

Bar Association of Erie County

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# *Noonday Lecture*

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March 4, 1998

## **Family Court Appeals: The Nuts and Bolts**

### *Faculty*

**Hon. Samuel L. Greene**  
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### *Presented by:*

**Brian R. Welsh, Chair**  
The Practice & Procedures  
in Family Court Committee

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**REFERENCES REGARDING EFFECTIVE BRIEF WRITING AND ORAL ARGUMENT**

THE ABCS OF PERFECTING APPEALS, Counsel Press (1989).

New York State Bar Association, *Appeals to Court of Appeals of the State of New York*, New York (1981).

Hon. Richard D. Simons, *Effective Appellate Advocacy*, (1976).

ARTHUR KARGER, NEW YORK COURT OF APPEALS.

Herald Price Fahringer, Jr., *Techniques for Effective Brief Writing*.

NEW YORK APPELLATE PROCEDURE (several New York State Bar Association Continuing Education books from various seminars in the 1980s (Audio tapes from Continuing Legal Education 1983-to present).

**REFERENCES FREQUENTLY USED IN WRITING APPELLATE BRIEFS**

JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS, BOSTON: LITTLE, BROWN AND COMPANY (1980).

BLACK'S LAW DICTIONARY, ST. PAUL, MINN. WEST PUBLISHING CO. (1951).

WILLIAM C. BURTON, LEGAL THESAURUS, NEW YORK: MACMILLAN PUBLISHING CO. (1992).

THE OXFORD DICTIONARY OF QUOTATIONS, LONDON: OXFORD UNIVERSITY PRESS (1979).

HARPER & ROW, ROGET'S INTERNATIONAL THESAURUS, LONDON: HARPER & ROW (1977).

THE SYNONYM FINDER, EMMAUS, PA.: RODALE PRESS (1961).

WILLIAM STRUNK, JR. & E. B. WHITE, THE ELEMENTS OF STYLE, NEW YORK: MACMILLAN (1959).

WEBSTER'S DICTIONARY OF ENGLISH USAGE, SPRINGFIELD, MA.: MERRIAM WEBSTER, INC. (1989).

February, 1998

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## GUIDELINES FOR FAMILY COURT APPEALS

### I. Duties of Trial Counsel

#### A. Notice of Right to Appeal:

Counsel, whether retained or assigned, must advise an aggrieved party in writing of his/her right to appeal. Counsel must also advise the party of the applicable time limitations; the manner of instituting an appeal and obtaining a transcript of the testimony; and the right to apply for leave to appeal as a poor person if the party is unable to pay the cost of an appeal. In addition, counsel is required to explain the possible reasons upon which an appeal may be based and the nature and possible consequences of the appellate process (Family Ct Act §1121 [2]).

Failure to give the written notice as statutorily required may be considered evidence of professional misconduct or malpractice. Copies of a form Notice of Right to Appeal are available from the Appellate Division and the Family Court Clerk's Office.

#### B. Notice of Appeal:

Counsel, whether retained or assigned, must ascertain whether the party wishes to appeal. If so, within 30 days after service by a party of the law guardian of the order sought to be appealed, or 30 days from receipt of the order by the appellant in court, or 35 days from the mailing of the order to the appellant by the Family Court Clerk, whichever is earliest, counsel must file an original and one copy of the notice of appeal (not the client's signed Notice of Right to Appeal) with the Family Court Clerk (not the County Clerk's Office) and serve copies upon all other parties (or their respective counsel); the Law Guardian, if any; and the County Attorney (Family Ct Act §§ 1115, 1121 [3]).

\*\* Note: Section 1113 of the Family Court Act was amended, effective January 1, 1998, to permit service of notice of entry by Family Court or the Law Guardian, in addition to the prevailing party.

C. Motion for Poor Person Relief and Assignment of Counsel:

Where a party wishes to appeal, counsel, whether retained or assigned, must file and serve the necessary motion papers on behalf of a party seeking permission to appeal as a poor person and, when appropriate, for assignment of counsel, pursuant to applicable provisions of the Family Court Act, the Judiciary Law and the Civil Practice Law and Rules (Family Ct Act §1121 [5]).

