocutory appellate process is outlined in _____ [statute; court rule].

Unlike an appeal of a final judgment (see above), in most jurisdictions, there is no right to appeal an interlocutory order. Trial counsel and appellate counsel must screen for a "meritorious" issue. As noted above, "meritorious" generally does not mean a "winner"; it means a claim worthy of appellate review with at least an arguable claim.

Who files interlocutory reviews?
In some jurisdictions, trial counsel can file an interlocutory appeal; in others, you may be able to reach out to your state's agency responsible for appellate counsel and request that appellate counsel be assigned. Depending on the state, appellate counsel may be able to either mentor you through the interlocutory appellate process, help you file the petition/writ, or take over representation just for the purposes of filing the interlocutory appeal.

Using Appeals to Address Systemic Issues

Whenever possible, trial and appellate counsel should work together to identify systemic issues. After identifying issues, they should strategize whether any of these issues can be addressed through the appellate process in a particular case.

Appellate counsel may assist trial counsel by providing scripts of direct or cross, suggestions for expert testimony, helpful case law, and specific arguments to preserve issues for appellate review.

FJI Family Justice Initiative

The FJI unites professionals from around the country to ensure every child and every parent has high-quality legal representation when child welfare courts make life-changing decisions about their families. Through the FJI's work, child welfare lawyers, researchers, judges, social workers, policymakers, families impacted by abuse and neglect, and others are reenvisioning how to best protect children, strengthen families and support communities. For more information, visit: https://familyjusticeinitiative.org/