How to Lay a Record for Appeal in Family Law and Domestic Violence Cases

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Who Is FVAP?

- Non-profit agency dedicated to appealing cases in California on behalf of survivors of domestic violence.
- We:
  - Represent clients in appeals (prosecute and defend).
    - Cocounsel with legal aid/pro bono attorneys.
  - File amicus briefs in cases of statewide importance.
  - Request publication of important unpublished DV opinions.

Who Is FVAP? (cont.)

- We (cont.):
  - Train attorneys and DV advocates on issues pertinent to appeals.
  - Provide technical assistance with trial court matters headed to possible appeal.
  - Assist pro per litigants.
  - Work with law students to become the next generation of advocates.

Top 10 Ways to Lay a Record for Appeal[1]

1. Obtain an appealable order from the trial court.
2. Raise all issues and objections on the record.
3. Be aware of, and make a record of, the prejudice to your client.
4. Move your exhibits into evidence.
5. Object to evidence in a proper and timely fashion.

[1] Content adapted with permission from *Ten Ways to Lose Your Appeal at Trial*, by Joan Wolff, Gregory Ellis, and Gerald Clausen, Course Materials for 1996 State Bar Meeting, updated August 2012.

Top 10 Ways to Lay a Record for Appeal

6. Make an offer of proof of improperly excluded evidence.
7. Request a statement of decision.
8. Object to a deficient statement of decision.
9. File a timely notice of appeal.
10. Don't disobey the trial court order.

1. Obtain an Appealable Order

- The Court of Appeal has no jurisdiction to consider an appeal taken from a ruling that is not appealable.
- Whether a ruling is appealable is determined by statute:

Code of Civil Procedure section 904.1.

1. Obtain an Appealable Order (cont.)

- **Final judgments** are appealable under C.C.P., § 904.1, subd. (a)(1).
  - Finally and completely adjudicates the rights of **all parties to the action, leaving nothing further** to be done in the way of judicial action.
  - E.g., divorce judgments, **final** custody or support orders.

1. Obtain an Appealable Order (cont.)

- **Final judgments (cont.):**
  - It is the **effect** of the ruling, and not the name given to it, that determines whether it is appealable.
    - *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 962-963.
  - Statements of Decision are generally **not** judgments, but may be treated as such if clearly intended to be the court's final decision on the merits.
    - *Pangilinan v. Palisoc* (2014) 227 Cal.App.4th 765, 769.

1. Obtain an Appealable Order (cont.)

- **Orders after final judgment** are appealable under C.C.P., § 904.1, subd. (a)(2).
  - Includes post-judgment (e.g., post-divorce) custody modification.
    - *Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1377–1378.
- Injunctions, including **DVROs**, are generally appealable under C.C.P., § 904.1, subd. (a)(6).
  - *Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1502 fn. 9.

1. Obtain an Appealable Order (cont.)

- **Interlocutory** judgments and orders are generally **not** appealable.
  - Determine some, but not all, of the rights of the parties to the litigation
  - E.g., the determination of only one issue in a bifurcated trial.
  - "One-final-judgment rule."
    - *In re Marriage of Nicholson & Sparks* (2002) 104 Cal.App.4th 289.

1. Obtain an Appealable Order (cont.)

- Some interlocutory judgments and orders (i.e., **"collateral" orders**) are actually appealable.
  - Although they do not dispose of all issues in the case, collateral orders are considered "final" for appeal purposes and are exceptions to the one-final-judgment rule:
    - 1. The order is **collateral** to the subject matter of the litigation (on an issue separate from the general subject of the litigation),
    - 2. The order is **final** as to the collateral matter (not preliminary to later proceedings), and
    - 3. The order directs the **payment of money** by the appellant **or the performance of an act** by or against appellant.
      - *Estate of Miramontes-Najera* (2004) 118 Cal.App.4th 750.

1. Obtain an Appealable Order (cont.)

- Examples of appealable **collateral orders:**
  - Permanent or final support orders, even if **modifiable** in the future.
    - The fact an order is modifiable does not mean it is not final.
      - *IRMO de Guigne* (2002) 97 Cal.App.4th 1353.
  - Judgment terminating marital status only.
    - Provided **objection made** at trial.
      - *IRMO Fink* (1976) 54 Cal.App.3d 357; F.C., § 2341, subd. (b).