(a) Necessary papers: The Court requires a formal motion for such relief, including an original and one copy of each of the following documents:

- 1) a notice of motion, with a specified return date;
- 2) proof of service of all motion papers on the County Attorney, opposing parties (or their respective counsel), and Law Guardian, if any, at least 8 days prior to the return date (13 days if service is made by mail; 9 days if service by overnight mail);
- 3) a date-stamped copy of the notice of appeal;
- 4) proof, or admission, of service of the notice of appeal;
- 5) a copy of the order appealed from,
- 6) a copy of the decision of the lower court, if any;
- 7) a copy of any prior order of this Court, and
- 8) if assignment of counsel and poor person relief are not authorized under §§ 262 and 1121 of the Family Court Act, an affidavit demonstrating merit to the appeal, pursuant to CPLR §1101 (22 NYCRR 1000.13 [a] [5]).

Motion papers that are incomplete or otherwise defective will be returned.

**\*\* NOTE** - All motions to the Court, not just poor person motions, must include an original and one copy of the above listed documents. In addition, if an Appellate Division Docket Number has been given to the appeal, that number must be noted on all subsequent motions, correspondence, records, and briefs. The

Appellate Division Docket Number in Family Court appeals will always be preceded by the prefix CAF and will include the year and the number of the case (i.e., CAF 98-702). Appellate Division Docket Numbers can usually be found in the upper left corner of an order of this Court.

Specified return date Notices of motion must contain a specified return date. Contrary to trial practice, the return date can not be left blank for the Court to fill in. Motions for poor person relief and assignment of counsel may be made returnable on Monday, or the first business day of the week, of any week, on the requisite notice (22 NYCRR 1000.13 [a] [1]).

© No oral argument In addition, notices of motion should note that oral argument is not permitted on the motion and that answering affidavits, if any, must be filed with the Court (actually received) by the Friday preceding the return date.

D. Abandonment and Automatic Dismissal of Appeal

Trial counsel should advise an appellant who does not wish to seek leave to appeal as a poor person and assignment of counsel, or whose motion for such relief is denied, that his appeal must be perfected within nine months of the date of service of the notice of appeal or his appeal will be deemed abandoned and automatically dismissed without order of the Court (22 NYCRR 1000.2 [b]; 1000.12 [b]). An order vacating such abandonment and dismissal may be granted only on motion, made within one year after the date the appeal was deemed abandoned and dismissed, supported by an affidavit setting forth facts justifying the delay and showing merit to the appeal (22 NYCRR 1000.13 [g]).

II. Assignment of Appellate Counsel

A certified copy of the Appellate Division order granting leave to appeal as a poor person and assigning counsel is mailed to assigned counsel, all interested parties, the County Attorney, the Family Court Clerk, and the administrative court reporter. The Appellate Division also sends a letter to appellant notifying him of counsel's name and address.

Unless a specific deadline date is given, an assignment order directs that the appeal is to be perfected within 60 days of the date of filing of the transcripts with the Family Court Clerk. Counsel may

seek in writing an extension of this time period for good cause shown (Family Ct Act §1121 [7]).

### III. Duties of Assigned Appellate Counsel

#### A. Contact Appellant:

Immediately following assignment, contact appellant and ask him to advise you of potential issues. If he can not be reached at the address stated in the letter accompanying the order of assignment, you may be able to locate him by contacting trial counsel, appellant's family, the Department of Social Services, or other agencies.

If you are unable to contact appellant, despite documented good faith efforts to do so, consider making a motion to be relieved of your assignment and to dismiss the appeal as abandoned.

#### B. Contact Trial Counsel:

Immediately following assignment, contact trial counsel and ask trial counsel to advise you of potential issues.

#### C. Obtain Transcripts:

1. Written Request Within 10 days of assignment, counsel must request preparation of the transcript of the proceeding appealed from (Family Ct Act §1121 [6]), in writing, from the Family Court Clerk or Administrative Court Reporter, depending on the local practice. Unless appellate counsel served as trial counsel, he should review the court file in the Family Court Clerk's office to ascertain the judgment roll (including any and all pleadings, orders, etc.) and the dates of any court appearances for which transcripts should be prepared. Such transcripts should be completed within 30 days from receipt of the request for production, where practicable, and filed with the Family Court.

2. Filing Delays If the transcript is not promptly filed, contact the administrative court reporter. (In the Fifth Judicial District, contact Donn T. King, Chief Clerk, Oneida County Family Court). If filing of the transcript is substantially delayed, consider making a motion for summary reversal.

If portions of the transcript are missing, contact the administrative court reporter. Motions to settle the transcript must be made within 15 days from the receipt of the transcript (CPLR 5525 [c] [1]).

