



## Preparing for A Civil Protection Order Hearing With an Appeal in Mind<sup>1</sup>

### *What Is An Appeal and Why Should I Read About It?*

Sometimes a DV survivor<sup>2</sup> thinks the trial court made the wrong decision in her protection order (“PO”) case. When that happens the DV survivor has the right to appeal, which means asking their state’s court of appeals (“COA”) to review the protection order judge’s decision. The COA has the power to agree with or reverse the decision of the PO court if the PO court made a legal error. Even though an appeal takes place *after* the protection order judge issues his/her decision, there are things you can do during your PO trial to improve your chances of succeeding on appeal.

We hope this document will provide survivors of domestic violence with **general non-state specific** information about how to improve their chances of success with an appeal as they are preparing their protection order case. **Please note that each state has its own set of law and procedures and it is always important to first check your state’s laws and court rules because *they govern your case.***

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### *What Happens In An Appeal?*

In an appeal, the COA reviews the PO case for legal mistakes the PO judge made that are important enough to change the decision entered by the PO judge. The COA does not hold its own trial, hear live witnesses or decide the facts of the case. For example, it will not decide if Ms. Witness was lying when she testified in the trial court, but it might

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<sup>2</sup> Throughout this guide, a DV survivor or Petitioner will be referred to as “she” and the batterer or Respondent will be referred to as “he.” DV LEAP recognizes that men may also be DV survivors and want to appeal a PO decision.

decide if the PO court judge was correct in refusing to hear any of Ms. Witness's testimony.

### ***How does the Court of Appeals know what happened during the PO case?***

The COA looks at the **"record"** of the case, which includes the **transcripts** of the PO hearing (the word for word summary of the testimony at the hearing) and the written documents filed in the PO case, such as your petition and affidavit for a PO.

Because the COA bases its decision on the record from the PO court, it is important to **"make the record"** during your PO case. DV LEAP frequently sees cases where we think the PO judge did something wrong, but because the DV survivor was unrepresented and didn't take certain steps during the PO hearing, an appeal is unlikely to succeed.

### ***What Does "Making the Record" Mean and How Do I Do It?***

The main thing to remember is that before the COA can decide an issue, that issue **has to first be raised out loud in PO court** so that it is part of the PO transcript and the record. The reason for this is that the PO judge should have a chance to hear your issue and either respond to it or correct his/her reasoning before the issue goes to the Court of Appeals.

On the next few pages, we have more information about specific issues that might come up and how to handle them, but in general, it's important to do the following:

**(1) If the PO judge refuses to allow you to present evidence, respectfully and calmly say that you object for the record and describe what the evidence was and would have shown.**

**2) If there is a legal (or procedural) issue, you need to state on the record why you object to the process or what legal rule the court should be (or should not be) applying or considering. For example, if the other side claims that you hit him and you did so because you were acting in self-defense, you should let the PO judge know this.**

**--Please note that just because you take these steps does NOT mean you will automatically win your appeal. (Each case is different and an appeal requires lots of steps that you should discuss with an attorney.) Taking these steps to "make the record" does mean that your appeal will be stronger.**

### ***What Should I Do After I've Made the Record and the PO Case Is Over?***

Just because you have made the record does not mean that you have finished (or even really started) your appeal. Appealing a trial court decision is complicated and involves several legal considerations and steps. If you have lost a PO case and are considering an appeal or if you won a PO case and an abuser is appealing against you, you should seek

the advice of an attorney as soon as possible. It is important to contact an attorney because each case has different facts and strategic considerations that an attorney can help with and that cannot be addressed in this kind of broad overview. Each state also has its own laws that cannot be addressed in this kind of general overview.

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### ***Examples of Issues for Appeal & Making the Record for Appeal***

Not every problem in a PO case is viable for an appeal. But some issues which often come up could potentially be successfully appealed if the domestic violence survivor does the right things at trial to “make the record for appeal.” The following lays out several such issues, including some recommendations for how to make the record so that these issues can best be addressed on appeal. ***Again, this is general information and it is very important that you consult your state’s rules and caselaw because that is what will govern your case.***

#### ***Issue #1: The court refuses to hear your evidence of domestic violence or child abuse.***

It is very important to let the PO judge know that you have evidence (either other witnesses or documents such as police reports, medical records, photos, etc.) If you don’t let the judge know that you have evidence, nothing can be done on appeal.

If the court refuses to hear testimony or admit evidence about abuse of you or your children, you should state out loud what that evidence was and what it would have shown.

