Supreme Court of the State of New York

APPELLATE DIVISION

Fourth Judicial Department

Attorneys for Children Program

Presents

APPELLATE TRAINING FOR ATTORNEYS FOR CHILDREN

March 26, 2013

THE APPELLATE DIVISION, FOURTH DEPARTMENT
presents:

APPELLATE TRAINING FOR ATTORNEYS FOR CHILDREN

Tuesday, March 26, 2013

Canandaigua Inn on the Lake
Canandaigua, New York

8:45 a.m.	Registration
9:15 a.m.	Welcome **Presiding Justice Henry J. Scudder** Appellate Division, Fourth Department **Tracy M. Hamilton, Esq.** Director, Office of Attorneys for Children Appellate Division, Fourth Department
9:30 a.m.	A View From the Bench **Presiding Justice Henry J. Scudder** Appellate Division, Fourth Department
10:00 a.m.	A View From the Clerk's Office (Including Tips From A-Z) **Frances Cafarell, Esq.** Clerk, Appellate Division, Fourth Department
10:45 a.m.	Break
11:00 a.m.	Compiling the Record on Appeal **David Foster, Esq.** Principal Appellate Court Attorney Appellate Division, Fourth Department
11:45 p.m.	Lunch (provided)
12:45 p.m.	Effective Brief Writing **Mary Hope Benedict, Esq.** Principal Law Clerk to Presiding Justice Henry J. Scudder Appellate Division, Fourth Department **Craig Peterson, Esq.** Chief Appellate Court Attorney Appellate Division, Fourth Department

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1:45 p.m.	Motion Practice **Alan Ross**, **Esq.** Deputy Clerk, Appellate Division, Fourth Department
2:30 p.m.	Break
2:45 p.m.	Role of Child's Attorney on Appeal/Ethics **Tanya Conley, Esq.** Attorney for Children Legal Aid of Rochester **Andrea Tomaino, Esq.** Principal Attorney Attorney Grievance Committee, Fourth Department
3:45 p.m.	Conclusion

The Appellate Division, Fourth Department has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York from March 2, 2011 to March 1, 2014. This program has been approved for a total of five and one-half (5.5) credit hours, of which two and one-half (2.5) credit hours can be applied toward the skills requirement, two (2.0) credit hours can be applied toward the professional practice (family law) requirement, and one (1) credit hour can be applied toward the ethics and professionalism requirement. This program is suitable for experienced or newly admitted attorneys.

MOTION PRACTICE

Presented by:

Alan Ross, Esq.
Deputy Clerk
Appellate Division, Fourth Department
Supreme Court of the State of New York

Attorneys for Children Program
The Appellate Division, Fourth Department

Appellate Training for Attorneys for Children
Canandaigua, NY
March 26, 2013

Alan L. Ross

Alan L. Ross was appointed Deputy Clerk of the Appellate Division, Fourth Department, in December 2011. Mr. Ross earned a Bachelor of Arts Degree from Hamilton College in 1982 and a Law Degree from the State University of New York at Buffalo School of Law in 1985. He began his legal career as an associate with the Rochester firm of Greisberger, Zicari, McConville, Cooman and Morin, P.C., focusing on civil litigation at the trial and appellate levels. In 1992 he accepted a position in Monroe County Family Court as Counsel to the Hon. Ann Marie Taddeo, and served with Judge Taddeo during her tenure as Supervising Judge of the Family Courts of the Seventh Judicial District. He continued his work in Family Court until 2004, when he accepted a position with the Appellate Division, Fourth Department, where he served as a principal appellate court attorney, overseeing Family Court motions and a variety of other matters, prior to his appointment as Deputy Clerk. Mr. Ross also served for eight years as Mendon Town Justice before retiring from the bench in 2009. In addition to his legal work, Mr. Ross has served the community as a youth mentor, volunteer teacher's assistant and student counselor in the Rochester City School District, and member of the Monroe County Council for Elders and the Monroe County Youth Board. He is also a past member of the Board of Directors of both the Society for the Protection and Care of Children and the Center for Youth Services, and a long time High School Varsity Ice Hockey Coach. Mr. Ross is a recipient of the "Friends of Children Award" from the Rochester Area Children's Collaborative and was named a finalist for "Youth Advocate of the Year" by the Monroe County Youth Bureau. He was also recognized as one of the Democrat and Chronicle's "10 for 2000". In addition, Mr. Ross has twice been named "Coach of the Year" in the Monroe County High School Hockey League.

