The Next Level: Appellate Practice in Child Welfare Cases
(Part 2)

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Introduction

- Part 1
  - Overview of basic appellate principles and key appellate doctrines
  - Pointers to use in everyday trial practice
- Part 2
  - Focus on procedural and substantive aspects of appellate practice
  - Tips on drafting briefs and dispositive motions
  - Guidance on oral argument

Agenda

- How to Appeal: Logistics
- How to Appeal: Motions Practice
- How to Appeal: Briefing
- How to Appeal: Oral Argument
How to Appeal: Logistics

Monitoring the Docket

- System for watching for orders
- System for tracking deadlines

Procedural Rules

- Local Rules
- E-filing requirements
- Internal Operating Procedures
  - Other local nuances
  - Administrative Orders
How to Appeal: Motions Practice

Motions Practice

- **Procedural Motions**
  - A motion for an order that does not substantially affect the rights of the parties or the ultimate disposition of the appeal

- **Substantive Motions**
  - Motions that decide important rights or even resolve the appeal

How to Appeal: Briefing
Components of Briefs

- Statement of Issues
- Statement of the Case
- Statement of Facts
- Standard of Review
- Argument
- Conclusion

Statement of Issues

- Framing the Issues
  - Case outcome can rest on how court approaches issues
  - Find premises that will pull court toward your conclusion
  - Make premises explicit right away
  - Question you are addressing clearly in mind

Statement of Issues

- Drafting Issues Presented
  - Support your theory of the case, but fairly
  - Legal issues + key facts
  - Be brief
  - Be clear
  - Answer itself
  - Reader should answer “yes” to all questions
Statement of the Case

- Panoramic overview:
  - How we got here
  - Who the parties are
  - When dispute took place
  - Where dispute took place
  - What kind of case this is
- One paragraph
  - Like first paragraph in published opinions

Statement of Facts

- Persuasive story, but not argumentative
  - If skewed, you lose credibility
  - Avoid certain phrases
  - Set forth facts that show why particular item doesn’t hurt you

Statement of Facts

- Chronological narrative of relevant events
- Balance
  - Enough facts for reader to understand what gave rise to legal problems
  - Avoid unnecessary details
- Use phrases that convey sense of time
Statement of Facts

- Almost every sentence needs a citation
  - Cite to transcripts or other evidence
  - Don’t just depend on court’s findings or conclusions of law
- Show, don’t tell
- Merge quotes into your sentences
  - More credible and persuasive
  - Use brackets if necessary

Standard of Review

- Level of deference given to trial court’s determinations depends on the nature of the issue

Questions of Law: De Novo

- Original appraisal of the record
- No deference given to trial court’s resolution of questions
- Usually involves interpretations of statutes, rules, common law
Standard of Review

- Questions of Fact: Clear Error
  - Reverse only when evidence is insufficient to support trial court’s ruling
  - What really happened
  - Includes credibility determinations

- Mixed Questions: Application of fact to law is considered a “mixed question”
  - Courts often “unmix” the question, reviewing the factual element for clear error, and reviewing the legal element de novo

Standard of Review

- Discretionary Matters: Abuse of Discretion
  - Did the trial court consider all required factors or consider one that is inappropriate or irrelevant?
  - Did the trial court explain its reasoning, and was its reasoning based on the record?
  - Best interest determinations are reviewed for abuse of discretion.
  - Applies to most motions
Standard of Review

- Related concept:
  - Issues not raised in trial court: Plain Error
    - Error; that
    - Is plain
    - Affected appellant's substantial rights
    - Seriously affects fairness, integrity, or public reputation of judicial proceedings
      - Appellant bears burden of proof

Standard of Review

- Related concept:
  - Issues objected to at trial: Harmless Error
    - Trial court's judgment not disturbed if error is harmless
    - I.e., ruling wasn't important to result of the case

Standard of Review

- Frame issues to get most favorable standard of review possible
- Stand-alone section or part of Argument
- Multiple standards for multiple issues
- Discuss other principles relevant to legal issues
Choosing and ordering your argument
- Avoid the “kitchen sink” approach
- Start with your strongest arguments

Start with relevant law and how courts interpret it
- Current state of the law
- Parentheticals should use quote or describe what courts do
- Merge quotes into your sentences
  - More credible
  - Cases
  - Statutes

Headings
- Use frequently
- Make them specific

Structure and Sequence
- Anticipate next question
- Transitional words or phrases
Argument

- Appellees:
  - Frame issues from your perspective
  - Say why you should win before saying why appellant should lose
  - Can structure brief same as appellant’s brief

