Preparing for A Civil Protection Order Hearing in West Virginia With an Appeal in Mind

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

Sometimes a DV survivor[1] thinks the trial court made the wrong decision in her Protective Order ("PO") case. When that happens the survivor has the right to appeal, which means asking either the Circuit Court or the West Virginia Supreme Court of Appeals ("SCA") to review the PO judge's decision. Both the Circuit Court and the SCA have the power to agree with or reverse the decision of the trial court if the court made a legal error. In fact, the SCA has reversed a number of trial court decisions in domestic violence cases.

There are things you can do during your PO trial to improve your chances of succeeding on appeal, should you need to take one. This document offers guidance on how to make a strong record for appeal.

> We hope this document will provide West Virginia survivors of domestic violence with information about how to improve their chances of success with an appeal as they are preparing their PO case. Please note that this document is based on West Virginia law and procedures. Each jurisdiction has its own set of law and procedures and it is always important to first check your state's laws and court rules.
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What Happens In An Appeal?

In West Virginia, the Family Court's decision to grant or deny a PO can be appealed to either the Circuit Court or the SCA. However the majority of PO appeals are heard by the Circuit Court. An unfavorable decision by the Circuit Court can be appealed to the SCA. When deciding an appeal, the appellate court[2]—either the Circuit Court or the

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[1] 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.

[2] The term "appellate court" as used in this guide refers to both the Circuit Court and to the SCA because both hear appeals from Family Court PO decisions.

SCA--reviews the PO case for legal mistakes the PO judge made that are important enough to require the PO judge's decision to be changed. The appellate court does not hold a new 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 decide if the trial court judge was correct in refusing to hear any of Ms. Witness's testimony.

How does the Appellate Court review what happened during the PO case?

The appellate court looks at the **"record"** of the case, which includes the **transcripts** of the PO hearing (the word for word recording 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 appellate court 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 appellate 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 appellate court.

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 (this is called making a "proffer.")

2) If there is a legal (or procedural) issue, you need to state on the record what legal principle the court should be (or should not be) applying or considering or why you object to the process. For example, if the other side claims that you hit him – but 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?
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.

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 have come up in past cases could 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 examples of such issues, including some recommendations for how to make the record so that these issues can best be addressed on appeal.

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 relevant evidence (either other witnesses or documents such as police reports, medical records, photos, etc.), and why it is relevant. If you don't let the judge know that you have relevant evidence, it cannot be addressed 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 say: "Your Honor, because PO proceedings are about preventing future harm and are not criminal proceedings, it is important for the Court to hear at least some of the history of abuse to assess future dangerousness. I am stating for

the record that in the past, the Respondent has shoved my head against the steering wheel and locked me in the bathroom, in addition to other violent acts."

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

- For example, a Respondent may testify "We were arguing and she slapped my arm so I threw her across the room, pulled her hair, and kicked her a couple of times." However, West Virginia law says that a person cannot use "excessive force" in self-defense. *See State v. Wykle*, 208 W. Va. 369, 373 (W. Va. 2000) (internal citations omitted). On these facts, the Respondent may have used "excessive force" even if he was reacting to your slap.

If you think the judge is wrongly treating the respondent's violence as self-defense, depending on the facts of your case, you may be able to argue, for the record:

- that the Respondent should NOT be able to claim self-defense because the amount of force he used was excessive, that he was not in immediate danger of serious bodily harm from you, and that he could have responded to your actions without using violence, such as leaving the room; and

- that the court should consider the respondent's past violence or abuse toward you, or controlling/intimidating behavior, to determine who the real victim is.

- If you think your own behavior was self-defense but the judge is not believing that, because you were "provocative" and helped trigger respondent's violence, you may be able to refer to the West Virginia Supreme Court of Appeals decision in State v. Taylor, 57 W. Va. 228 (1905). This case held that even where the "accused" "provoked the difficulty," s/he is still permitted to call on self-defense as long as his/her provocation did not include an intent to kill or to do bodily harm.

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. For instance, he may testify, "I only hit her because she got in my face and was drunk and screaming at me."If the Respondent accuses you of provoking him and argues that there should be (1) a PO issued against you or (2) argues that there should NOT be a PO issued against him, you could cite the *Taylor* case above, which says that you can still rely on self-defense even if your "provocation" triggered the assault. Other states have also recognized that provocation is not grounds for a PO against a victim, or for refusing a PO against the perpetrator of violence. *Murphy v Okeke*, 951 A.2d 783 (D.C. 2008).