FOURTH DEPARTMENT FAMILY COURT MOTION PRACTICE

I. PROCEDURE

A. Requirements when proceeding by notice of motion:

1. Sufficient Notice

a. Selecting a return date (22 NYCRR 1000.13 [a] [1] & [2])

Motions are returnable any Monday (or the first business day of the week if Monday is a legal holiday) regardless of whether the Court is in session, upon sufficient notice to all necessary parties. Required notice periods are:

- Personal service - 8 days
- Overnight delivery - 9 days
- Regular mail - 13 days
- Electronic filing - 8 days

In computing the notice period, do not include the date of service.

b. Cross motions (22 NYCRR 1000.13 [a] [3])

Cross motions are returnable on the same date as the motion. Service must be either by personal service or by overnight delivery, and must allow four days notice.

c. Filing deadline for responding papers (22 NYCRR 1000.13 [a] [4] [i]

Responding papers must be filed by 5:00 p.m. the Friday before the return date (or Thursday, if Friday is a legal holiday). Note: filing is accomplished by physical delivery of the papers to the Clerk's Office (22 NYCRR 1000.13 [a] [4] [ii], not by putting the papers in the mail).

The Court will accept electronic [faxed] responses, provided that the original and one "hard" copy are sent to the Clerk's Office on the same date that the papers are transmitted (22 NYCRR 1000.13 [a] [4] [iii]).

2. Proper Format

a. Necessary papers (22 NYCRR 1000.13[a][5][i])

i) Notice of Motion, with specified return date;

ii) Supporting affidavit/affirmation;

iii) Affidavit of service of the motion on all parties;

iv) Notice of Appeal, bearing the time-stamped filing date by the Family Court clerk's office;

v) Proof of service of the notice of appeal, or admission of service by the opposing party;

vi) Copy of the order or judgment being appealed, along with the court's decision, if any; and

vii) Copy of any prior order of this Court.

b. Number of copies (22 NYCRR 1000.13 [a] [5] [iii])

An original and one copy of all documents, including any attachments, is required.

c. Oral arguments (22 NYCRR 1000.13 [a] [6])

Oral arguments of motions are not permitted.

B. Requirements when proceeding by order to show cause

1. Applicability (*see* 22 NYCRR 1000.13 [b] [1], [d] [1])

Typically, orders to show case are applicable to stay motions in Family Court matters. Indeed, unless otherwise ordered by a Justice of the Court, an application for a stay pursuant to Family Court Act § 1114 must be made by order to show cause.

2. Necessary papers

When proceeding by order to show cause, the moving papers are the same as for a motion brought on notice, except that an order to show cause takes the place of the notice of motion. The moving party does not have to specify a return date in the order to show cause.

3. Where made

The order to show cause must be directed to a Justice of the Court with chambers in the Judicial District from which the appeal arises.

It is best to call the Clerk's Office when your order to show cause papers are complete, for the name and chambers phone number for the appropriate Justice handling motions at that time.

4. Scheduling

The rules require that "reasonable notice" of the date, time and location where the order to show cause will be presented be given to opposing counsel or parties.

The desirable practice is for all counsel to be present upon the presentation of the order to show cause and for a copy of the motion papers to be served on all parties prior to the presentation.

In the event that an adverse counsel's presence cannot be obtained, the papers in support of the order to show cause must include an affidavit setting forth the manner in which reasonable notice has been given, and an explanation for the failure to obtain the presence of the adverse counsel.

Unless otherwise ordered by the Justice hearing the motion, all papers in opposition to a motion brought by order to show cause shall be served and filed in the Clerk's Office no later than noon of the return date set in the order to show cause.