- For example, if you have an eyewitness to a domestic violence incident, you could say: “Your Honor, I’m stating for the record, that Ms. Witness would have testified that she saw the Respondent slap me while I was holding our daughter and that our daughter started crying.”
  
- For example, if you have a 911 tape, you could say: “Your Honor, I’m stating for the record that this 911 tape would show that I called 911 on July 1, 2010, the operator asked me what happened and I told her that the Respondent had stabbed me with a knife causing me to bleed and that I needed medical attention.”
  
- If the PO judge doesn’t want to hear about past domestic violence incidents, you can look into **your state’s cases** to see if any of those cases require that the court looks at the entire history of abuse. For example, in D.C. there is a case which says that the trial court is bound to consider the “entire mosaic of the relationship” in determining whether or not to grant the civil protection order.

*See Tyree v. Evans*, 728 A.2d 101 (D.C. 1999). **Please note that this case only applies in D.C.**

**Issue #2: Self-defense.** The PO judge may mistakenly deny a PO petition because the abuser has argued that his violence was self-defense and the judge incorrectly thinks that the abuser is actually the victim.

If you think this may be an issue in your case, you will want to look at your state's caselaw to see what you and the abuser would need to prove to show self defense. For example, in some states, a DV survivor would need to prove that the amount of force the abuser allegedly used in response to her actions was excessive. In some states, the abuser would need to prove that the survivor posed a threat that was unlawful and immediate and that he honestly believed that he was in imminent danger of death or serious bodily harm. *See e.g. Hernandez v. U.S.*, 853 A.2d 202, 205 citing *Brown v. U.S.* 619 A.2d 1180, 1182 (D.C. 1992) **(Please note that this case ONLY applies in D.C.)**

**Issue #3: Provocation.** The court blames the survivor for the respondent's violence by claiming that she provoked his violence. Provocation comes up when the abuser tries to blame the DV survivor for his actions. He may testify, "I only hit her because she got in my face and was drunk and screaming at me." In D.C., a survivor could cite to the D.C. Court of Appeals decision in *Murphy v. Okeke*, 951 A.2d 783 (D.C. 2008). This case rejected an abuser's provocation argument. **Again, you will need to check your state's caselaw to see if this is a viable issue for appeal.**

**Issue #4: Mutual PO's.** The judge wants to grant mutual POs (one against EACH party).

*If the abuser did not file the necessary paperwork containing allegations against you and/or you were not served with the paperwork, you may be able to argue a violation of your due process rights:*

- "Your Honor, [name of abuser] is not entitled to a PO at this time. I was not served with his petition and was not given prior notice of his allegations so I should not be forced to defend myself against these allegations today. Making me do so would violate my rights to due process."

*If you were served with the necessary paperwork, but the abuser does not allege that you committed an offense covered by your state's protection order law (often a criminal act), you may be able to argue:*

- "Your Honor, [name of abuser] has not alleged, and I have not committed, an act that [is covered by the state's protection order statute]. A protection can only be issued against me if Mr. X proves that I committed such an act."

**Issue #5: The court denies your PO with no explanation.** For purposes of an appeal, if the judge says that he or she is not going to grant the protection order, it is important to ask the judge to state his or her reasons for denying the protection order request.

**Issue #6: If your state's law authorizes the PO judge to award child support or other monetary relief in the PO and the PO court refuses to even consider these requests, you may have an appealable issue.**

Most states allow PO judges to determine temporary custody and visitation as part of the PO and require judges to weigh an abuser's act of domestic violence (as defined by that state's law) as something negative *against* the abuser in determining custody. Jurisdictions generally require that the PO judge consider the "best interests of the child factors" in determining custody and whether a party has committed domestic violence is usually one of these factors. Some states also have laws that contain what's called a "rebuttable presumption" against granting custody to a person who has committed an act of domestic violence. A rebuttable presumption means that before the judge has heard any facts, he or she assumes that giving an abuser custody is NOT in the best interest of the child and should not be ordered. **Depending on your state's laws, the following may also be appealable issues.**

*Issue #7: The judge does not want to hear evidence related to custody or visitation and/or refuses to decide custody or visitation.*

*Issue #8: The judge finds that the abuser committed an act of domestic violence and grants the PO, but orders custody to the abuser or unsupervised visitation.*

Depending on your state's law, you may want to cite the state law and remind the PO judge that he or she is required by law to consider domestic violence as a negative factor against the abuser. If you do not have an attorney, you may want to call a legal aid office or domestic violence organization in your jurisdiction and ask if someone working there can simply explain what the law is in that state.