1. Obtain an Appealable Order (cont.)

- Examples of appealable **collateral orders** (cont.):
  - Pendente lite (i.e., interim) orders for payment of money are appealable, including, e.g.:
    - Child support,
    - Spousal support,
    - Attorney fees, or
    - Costs.
  - But if court reserves jurisdiction to modify pendente lite order retroactively, there is currently a split of opinion as to whether it is final and appealable.
    - *IRMO Goodman & Gruen* (2011) 191 Cal.App.4th 627; *IRMO Freitas* (2012) 209 Cal. App.4th 1059.

1. Obtain an Appealable Order (cont.)

- Interlocutory judgments and orders, other exceptions:
  - There are exceptions for sanctions orders over $5,000 and actions pertaining to real or personal property.
    - C.C.P., § 904.1, subds. (a)(8), (a)(9), (a)(11) & (a)(12).
  - Also, orders that dispose of all issues as to one party are appealable.

1. Obtain an Appealable Order (cont.)

- Issue **Certified for Appeal:**
  - Trial court may certify an issue for interlocutory appeal.
    - Cal. R. Ct., rule 5.392.
  - Step 1:
    - Ask the trial court to certify issue for appeal—can be requested orally, by informal letter, or by noticed motion filed within **10 days** of clerk's mailing of order.
    - Grounds:
      - Likely to lead to settlement of entire case;
      - Simplify remaining issues;
      - Conserve court's resources; **or**
      - **Benefit the well-being of a child or the parties.**

1. Obtain an Appealable Order (cont.)

- Issue **Certified for Appeal** (cont.):
  - Step 2:
    - If motion granted, within **15 days** of mailing of notice of order granting it, file motion to appeal the issue in the Court of Appeal.
    - Serve on parties and trial court.
    - Usually granted by COA, but not automatic.
    - If granted, will have to file motion to augment record to include the balance of the record quickly.

1. Obtain an Appealable Order (cont.)

- Custody Orders:

"[O]f all issues, child custody is perhaps the most time-sensitive (and hence least amenable to an adequate remedy by way of appeal)."

Alan S., Jr. v. Superior Court (Mary T.) (2009) 172 Cal.App.4th 238, 250.

1. Obtain an Appealable Order (cont.)

- Custody Orders (cont.).
  - **Prejudgment** orders **temporarily** determining child custody and visitation during litigation generally are **not** appealable.
    - Intended to be superseded by a permanent order.
      - *Lester v. Lennane* (2000) 84 Cal.App.4th 536.
  - Not "collateral" order because:
    - Does not order payment of money or an act of either party, and
    - Not "collateral" when custody is the only disputed issue in the case.

1. Obtain an Appealable Order (cont.)

- Custody Orders (cont.):
  - **Post-judgment (post-divorce or -restraining order)** custody orders may be appealable under C.C.P., § 904.1, subd. (a)(2), even if "temporary."
    - The previous case law implied that post-judgment temporary custody orders are not appealable if they are preliminary to later custody proceedings.
    - But an **unpublished** case from the Fourth District, Division Three, *Funk v. Harris* (No. G047229, Jan. 10, 2014), held any post-judgment temporary custody order is appealable.

1. Obtain an Appealable Order (cont.)

- Custody Orders (cont.):
  - And, some appellate courts have considered temporary custody orders nonetheless, including:
    - Where the order will determine outcome of the rest of the proceeding, or
    - Where trial court had no jurisdiction to make the order.

1. Obtain an Appealable Order (cont.)

- What if you want to challenge a temporary custody order?
  - Review case law to see if your type of temporary order has been considered on appeal before.
  - Consider whether the order is truly "temporary" in substance.
    - E.g., no later review hearings set, or review hearings continuously set but no changes are ever made to the order.
  - Ask trial court to certify issue for interlocutory appeal.
  - Even if not appealable, may be challenged by writ.
  - ***Tip:*** Try to get "final" custody orders (or at least orders not labeled "temporary") if you want to appeal, and if it won't prejudice your client.

2. Raise All Issues and Objections on the Record

- As a general rule, issues and objections not raised in the trial court will not be considered on appeal.
  - For example, you cannot object to termination of marital status—and an appeal does not stay termination of status—**unless** an objection was made at trial.
    - Fam. Code, § 2341, subd. (b).