3. Transcript copies Do not deliver any original copies of the transcript to appellant. Appellate counsel is not obligated to provide a free copy of the transcript to appellant.

4. Due date Assigned counsel must perfect the appeal within 60 days after the filing of the transcripts. If, for good cause, the appeal can not be perfected by that date, counsel must request an extension of time, in writing, prior to the expiration of the due date (see, section III, E, *infra*).

D. Perfect the Appeal

The appellant perfects an appeal by filing the stipulated or court settled record (just one record, not 10) and 10 copies of appellant's briefs with the Clerk of the Appellate Division, Fourth Department, together with a demand for exhibits, when necessary, with proof of service thereof; a copy of any and all prior orders entered by this court (including an order of assignment; order extending time to perfect the appeal; order granting a stay, etc.); and proof of service of one copy of the record and brief on each opposing party to the appeal, as well as the Law Guardian, if any (22 NYCRR 1000.3 [c] [2]).

Court rule requires perfection of the appeal within 60 days of filing and service of the notice of appeal (22 NYCRR 1000.2 [b] [2]), but, when a trial transcript is required, §1121 of the Family Court Act extends this time to 60 days after the filing of the transcript, subject to extension by the Court for good cause shown.

1. Prepare Stipulated or Settled Record on Appeal

Assigned appellate counsel should begin preparing the stipulated or settled record on appeal immediately upon receipt of all transcripts. The attorneys or parties, and the Law Guardian, if any, must either sign a stipulation itemizing the documents, including exhibits, that constitute the record, or the Family Court judge, on motion, must sign an order itemizing those documents that constitute the record on appeal.

The original stipulation or order must be included in the record filed with the Court.

a. Contents of the Record

The first step in preparing the record is gathering copies of all documents that constitute the record (see, CPLR 5526). Typically, these include:

- notice of appeal
- order appealed
- written decision, if any
- pleadings (petition and answer)
- trial transcript
- trial exhibits (which could be located in the Family Court Clerk's Office or in trial counsel's file), and
- stipulation of counsel or Family Court order settling the record.

On an appeal from a support order, the record will also include the order and determination of the hearing examiner and the written objections thereto, as well as a transcript of the support hearing.

b. Format of the record

Both the CPLR and Court rules require that

- the record be reproduced on 8 1/2 by 11 inch paper;
- the record be consecutively paginated;
- the record contain a table of contents indicating where in the record the various documents may be found;
- the record have a white cover labeled "Record on Appeal" with the correct caption of the proceeding (as set forth in the order appealed) and the name and address of the respective counsel or parties to the appeal; and,
- the record be bound on the left.

The form of the binding may be as simple as staples or spiral binding or as formal as adhesion binding done by a printing company.

You may not use three-ring binders and should not use metal prongs that are not secured and covered with plastic tape.

You may use multiple volumes if the record is large, provided that each volume has a cover and is properly marked (i.e., Volume 1 of 3; Volume 2 of 3; Volume 3 of 3).

You may use two-sided copying for the record; however, the record must be legible and the type size may not be smaller than pica type (the standard font in most word processing programs is pica size or greater).

c. Exhibits or Sealed Transcripts

Exhibits, or sealed transcripts of *in camera* interviews of children conducted by the Family Court judge, must be provided to the Appellate Division. If there are any problems in arranging for direct submission of the exhibits or sealed transcript by Family Court to the Appellate Division, assigned counsel must notify the Appellate Division of the problem, and provide the name of an individual in the Family Court Clerk's Office to contact to obtain the necessary documents.

In addition, the record on appeal should reference the exhibits or sealed transcripts, even if they are submitted under separate cover. The documents should be included in the table of contents; on the page referred to in the table of contents, you should note the name of the document and that it is submitted under separate cover to the Court.

d. Briefs

A copy of appellant's brief must be given or mailed to appellant on or before the date of filing with the Appellate Division, and copies served on each party, including the Law Guardian. Ten copies of the brief must be filed with the Court, together with proof of service on all interested parties, including the Law Guardian, if any.

Briefs must be bound on the left and reproduced on 8  $\frac{1}{2}$  by 11 inch paper. The briefs must be paginated and a table of contents and cover are required. The brief should be labeled as appellant's or respondent's brief and should bear the name and address of counsel.

In the upper right hand corner of the cover, the brief should indicate whether the matter is to be submitted or argued and the amount of time requested for argument (up to 15 minutes on an appeal from an order and up to 30 minutes on an appeal from a judgment).

