



Navigating Appeals in Family Law Cases

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I. Introduction

In the United States, more than one in three women – approximately thirty-seven percent – have experienced sexual violence, physical violence, and/or stalking by an intimate partner during her lifetime. (The National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report, p. 117). As a result, many survivors of intimate partner violence seek legal protections from their local courts, often in the form of civil restraining orders and/or child custody and visitation orders, to protect themselves and their children. For a self-represented survivor, this can be daunting; it typically involves enduring long lines at the self-help center (if one exists), completing legal forms with minimal to no guidance, and making a case for protection in a public courtroom with very little understanding of the court system. These pitfalls for the self-represented survivor are magnified when many are erroneously denied the legal protections they need. Moreover, few survivors appeal these dangerous decisions due to seemingly insurmountable barriers like the high cost of litigation, lengthy appellate timelines, and limited access to quality legal assistance.

The Family Violence Appellate Project (“FVAP”) is the first non-profit organization in California dedicated to providing legal representation and support to survivors of intimate partner violence at the appellate level. Founded in 2012 by two Berkeley Law students, FVAP aims to break the intergenerational cycle of domestic abuse by creating a powerful body of case law that supports California’s strong and well-crafted domestic violence statutes. To do this, FVAP partners with pro bono attorneys from California’s top law firms and corporate legal teams to provide both low- and moderate-income survivors with high quality legal representation. FVAP also provides technical assistance to attorneys and unrepresented litigants across the state, and has trained hundreds of attorneys, advocates, mediators, and bench officers on domestic violence issues arising in family law cases. With this multi-faceted approach, FVAP strives to assist as many survivors as possible, and ultimately to change the legal landscape for all survivors of domestic violence.

II. Appeals Overturn Dangerous Orders, Prompt Proper Treatment of Domestic Violence in All Cases, and Create Binding Case Law to Guide Future Courts

Appeals in domestic violence cases are rarely brought. This is largely because (1) they require specialized expertise – not only in appellate practice, but also in domestic violence laws and prevailing social science; and (2) they can be incredibly expensive. To gauge just *how* expensive, FVAP conducted an internal assessment based on an informal survey of California family law practitioners, and found that filing an appeal of a family law decision can require as much as \$40,000 to \$60,000 in attorney’s fees. For the self-represented survivor who is often at an economic disadvantage compared to their abuser, the cost of an appeal can be a tremendous deterrent. As a result, pro bono representation is key.

With quality pro bono representation, appeals are a very effective tool for correcting dangerous legal decisions made at the trial court level. Indeed, trial courts are more likely to comply with domestic violence laws in states where family law cases are appealed. (Nancy K.D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective are They?*, 28 WM MITCHELL L. REV. 601 (2001).) Moreover, because appeals create binding case law on lower courts in their jurisdiction, appeals have a broad and sweeping impact across the legal landscape.¹ As a result, one meritorious

¹ California has both published and unpublished opinions, and only published opinions are precedent. However, this is not true in every jurisdiction.

appeal raised by a survivor has the power to affect thousands of other survivors with familiar facts or similar legal issues – and this is where case selection for appeals becomes critical.

III. ‘Good’ Cases for Appeal Preserve the Issues, Have Properly Lodged Objections, and Can Meet the Relevant Standard of Review

Since its founding more than six years ago, FVAP has screened over 1,000 requests for appellate-level assistance from survivors of intimate partner violence. And although FVAP can only take a small fraction of these cases (approximately 10-15 per year) for appeal, it has been tremendously successful. To date, FVAP has won 74% of the affirmative appeals it brings to court, which is well above the California statewide average of 20%, as well as winning 100% of the appeals it defends. One notable factor for this high margin of success is FVAP’s case selection process – how FVAP identifies a potential case for appeal.

When FVAP was initially conceived, it found that many cases with unfavorable outcomes did not properly preserve the issues to raise on appeal. Indeed, cases without properly lodged objections, requests for statements of decision,² and court reporters³ can damage the possibility of appellate success. In order to cultivate a broader selection of ‘good’ appeals to screen, and simultaneously create relationships where strong appeals could be referred, FVAP created a training program for trial level practitioners to help them preserve appeals. This system has been highly effective and many referrals come to FVAP from legal service providers. FVAP also participates in a wide array of coalitions and roundtables to provide technical assistance to domestic violence service providers, which are another source of referrals. Finally, a large number of survivors seeking FVAP’s services find and learn about FVAP online – either through its website or other legal referral websites.