II TYPES OF FAMILY COURT APPELLATE MOTIONS

A. Extension of Time to Take an Appeal (CPLR 5514)

CPLR 5514 details the circumstances under which a party may obtain an extension of time to appeal in a civil action: (1) if the appellant mistakes the method appropriate to the particular situation, and appeals as of right when permission is necessary or moves for permission when an appeal lies as of right (CPLR 5514 [a]), (2) where the attorney for the aggrieved party dies or becomes disabled (CPLR 5514 [b]), (3) where there has been substitution of a party (CPLR 5514 [c], citing CPLR 1022), or (4) where an appellant has either served or filed a timely notice of appeal but has failed to do another act required within the time limited (CPLR 5514 [c], citing CPLR 5520).

B. Defects in Form of Notice of Appeal/Premature notice of appeal (CPLR 5520 [c])

Where a notice of appeal is premature or contains an inaccurate description of the judgment or order appealed from, the Court may, in its discretion, in the interests of justice, treat the notice as valid

C. Extensions of Time

Typically, motions for an extension of time are made in the following situations:

1. Stay (22 NYCRR 1000.13 [d] [2])

   An application to extend a stay in a Family Court appeal must be made by motion on notice. The papers in support of the motion must include an affidavit demonstrating reasonable efforts to obtain the transcript of the proceeding to be reviewed an otherwise explaining the delay

2. Conditional orders of dismissal (22 NYCRR 1000.13 [f])

3. Late Respondent's Brief (22 NYCRR 1000.13 [h])

4. Late Pro Se Supplemental Briefs (*see* 22 NYCRR 1000.13 [f])

5. Extensions of time to perfect (*see* 22 NYCRR 1000.13 [(h])

a. Where required:

i. When the Court previously entered an order dismissing the appeal unless perfected on or before a date certain;

ii. When the appeal is subject to automatic dismissal as abandoned if not perfected within nine months of the date of service of the notice of appeal (*see* 22 NYCRR 1000.12 [b]) (not applicable where appellant has been assigned counsel – 22 NYCRR 1000.2 [c] [1]);

iii. **When assigned appellate counsel has been directed by the Court to apply for any further extension of time by formal motion.**

b. When required:

In each case, the motion for an extension should be made (i.e., served) prior to the expiration of the previously imposed deadline, or it may be deemed untimely.

c. What required:

Motion papers should show:

i. A reasonable excuse for the delay, and

ii. An intent to file the brief within a reasonable time, including documentation of the work already done on the appeal and the specific work yet to be completed.

D. Vacate Dismissal (22 NYCRR 1000.13 [g])

If an appeal is dismissed for failure to timely perfect, a motion to vacate the dismissal may be made. If the appeal that was dismissed was an assigned counsel appeal, a motion to vacate the dismissal is required to be made.

The papers submitted on a motion to vacate must demonstrate:

1. A reasonable excuse for the delay;

2. An intent to perfect the appeal within a reasonable time; and

3. Sufficient facts to demonstrate merit to the appeal.

This motion must be made within one year of the date of the dismissal.

E. Summary Reversal

Summary reversal may be appropriate when a portion of the record is missing. The motion papers must demonstrate that:

1. The transcript is unavailable;

2. The missing transcript is relevant and necessary to a determination of the appeal; and

3. There are no alternative means to reconstruct the missing portion of the record. The motion papers should set forth the specific efforts made by counsel to try to reconstruct the record, such as a review of notes by trial counsel for both sides and the trial judge or a reconstruction hearing in the trial court.

F. Relief from Assignment

An assigned attorney may seek to be relieved from an assignment on the following grounds:

1. Appellant has abandoned the appeal. Counsel must show:

   a. counsel has made repeated efforts to contact appellant, at his or her last known address, without success, or appellant has indicated orally or in writing that he does not want to continue with the appeal but has failed or declined to sign a written consent to withdraw the appeal; and

   b. counsel has served a copy of the motion to be relieved on appellant, at his or her last known address.