- You could state, "Your Honor, the D.C. Court of Appeals has rejected an abuser's argument that his violence was provoked by his victim in *Murphy v. Okeke.* The Court rejected '[t]he suggestion that a survivor of domestic violence brings the harm on herself or himself, shifts the responsibility for the abuse onto the survivor and does not hold the abuser accountable.' In that case, the Court of Appeals reversed the judge's decision to issue a PO against the survivor because the judge's reason for granting the PO, that her own behavior provoked violence in her abuser, was improper. The same principle should apply to my case and this Court should reject the Respondent's claim that I provoked him."

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

§48-27-507 of the West Virginia code states "Mutual protective orders are prohibited unless both parties have filed a petition under part 3 of this article and have proven the allegations of domestic violence by a preponderance of the evidence."

In *Pearson v. Pearson*, 200 W. Va. 139 (1997), the West Virginia Supreme Court confirmed that a court can not issue mutual protective orders unless it makes specific findings of abuse under the statute in support of both orders.

If the Respondent did not file a petition and affidavit and/or you were not served with a Petition and Affidavit against you, you may be able to argue a violation of your constitutional due process rights as well as a violation of the statute, as follows:

- "Your Honor, the Respondent 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 a petition and affidavit, but the Respondent does not allege that you committed an act of domestic violence, you may be able to argue:

- "Your Honor, Mr. [X] has not alleged, and I have not committed, an act of domestic violence and under §48-27-507 of the West Virginia code, a PO can only be issued against me if Mr. X proves that I committed an act of domestic violence." (Remember, self-defense is not domestic violence.)

Finally, you may be able to argue that a PO should not be issued against you because you do not pose a threat of violence to the Respondent. Here again we offer a DC case:

- "Your Honor, in *Murphy v. Okeke*, 951 A.2d 783 (D.C. 2008) the D.C. Court of Appeals overruled the PO court's decision to issue a mutual protection order against a victim because she did not pose any actual or threatened danger to her abuser, as he did to her. In this case, it is Mr. X who is dangerous as shown by his actions on [dates], not me."

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 protective order, it is important to ask the judge to state his or her reasons for denying the order. If the PO judge refuses to do so, you can state:

- "Your Honor the W. Va. Benchbook for Domestic Violence Proceedings states in section 4 page 7 that "since a denial of a protective order may likewise be the subject of an appeal, the court should set forth specific findings regarding the insufficiency of the evidence in those cases." I request that Your Honor explain the factual and legal reasons for Your Honor's decision to deny my request for a PO."

- You can also state, "Your Honor, in *John P.W. v. Dawn D.O.*, 214 W.Va. 702 (2003), the Supreme Court held that a Family Court judge must articulate the factual findings and statutory definition of domestic violence in support of a PO to allow for proper judicial review. Under that reasoning, I request that Your Honor explain the factual and legal reasons for Your Honor's decision to deny my request for a PO."

Issue #6: **The court refuses to award the abuser to pay temporary child support or alimony/maintenance.**

W. Va.'s statute clearly invites courts to make such awards, but it does not require them to do so. You can state:

- "Your Honor, for the record, West Virginia Code Sections *48-27-503 (4) & (5)* provide that the Court may award child support or maintenance. To be free from the Respondent's violence, I need to be able to [take care of our child] [be able to live independently until I can get back on my feet financially] without having to rely on him. I need [child support] [maintenance] to do so."

If you can explain why you are financially dependent on him, and that it was at least partly his doing (e.g., he coerced you to quit your job, wanted you to stay home and raise the children, undermined your employment, etc), you should also do so.

The following issues all deal with custody or visitation involving the parties' children.

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

If the court does not want to hear evidence about custody or visitation or decide custody or visitation you can argue:

- "Your Honor, the PO statute authorizes this court to award *temporary* custody and visitation in the PO. If custody and visitation are left up in the air until the domestic relations proceeding, the Respodent will use our child as a way to continue abusing and harassing me. Any *permanent* order will await the domestic relations proceeding."

- You can also cite the following:

*Nancy Viola R. v. Randolph W.***,** *177 W. Va. 710 (1987), which held "We* have recognized that spousal abuse is a factor to be considered in determining parental fitness for child custody" (citing *Collins v. Collins*, 171 W. Va. 126 (1982)).

Issue #8: **The judge orders custody or unsupervised visitation to the abuser. If this is the case, you should remind the PO judge of West Virginia law, which requires the judge to protect victims of domestic violence and their children in custody and visitation cases:**

- **For example, you can cite:** *Henry v. Johnson*, 192 W. Va. 82, 450 S.E.2d 779 (1994), where the Supreme Court held that that domestic violence is a required consideration in a custody determination.

If you are specifically concerned about your or your children's safety, you can argue:

- "Your Honor, for the record, the domestic violence statute and the Supreme Court are clear that before custody or visitation can be granted to Mr. ___, whom you have found committed an act of domestic violence, the court must consider the domestic violence and determine that the child(ren)'s safety will be adequately protected while in Mr. __'s care.

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