With respect to case selection, FVAP began by looking at the relevant domestic violence statutes in California and highlighted focus areas where clarification or guidance from the appellate courts could have a beneficial impact for survivors. For example, California has a statutory rebuttable presumption against awarding any custody to a parent who has abused the other parent in the past five years. The statute contains seven factors trial courts must consider when determining whether the presumption has been rebutted. However, FVAP identified that appellate clarification on what it means to “consider” those factors would be of significant help to survivors. It hoped for an appellate opinion that would require trial courts to discuss all of the seven factors and their findings as to each on the record or in writing. It also hoped for an opinion to help trial courts understand how the first factor (best interest of the children) is just one consideration in a rebuttal case – not the *only* consideration. In practice, however, FVAP has never turned down an appeal because it didn’t raise issues identified as needing appellate guidance—the fact that one judge got it wrong is a good indication that many others probably will, too.

But even with a strong pool of potential cases that match your focus area, there are still other considerations to keep in mind. One of those is being cautious of cases with ‘bad’ facts – facts where the trial court could have reached the same bad outcome for *different reasons*. Indeed, in the appellate

² California courts are not required to make findings or explain their reasoning on the record or in writing unless a Statement of Decision is requested. (California Code of Civil Procedure section 632.)

³ The California Supreme Court recently decided *Jameson v. Desta* (2018) 179 Cal.App.4th 672, holding that trial courts are required to provide fee waiver recipients with official court reporters in their civil cases. In California, a recent study showed that 38 out of 53 counties did not provide court reporters in all family law cases. (Ana Fatima Costa, “Absence of Court Reporters in Family Law Courts = Access to Justice Denied,” (Aug. 17, 2017), <http://blog.sfbay.org/2017/08/17/paralegal-corner-absence-of-court-reporters-in-family-law-courts-access-to-justice-denied/>.)

world, ‘bad’ facts can be the equivalent to harmless error, which ends the appellate court’s inquiry. And in California, the doctrines underlying appellate law presume that trial courts are applying the laws correctly and making the correct findings to reach the outcome. As a result, if the appellate court finds that the trial court could have reached the same bad outcome on a different basis – *or any other basis* – the error will be deemed harmless and the decision affirmed. Thus, it is important to think very deliberately about the possible harmful effects of taking an appeal with bad facts and having the trial court decision upheld.

Lastly, it is important to consider the applicable standard of review and the lens through which the court of appeal will be evaluating your case. To this effect, FVAP generally looks closely at cases presenting questions of law, which are reviewed under the *de novo* standard. This means that the appellate court will not defer to the trial court’s ruling, as it will under the abuse of discretion or substantial evidence standards. And absent the presumption of the trial court’s correctness, bringing an appeal that will be evaluated under the *de novo* standard of review provides an appellant with the best opportunity for success. (Shuray Ghorishi, *How Battered Immigrants Can Obtain Economic Stability in Court*, Clearinghouse Community (Feb. 2018)).

IV. Navigating the Appellate Process Means Knowing Your Rules of Court From Notice of Appeal to Oral Argument

Once you have decided to take a case on appeal, it is important that you familiarize yourself with the rules that govern appeals and appellate practice in your specific jurisdiction. Since these are the rules that will inform all of your next steps in the appellate process – from identifying an appealable issue to making a request for oral argument – you should have a firm understanding of the applicable rules, and how to use them. In California, this means becoming well-versed in California Code of Civil Procedure, sections 901-936.1, and California Rules of Court, sections 8.100-8.276. It also involves researching any “local rules” or guidelines for practice and procedure that may exist in your appellate district.

Generally, however, initiating an appeal begins with filing a *timely* Notice of Appeal. This is where knowing your governing rules is critical. For instance, in California (where filing deadlines are relatively flexible), failing to file a Notice of Appeal under the strict time constraints of California Rule of Court 8.104 bars the appeal altogether. At this stage, you will also want to be mindful of court fees and rules on requesting fee waivers, especially if your client cannot afford the often lofty cost of filing their Notice of Appeal. The same holds true as you begin preparing the record for appeal, which is a compilation of the documents and oral proceedings you want the appellate court to consider; indeed, there may be costs for a court-prepared record, or to augment the record later on, or fees to obtain reporters’ transcripts. To this effect, you may need to research the process for filing a fee waiver on your client’s behalf, which may waive some (if not all) of the court fees and costs associated with the appeal.

In California, the filing of the record with the appellate court triggers the briefing schedule, mandating the time frames for appellant’s opening brief, respondent’s brief, and appellant’s reply brief. Again, be sure to check the rules specific to your jurisdiction, as it is important to allot enough time to carefully craft the arguments in your brief. Indeed, many appeals are won and lost on briefs alone. (See Judge Stephen J. Dwyer, Leonard J. Feldman & Ryan P. McBride, *How to Write, Edit, and Review Persuasive Briefs: Seven Guidelines from One Judge and Two Lawyers*, 31 SEATTLE U. L. REV. 417 (2008). With this in mind, an FVAP brief typically undergoes multiple rounds of edits before its final filing. This thorough editing process does two things: (1) it allows FVAP to skillfully develop the strongest brief possible; and (2) it ensures that all briefing requirements are met. In California, these requirements are specified in

California Rules of Court, Rule 8.204; and like many jurisdictions, mandate that opening briefs contain specific content, such as a statement of appealability, a summary of the facts, citations to the record, a statement of relief, a statement of the judgment on appeal, and a statement of the nature of the action. Thus, it is important to check the rules in your jurisdiction to ensure that your brief is in compliance.