Conclusion

- One line requesting relief
  - “For the reasons stated above, this court should affirm/reverse the judgment of the trial court.”
- Clear summation
  - Distills complex argument into tight points
  - Short paragraph

Conclusion

- Consider carefully your precise request for relief
  - What are the practical implications of different types of relief?
  - Should you ask for specific guidance on remand?
  - Should the same judge hear the case on remand?
General Reminders

- Citations
  - Proper format
  - Communicates competence
  - Mistakes = distractions
- Parentheticals
  - Use quote or describe what courts do
  - Subsequent history
  - Alteration of quote

General Reminders

- Block Quotes:
  - Use sparingly
  - Only when full context is needed or when entire passage is critical
    - Use lead-in summary phrase
    - Use italics, ellipses, and brackets

General Reminders

- Active Voice v. Passive Voice
  - Active voice is usually clearer and more concise
  - Unless there is a strategic reason to do so, avoid writing in the passive voice
    - Passive voice may be used strategically and sparingly to minimize the identity of the actor
    - Passive voice may be necessary when the identity of the actor is unclear in the record
How to Appeal: Oral Argument

Goals of Oral Argument
- Be helpful to judges
  - Help them rule for you
  - Help them with their job
- It's a conversation
  - Tennis match

Preparing for Oral Argument
- Reread the briefs
- Review the record
  - Relearn the facts
- Reread important authorities
  - Both sides
- Learn about the judges on your panel
Preparing for Oral Argument

- Ask yourself:
  - Likely questions and your responses
  - Your weak points
  - Key points
  - Reliable authorities
  - Opposing party’s best points
  - Unifying theme
  - Amplify or clarify something from your brief
  - What is and isn’t settled in case law

Preparing for Oral Argument

- Prepare an outline
  - Series of cheat sheets or memos on each key point
- Draft an opening
  - Start with thematic sentence or roadmap
- Practice alone
  - Talk it all out loud to yourself
  - Refine outline after doing once, then repeat

Preparing for Oral Argument

- Moots:
  - Ideally at least one
  - Mix of people who do and don’t know the case well
  - Don’t break character
  - Time yourself
- 1 to 2 days before oral argument:
  - Finalize roadmap and wrap-up line
    - Memorize them
  - Make a “do or die” list of critical points
    - 3 to 5 points
At Oral Argument

- Interacting with the judges
  - Be a good listener
  - Don’t talk over judges
  - Welcome questions
  - Consider body language
  - Consider your tone

At Oral Argument

- Answer questions immediately and directly
  - “Yes,” “no,” “it depends”
- Transition back to your outline
  - Be ready with transitions (and watch the clock)
  - You’re driving the bus
- Be candid
  - Don’t hide your argument’s weaknesses
  - Concede disadvantageous points if not needed to win

At Oral Argument

- Do not summarize the facts of the case
  - The judges already know them
- Use sources of authority to support your points
  - Weave into your outline
  - Don’t cite every principle you say
  - 1 or 2 highly relevant cases
  - Direct judges to pages in the transcript
At Oral Argument

- Consider limiting principles for each of your arguments
- How ruling in your favor would impact similar cases in the future
- Prepare for hypotheticals
- Practical implications of your argument and opponent’s argument

Opportunities and Pitfalls

- Hypotheticals
  - Address concern behind the question
    - Then say why that idea isn’t a concern in this case
  - Know what you cannot give up
- After roadmap, go to first point
- No hostile dialogue
  - Show grace under fire
  - Have arguments in the alternative
  - Stick to your guns where necessary

Opportunities and Pitfalls

- Give answer and follow through to next point
  - Be prepared for a “cold” bench
  - No awkward silences
- Softballs
  - Recognize and hit out of the park
  - Don’t be defensive
  - Acknowledge it out loud
- Going outside the record and new arguments
  - You shouldn’t raise, but judges or opposing counsel might
- Try not to ask clarifying questions
Opportunities and Pitfalls

**Appellants:**
- Frame issue so you win
- You set the tone
- Reserve time for rebuttal during roadmap

**Opportunities and Pitfalls**

**Appellees:**
- Where to begin and what to address
- Listen to court’s concerns during appellant’s argument
- Respond to appellant’s persuasive points

Opportunities and Pitfalls

- **Rebuttal**
  - Tennis → boxing match
    - Every sentence must score a point
  - Respond to specific arguments
- **Final line**
  - “Because X and Y, this court should reverse the judgment of the lower court”
Any questions?

Thank you!