

THINKING APPEAL

Presentation by
Elizabeth Liu, Staff Attorney
Domestic Violence Legal Empowerment
and Appeals Project (DV LEAP)

February 26, 2010
D.C. Bar Pro Bono Program
“Litigating Civil Protection Orders
Representing Victims of
Domestic Violence”

Overview

- The Value of Appeals
- Litigating with an Appeal in Mind
- Resources

The Value of Appeals

- Helps future victims as well as your individual client achieve justice
- Possibility of better outcome for victims of domestic violence on appeal
- Holds trial courts accountable
- Interesting and challenging legal issues

Examples of Issues that Could Warrant Appeal

- Remedies in CPOs (esp. economic)
- Contempt
- Defenses to CPO Violations
- Custody/Visitation – Child Safety Issues (see *Wilkins* decision)
- Refusal to Hold a Hearing

Wilkins v. Ferguson

- 2007 DV LEAP and *pro bono* law firm victory in the DC Court of Appeals
- Emphasized that child visitation/safety provision (contained in both the custody statute and the IFO Act) really requires courts to *put child safety first*
- Affirmed that adult dv *is* relevant to the safety and emotional well-being of children.
- 928 A.2d 655 (D.C. 2007)

PF v. NC

- 2008 Legal Aid Society custody case/ DV LEAP & *pro bono* law firm filed an *amicus* brief.
- Trial court judge had concluded that custody statute's presumption against joint custody when there had been abuse did NOT suggest that sole custody to the BATTERER was disfavored.
- D.C. COA: DC's statute requires that domestic violence be given "significant" weight in determining custody and the statute's presumption against joint custody where one party has committed an intra-family offense means that the parties are NOT "equally suitable" for sole custody.

Murphy v. Okeke

- 2008 DV LEAP and *pro bono* law firm victory
- Trial court judge had punished the victim by entering a mutual order against her because she “brought” the violence “on herself.”
- COA: Courts may not enter a CPO to “protect a victim from herself.” Courts must use discretion to consider who is in danger and who is in need of protection.
- COA: CPO’s serve distinct and additional purposes to criminal prosecutions.

In Re Robertson

- Involves victims' abilities to privately prosecute criminal contempt and whether such actions are brought in the name of the sovereign.
- D.C. Court of Appeals: "[t]he criminal contempt prosecution in this case was conducted as a private action brought in the name and interest of the victim, not as a public action brought in the name and interest of the United States or any other governmental entity."

In Re Robertson (continued)

- U.S. Supreme Court recently granted cert. in this case.
- Supreme Court case raises an important issue re: the extent to which domestic violence victims can prosecute contempt on their own behalf (as opposed to on behalf of the State).

Litigating with Appeal in Mind

- Preparing the Record For Appeal
- Considering Post-Trial Motions
- Child Safety Issues
- Strategic Considerations

Making the Record

- The Record: The formal record of what happened in the trial court litigation (i.e. the transcript of the proceedings and/or the formal court file) which is what the appellate court will review.
- Making the Record: Making sure that the court record contains (i) all evidence you want to argue about in appeal; (ii) specific objections to the exclusion of evidence and a description of the evidence you wanted admitted; and (iii) specifically stated (or written) objections to procedural violations or legal errors.

Preparing the Record for Appeal

- a. Clear Theory of the Case (for Remedies too)
- b. Be Prepared to Address Legal Errors
- c. Evidence Prepped for Admissibility
- d. Factual Findings

Child Safety Issues

- Very charged issues for courts
- May need an expert witness to develop the claim that children are at risk, especially if child sexual abuse is at issue
- Consider submitting legal/social science authorities on psychosocial issues

Post-Trial Motions

- Consider whether trial-level action might resolve problems without appeal. (Post-trial motions may be more efficient.)
- Consider motions to alter or amend the judgment, motions to amend or make additional findings of fact, and motions for relief from judgment
- Consider a motion to stay the order.

Strategic Considerations

- Client's Safety: Will an appeal increase the abuser's aggression or rage? Will an appeal help him find her?
- Dragging out the conflict/ uncertainty/ emotional toll on your client.
- Risks of Making Bad Law
- Time and Resources

Filing the Notice of Appeal

- This is very important!
- Must do this within 30 days of entry of the ruling sought to be appealed!
- Read the D.C. COA rules re: details like number of copies and what to include.

Resources for Support

- Important to have input from dv community on cases that may make law
- Consider amicus briefs
 - Can put your issue in a broader policy context
 - May provide supportive research for you
- Resources on legal and strategic questions:
 - Local DV Advocates List
 - CDV list-serve
 - DV LEAP

DV LEAP

- Launched 6 years ago
- We've already handled many appeals, including four Supreme Court cases.
- We provide consultation and technical assistance if you keep the appeal.
- We will screen referrals, place with law firm, and mentor or co-counsel the appellate case.
- We will also provide amicus briefs.
- Contact me at 202-994-4306 or elizabeth@dvleap.org or Joan Meier, jmeier@law.gwu.edu, 202-994-2278
- www.dvleap.org