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Winning appeals in family law

Adopting these practices will improve your client's chances in the appellate courts

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Family Law

On May 17, the U.S. Supreme Court issued a decision about an international custody dispute that settled conflicting decisions issued by different federal districts. In the case of Abbott v. Abbott, 10 C.D.O.S. 5983, a British man and an American woman were married in England before ultimately moving to Chile and filing for divorce. Contrary to a Chilean court order, the mother removed the parties' 10-year-old child without the father's permission and took him to Texas, where she filed for divorce. The father then went to Texas and filed his own action in state court, seeking to return to Chile with the child.

After being denied the relief he sought in the state court, the father filed a federal court action in the Western District of Texas, seeking an order to return his son to Chile under the Hague Convention, based on a ne exeat provision in the Chilean court order that required the mother to obtain Mr. Abbott's consent before leaving Chile with their son. The federal court denied this request, as did the Fifth Circuit U.S. Court of Appeals, finding that the Chilean court "consent" requirement did not constitute a "right of custody" under the Hague Convention.

The Supreme Court reversed, relying on a dissent issued by Justice Sonia Sotomayor (before she was confirmed as a Supreme Court justice) in the similar Second Circuit case of Croll v. Croll, 239 F.3d 133. The majority opinion in Croll had been adopted by the Fourth and Ninth circuits, while the rationale of the dissenting opinion was followed in the Eleventh Circuit. Justices Anthony Kennedy, John Roberts, Antonin Scalia, Ruth Bader Ginsburg, Samuel Alito and Sotomayor reversed the Fifth Circuit, holding that the ne exeat right created a right of custody. Justices John Paul Stevens, Clarence Thomas and Stephen Breyer dissented, one of the more unusual groupings of Supreme Court justices in recent years.

It took several courts (foreign, state, and federal) and five years, but the father ultimately won the right to return to Chile with his son, who is now 15 years old. Very few people have the time, money and patience to take a custody battle all the way to the U.S. Supreme Court. Mr. Abbott and his attorney prevailed because they prepared thoroughly and pursued every legal opportunity.

When representing a client in a high-stakes family law case, you need to prepare for a possible appeal at the trial court level long before the court issues its decision. Whether establishing custody and visitation schedules, characterizing and dividing property assets, or paying child or spousal support, most family court decisions balance legal and factual elements in unique and complicated ways.

When the facts and law are unchallenged, such as using guideline child support calculations for parents who receive only W-2 income and have a specific custody schedule, most family law attorneys settle the issue. However, when uncertain case law or contested facts prevent the parties from settling, and the issues are significant, family law attorneys need to plan and prepare for a possible appeal before the issues are presented to the trial court.

The final choice about whether to appeal any court ruling should be made by the client with the attorney's input. However, to give a client who is unhappy with a legal decision the opportunity to reverse that decision, the attorney in a high-stakes family law case must present the matter to the lower court in a way that gives the client a second chance on appeal, possibly to the Supreme Court.

Family law appeals can be won, but they are difficult. The starting point for any appeal is to know the standard of review that applies to the trial court's decision: substantial evidence, de novo, or abuse of discretion. The substantial evidence test (whether there is any substantial evidence to support the trial court's decision) applies to findings of fact. The de novo standard (or independent review) governs the trial court's interpretation of statutes and application of legal principles.

To succeed in most family law appeals, however, you must show that the trial court abused its discretion: "the trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order." (Marriage of Burgard, 72 Cal.App.4th 74 (1999)) Since custody and visitation orders, support orders, attorney's fees awards and decisions to divide property usually require the trial court to exercise its discretion, the abuse of discretion hurdle

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must be cleared to overcome an adverse decision on those issues.

To prepare for a family law hearing with the intent to show that any decision other than one favoring your client would be an abuse of discretion, you need to be thorough and detail-oriented. It is imperative to ensure that your witnesses present testimony and evidence that is admissible, and you must prepare to authenticate every document, to overcome objections by opposing counsel, and to get your exhibits admitted by the court.

Conversely, you must challenge and object to any evidence offered by the other party that is hearsay, speculative, lacking in foundation or otherwise improper. If appropriate, as when responding to improper evidence offered in the opposing party's declarations or legal briefs, you should submit detailed written objections and insist that the trial court rule on those objections. Failing to object to improper evidence, or to insist that the court rule on your objections, may result in waiver of your right to challenge that evidence on appeal. You must preserve your right to challenge the other party's evidence on appeal.

Experts must be qualified and their opinions supported by admissible evidence. Know what type of evidence experts can rely upon, including hearsay evidence. Many property and support battles require the use of forensic accountants and dozens of documents to support their opinions, each one of which must be admissible. If the parties dispute the characterization of property or tracing of assets, the chain of supporting documents must be clear and comprehensible.

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Custody evaluators should be deposed before the hearing, and their files reviewed thoroughly. Your client's custody experts should be prepared to overcome the same level of scrutiny that you apply to the other party's experts, both in terms of their expertise and their opinions. Their curriculum vitae needs to be examined closely and you should consult attorneys who have used or opposed the same expert.

The bottom line requirement to prevail on any appeal is to have an appellate record that supports your client's position. If your family law client needs to win an important issue, you have a duty to ensure that the supporting legal briefs, declarations and documents, witnesses and evidence create a detailed and admissible record.

It is not always possible to be thoroughly prepared and detail-oriented in a family law case. Because of the time constraints in most family courts, and the large number of pro per parties, the rules of evidence, civil procedure and due process are not always observed. If these mistakes are made by the other party or the court, however, it creates an appellate opportunity for your client. That is why you prepare to take advantage of that opportunity by focusing on the admissibility of your evidence and exhibits, and by objecting to improper evidence offered by the opposing party.

You cannot and should not appeal every adverse order. Your client needs to know not only what orders are immediately appealable (i.e., temporary support orders, attorneys fees and sanctions awards), but whether an appeal would be cost-effective. If only one year of child support remains, it does not make sense to spend $50,000 appealing a support modification order where the best outcome would save your client $25,000.

However, some clients need to appeal certain adverse decisions, despite long odds and the lack of explicit authority for their position. The Abbott decision demonstrates, in extreme fashion, that attorneys handling family law custody cases may need to master and be prepared to argue legal issues involving international jurisprudence, in both state and federal court. As the global economy evolves, so too does the complexity of family law practice and the need for family law attorneys to prepare for possible appeals.

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