Rule 1000.4 (f) (5) requires that the cover of an appellant's brief shall be blue, the cover of respondent's brief shall be red, the cover of a reply brief shall be gray, and the color of a surreply brief shall be yellow.

Where the party has been granted permission to appeal as a poor person, or is represented by a Law Guardian, the cover of the brief shall be white.

e. Compliance. *The Clerk shall reject any record, appendix or brief that does not comply with these rules, is not legible or is otherwise unsuitable (22 NYCRR 1000.4 [h]).*

f. Scheduling orders. Once the Clerk's office receives a complete filing by an appellant, a scheduling order is prepared. The order will specify the term of Court for which the matter has been scheduled and will fix the date of service and filing of respondent's briefs (22 NYCRR 1000.10 [a]).

- a party or his attorney shall notify the Clerk in writing within 15 days of the date of mailing of the scheduling order of unavailability for oral argument on a specific date or dates during a term.

- to obtain an extension of time to file a brief, a respondent must make a motion on notice.

- either party may move to expedite the appeal by filing a motion within 15 days after the date of mailing of the scheduling order. The motion must contain an affidavit setting forth the circumstances requiring that the appeal be expedited.

- not less than 20 days prior to the commencement of a court term, the Clerk will mail a notice to appear for oral argument to all attorneys or parties.

E. Timely Request Extension of Time to Perfect Appeal

1. Extension application If, for good cause, an appeal can not be perfected by the required due date, a request for an extension of the filing deadline must be made to this Court prior to the expiration of the due date. The application may be in the form of a letter, rather than by formal motion, providing that the letter

a) is received by the Court prior to the original deadline date;

b) includes the full caption of the case with the Appellate Division Docket Number, and

c) reflects the fact that copies of the letter have been sent to all

interested parties (or their respective counsel), by listing the names of those individuals with their full mailing addresses, as if those names were set forth in a formal notice of motion.

2. Conditional Dismissal An extension of time to perfect an appeal will be granted only on condition that the appeal be perfected by a specified date, and in the event of failure to so perfect, the appeal will be dismissed. Assigned counsel will then be forced to make a formal motion to vacate the dismissal upon a showing of reasonable excuse for the delay in perfecting and upon notice to all parties.

IV. Duties of Appellate Counsel upon Receipt of Decision:

Upon receipt of the Court's order, counsel should notify appellant in writing of the Court's decision.

If the order is adverse to appellant, counsel should ascertain whether appellant seeks to apply for permission to reargue and/or for leave to appeal to the Court of Appeals. If so, counsel should make such application on behalf of appellant.

If the order is favorable to appellant, counsel should serve the order with notice of entry upon opposing parties or their respective counsel.

Questions:

If you have any questions concerning a Family Court motion or assignment of counsel, you may contact Frances E. Cafarell, Esq., Court Clerk Specialist, at (716) 428-1083. If you have any questions concerning the filing of a Family Court record or brief, you may contact Paul G. Reiter, Esq., Court Clerk Specialist, at (716) 428-1024.

**FAMILY COURT APPEALS**  
**FORMS**

NOTICE OF RIGHT TO APPEAL  
Family Court Act §1121

TO: \_\_\_\_\_  
(name of client) (name of Attorney)

Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

PLEASE READ THE ENCLOSED NOTICE, CHECK THE APPROPRIATE BOX AND RETURN THIS FORM TO ME AT THE ADDRESS INDICATED ABOVE.

- 1. You have the right to appeal.
- 2. If you wish to appeal please check the first box listed below and I will file and serve a notice of appeal on your behalf. If you do not wish to appeal, please check the second box.

I want to appeal

I do not want to appeal.

- 3. Please check one of the boxes below. If you cannot afford an attorney and believe that you are eligible for assigned counsel check the first box indicated below, complete the attached form entitled "Affidavit in Support of Motion to Appeal as a Poor Person" and I will apply to the Appellate Division to have an attorney assigned to represent you on your appeal and to have a transcript furnished to the attorney free of charge. If you can afford to pay for an attorney, check the second box and return this form to me.

I want to have an attorney assigned to represent me on my appeal.

I will retain my own attorney.

- 4. Please sign this form on the line indicated below.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

- 5. Return the form to me at the address indicated above.





SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION, FOURTH DEPARTMENT

January 1996

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
(INSERT TITLE OF ACTION ABOVE)  
\_\_\_\_\_

)  
) NOTICE OF MOTION  
)  
) # \_\_\_\_\_  
) (Insert Docket No.)  
)  
)

PLEASE TAKE NOTICE, that upon the annexed affidavit(s), the undersigned will move this Court at a term of the Appellate Division, 501 Hall of Justice, Rochester, NY, on \_\_\_\_\_ (insert appropriate return date), for an order granting appellant/respondent (circle one) leave to appeal/respond to an appeal (circle one) as a poor person and assignment of counsel from an order of the Family Court as set forth in the accompanying notice of appeal and order (attach notice and order).

PLEASE TAKE FURTHER NOTICE, that this motion will be submitted without oral argument (see 22 NYCRR 1000.2 [d]). Answering affidavits, if any, must be filed with the Court (not served) on or before the Friday preceding the return date.

Dated: \_\_\_\_\_

(Name and address of moving party or attorney)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

TO: \_\_\_\_\_ County Attorney

\_\_\_\_\_  
\_\_\_\_\_

and

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Names and Addresses of opposing parties/attorneys and law guardian, if any (use additional sheet if necessary)

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION, FOURTH DEPARTMENT

Affidavit in Support of  
Motion to Appeal as a  
Poor Person

(INSERT TITLE OF ACTION ABOVE)

Docket No.

STATE OF NEW YORK  
COUNTY OF \_\_\_\_\_ ss:

\_\_\_\_\_, being duly sworn, deposes  
and says:

1. I am the appellant/respondent (circle one) herein and I hereby apply to the Appellate Division, Fourth Department, for permission to appeal/respond to an appeal (circle one) as a poor person and for an attorney to be assigned to represent me on appeal.

2. My present mailing address is \_\_\_\_\_

3. The following is a summary of my financial status:

A. PRESENT INCOME (If none, write none. Do not use "ditto" marks. Figures should reflect NET monthly income.)

	<u>Appellant/Respondent</u>	<u>Spouse</u>
Employment Income	_____	_____
Place of employment	_____	_____
Length of employment	_____	_____
Unemployment benefits	_____	_____
Disability benefits	_____	_____
Social Security	_____	_____
Pension	_____	_____
Veterans and/or active service benefits	_____	_____
Welfare or SSI	_____	_____
Alimony or support	_____	_____
Rental income	_____	_____
Other	_____	_____
<b>TOTAL</b>	_____	_____

B. ASSETS (Must be completed)

Savings, checking, trust accounts	_____	_____
Location of same	_____	_____
Cash on hand	_____	_____
Vehicles owned:	_____	_____
value	_____	_____
amt. owing	_____	_____
Real estate owned:	_____	_____
description	_____	_____
value	_____	_____
amt. owing	_____	_____
Other	_____	_____
TOTAL	_____	_____

C. PRESENT OBLIGATIONS: (Figures should reflect monthly payments made. Must be completed.)

Rent/Mortgage	_____	_____
Alimony/Support	_____	_____
Medical	_____	_____
Other (description)	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
TOTAL	_____	_____

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_  
19\_\_\_\_\_.  
\_\_\_\_\_ (sign your name above)

\_\_\_\_\_  
Notary Public

NOTE: PLEASE RETURN THE ORIGINAL COMPLETED FORM TO YOUR ATTORNEY

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION, FOURTH DEPARTMENT

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
(INSERT TITLE OF ACTION ABOVE)  
\_\_\_\_\_

AFFIDAVIT OF  
SERVICE BY MAIL

DOCKET # \_\_\_\_\_

STATE OF NEW YORK)  
COUNTY OF \_\_\_\_\_) ss.:

\_\_\_\_\_, being duly sworn, deposes and says  
that (s)he is not a party to this action, is over 18 years of  
age, and resides at \_\_\_\_\_.

That on the \_\_\_\_ day of \_\_\_\_\_, 19\_\_, your deponent served  
the within Notice of Motion for Permission to Appeal as a Poor  
Person and for Assignment of Counsel and supporting papers by  
depositing a true copy thereof enclosed in a post-paid wrapper in  
an official depository under the exclusive care and custody of  
the U.S. Postal Service within New York State, addressed to each  
of the following parties and/or their attorneys at the last known  
address set forth after each name:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
(PRINT NAME BELOW SIGNATURE)

Sworn to before me this  
\_\_\_\_ day of \_\_\_\_\_, 19\_\_

\_\_\_\_\_  
NOTARY PUBLIC/COMMISSIONER OF DEEDS  
My commission expires: \_\_\_\_\_