After briefing is complete, the case generally proceeds to oral argument if requested by a party. In California, each party has the right to participate in oral argument in any appeal considered on the merits and decided by a written opinion.⁴ However, while oral argument is typically perceived as the highlight of appellate practice, it is important to weigh the costs and benefits to participation. Remember – most judges will have already made their decision based on the parties’ briefing. As a result, oral argument may not have a significant impact, or any impact at all, on the outcome of the case. Nonetheless, oral argument can be a powerful tool to supplement a brief and provide further clarification on issues that may be close-calls. To this extent, FVAP generally *does* participate in oral argument, and prepares extensively to do so. This typically involves conducting at least two moots (or practice sessions) beforehand with volunteer attorneys from FVAP’s extensive pro bono network acting as “judges.” These moots not only help FVAP frame its arguments for the bench, but also allows FVAP to identify weaknesses in those arguments. And since the last thing any attorney wants is to be caught off-guard at oral argument, moots are an effective way to practice crafting clear and articulate answers to tricky questions before answering to the bench.

Once the case has been submitted and an opinion filed, if you practice law in a jurisdiction where not all appellate opinions are precedent, requesting a favorable decision be certified for publication may be an option. If it is, be sure to consult the standards for certification, and assess whether the opinion does, in fact, advance the interests of survivors in your state; this may involve researching existing case law, consulting social science literature, and speaking with others in the field. Indeed, FVAP routinely requests publication of its own successful cases, and also monitors unpublished California civil court decisions related to domestic violence on a daily basis through its Case Publication Project. The goal behind this project is to identify unpublished cases that are helpful to survivors statewide and to request their publication in order to create a robust body of precedential case law supporting California’s domestic violence statutes. Without this type of extensive monitoring, beneficial decisions may otherwise go unnoticed. Thus, requesting publication can make positive, favorable decisions that much more impactful.⁵

V. Amicus Briefs Provide Valuable Insight and Perspective to the Court with Policy Arguments and Specialized Knowledge

If you would rather not delve immediately into representing a party on appeal, you may want to consider participating in the role of amicus. Amicus curiae briefs (friend-of-the-court-briefs) play an important role in the appellate process and act as a supplement to a supported party’s position. This may include fleshing out legal arguments raised in the supported party’s brief, arguing for policy considerations, and/or discussing the social science around the legal issues presented. Unlike parties, amicus briefs are not as strictly confined to the record on appeal, which allows them to be less fact-

⁴ See *Moles v. Regents of Univ. of Calif.* (1982) 32 Cal.3d 867, 871-872; see also *Lewis v. Super. Ct. (Green)* (1999) 19 Cal.4th 1232, 1254.

⁵ Prior to requesting publication, it is important to ensure that the entire opinion is helpful and does not have bad effects—especially for a particular community you do not represent. For instance, FVAP will request publication of juvenile dependency cases that discuss domestic violence, but will first reach out to dependency experts to make sure other parts of the opinion would not be harmful additions to the body of dependency law.

focused and uniquely positioned to take broader liberties when making policy and fairness arguments. In this sense, amicus efforts can bring a different, important perspective to a case – one that rounds out the legal arguments and provides the bench with specialized knowledge.

It is, however, important to make sure that your amicus brief truly *adds* information to the considerations before the court; reiterating arguments that have already been addressed in the parties' briefs is a failed opportunity to do something impactful. For FVAP, amicus briefs provide an opportunity to draw the court's attention to the issues that affect (or could potentially affect) survivors, while simultaneously strengthening a supported party's legal arguments with social science around domestic violence. To this effect, amicus briefs can be a platform for not only educating the bench in your area of expertise, but also for spotlighting the widespread impact of the court's final decision. Thus, if you are hesitant to represent a party on appeal, taking on the role of amicus (or signing onto an amicus brief) in a potentially influential case can be equally powerful.

VI. Conclusion

FVAP was founded on the principle that good laws are much more effective when appellate oversight is robust. However, appellate oversight necessarily requires that more cases be brought on appeal, and this is where pro bono representation can harness the power that appeals have as a tool for correcting and deterring dangerous legal decisions. With strategic case selection, rules research, and proper preparation, the first (or next) case you bring on appeal has the potential to make a difference not only for your client, but also for the many survivors in your state that depend on appellate oversight for their protection.