2. The appeal is moot.

3. There are no nonfrivolous issues meriting this Court's consideration (*see Matter of Jordan S.*, 179 AD2d 1091 [the equivalent of a *Crawford* motion in a criminal appeal; *see* 22 NYCRR 1000.13 (q)])

   - Such a motion may be made by an attorney assigned to perfect a Family Court appeal on behalf of an indigent appellant. Assigned counsel must

   i. Submit an affidavit accompanied by a brief in which counsel states all points that may arguably provide a basis for appeal, with references to the record and citation of legal authorities; and

   ii. Submit proof of service of a copy of the motion papers and brief on appellant, at his last known address, at least 30 days before the return date of the motion; and

   iii. Submit proof of service of a copy of the motion papers on the opposing parties and the Attorney for the Child, if any; and

   iv. Submit the papers that would constitute the record on appeal; and

v. Submit a copy of a letter to appellant advising that he or she may elect to file a pro se response to the motion (*see* 22 NYCRR 1000.13 [q], as amended effective March 28, 2007); and

vi. Comply with all general procedures for submitting a motion to the Court (1000.13 [a]).

4. A conflict of interest precludes counsel from representing appellant on this appeal.

G. Expedite Appeal (22 NYCRR 1000.10 [d]; 1000.13 [m])

1. Compelling Circumstances - a motion to expedite an appeal can only be granted upon a showing of compelling circumstances.

2. Time Limitation - this motion must be made within 15 days of the date of the scheduling order.

H. Change Oral Argument Date

Counsel must notify the Clerk in writing within 15 days of the date that the scheduling order was mailed of unavailability for oral argument on a specific date or dates during the term (22 NYCRR 1000.10 [c]). If such notification is not provided, or if counsel subsequently becomes unavailable on the date scheduled for oral argument, a formal motion to change the oral argument date is required.

I. Consolidate Appeals (22 NYCRR 1000.4 [b] [1], [2]; 1000.13[n])

1. Specification - a motion to consolidate appeals must be supported by an affidavit specifying the appeals to be consolidated);
2. Justification - the affidavit must also set forth the reasons justifying consolidation

J. Strike Material From Record or Brief

If inappropriate materials is contained in a record or brief, a party may move to strike that material, on notice to all necessary parties.

K. Reargument (22 NYCRR 1000.13 [p])

1. Necessary papers (22 NYCRR 1000.13 [p] [2])

   a. Notice of motion;

   b. Supporting affidavit setting forth the points alleged to have been overlooked or misapprehended by the Court;

   c. Proof of service of the motion;

   d. Copy of the Court's order and decision

2. Time Limitation (22 NYCRR 1000.13 [p] [1])

   A motion for reargument must be made within 30 days of service of this Court's order of the Appellate Division with notice of entry.

L. Leave to Appeal to the Court of Appeals

1. Where made - This motion can be made to either the Court of Appeals or to a justice of the appellate division. If made to this Court, it may be submitted to and determined by any member of the panel of justices who determined the appeal.

2. Necessary Papers (22 NYCRR 1000.13 [p] [2] & [p] [4]) - The papers required for a motion for leave to appeal to the Court of Appeals are the same as those for a motion for reargument.

3. Time Limitation (22 NYCRR 1000.13 [p] [1]) - a motion for leave to appeal to the Court of Appeals must be made within 30 days of service of the order of the Appellate Division, with notice of entry.

III. SUGGESTIONS FOR DRAFTING EFFECTIVE MOTION PAPERS

A. Be Thorough - provide the Court with the necessary background facts.

B. Be Organized - present the information in the supporting affidavit in an organized, understandable fashion.

C. Be Concise - do not offer extraneous facts, or explore tangents.

D. Be Persuasive - don't just go through the motions (pun intended); convince the Court the relief sought is right and just.

QUESTIONS:

If you have any questions concerning a motion on a Family Court appeal, you may call Alan L. Ross at (585) 530-3137, or send an e-mail to aross@courts.state.ny.us. If you have any questions concerning the filing of records or briefs, you may call the Court's main switchboard at (585) 530-3100 and ask to speak with someone in the Court's calendar unit. If you have any questions concerning an assigned Family Court appeal, you may call Kim K. Taylor, Esq., Principal Appellate Court Attorney, directly at (585) 530-3112, or send an e-mail to KKTaylor@courts.state.ny.us