2. Raise All Issues and Objections on the Record (cont.)

- **Tip:** Memorialize anything that happens in an in-chambers conference on the record when back in court.
  - Or, ask for the court reporter to join you in chambers.
- **Tip:** Make sure all your motions are filed, not just handed to the court clerk.

2. Raise All Issues and Objections on the Record (cont.)

- **Example of good lawyering** in a case FVAP successfully appealed:

Attorney for petitioner: "You're making a determination that there was domestic violence in the past and that that is not sufficient to order a restraining order going forward?"

Trial court: "That's right."

Rodriguez v. Menjivar (2015) 243 Cal.App.4th 816, 822-823

2. Raise All Issues and Objections on the Record (cont.)

- **New** issues may sometimes be raised on appeal if they are purely a **question of law** on **undisputed** facts.
- Appellate courts are most likely to invoke this exception with legal questions raising **important issues of public policy.**
  - *Avalos v. Perez* (2011) 196 Cal.App.4th 773, 777 (despite appellant's failure to object at hearing, trial court's failure to renew restraining order for full, statutorily-mandated period correctible on appeal).
- Also, an appellate court may (and sometimes must) take **judicial notice** of certain matters though not noticed or raised at the trial court level.
  - Evid. Code, § 459.

3. Establish Prejudice

- Even if the trial court committed legal error, the Court of Appeal will generally reverse only if it was **prejudicial error.**
- Error is "prejudicial" only if it resulted in a **"miscarriage of justice"—**where it appears reasonably probable a result more favorable to appellant would have been reached **but for** the error.
  - Cal. Const., art. VI, § 13; C.C.P., § *475*; *F.P. v. Monier* (Nov. 27, 2017, No. S216566) ___ Cal.App.5th ___ [2017 WL 5662394].
- Appellant's burden to prove prejudice.

3. Establish Prejudice (cont.)

- A **writ**, rather than an appeal, may be required to show prejudice.
  - Prejudice may be difficult or impossible to prove after a full trial.
- ***Tip*:** Argue the prejudicial effect of **each** ruling the court gets wrong.

4. Admit Exhibits into Evidence

- Exhibits may be deemed part of the clerk's transcript (part of the appellate record) whether they were admitted, denied, or lodged with the trial court.
- But there may be exceptions and some appellate districts may not consider evidence not admitted, so best practice is to **move all exhibits into evidence** in the trial court.
- This also lays the cleanest record possible because it identifies the universe of information on which the trial court relied.

4. Admit Exhibits into Evidence (cont.)

- Ordinarily, declarations filed in a request for a DVRO may be considered as evidence, absent an objection and ruling.
  - Cal. R. Ct., rule 5.111(c).
- A recent case held a trial judge may limit evidence to testimony provided and evidence submitted at trial because F.C. § 217 requires live testimony for a **motion** hearing, absent a stipulation or "good cause."
  - If judge says ruling is based "on the evidence presented," make sure you get the declaration **admitted into evidence**.
  - If denied because hearsay, need to put client on the stand.
  - See *IRMO Shimkus* (2016) 244 Cal.App.4th 1262.

5. Make Evidentiary Objections

- Failure to object on **specific grounds** to your opponent's evidence may waive your right to challenge its admissibility on appeal.
  - Evid. Code, §353, subd. (a).
  - Anything not objected to, and accepted by the trial court, is considered evidence.
- State your specific **grounds** for objecting (e.g., hearsay, lack of foundation, not relevant).
  - Failure to do so makes a challenge on appeal less likely to be successful.

5. Make Evidentiary Objections (cont.)

- Make evidentiary objections **at or before the hearing** in the trial court, else it will be deemed waived on appeal.
- Court's failure to rule on objections does not waive the issue on appeal, but best practice is to **obtain rulings on objections on the record** nonetheless.
  - Obtain specific basis or bases for trial court's ruling if you objected on multiple grounds.
  - If you do not, the court of appeal may presume the trial court ruled permissibly.

6. Make an Offer of Proof

- Make your record by **offering proof as to what excluded evidence would have shown.**
  - Evid. Code, § 354.
- If the court of appeal can't determine the content or effect of the evidence you claim was erroneously excluded at trial, it can't assess whether **reversible error** occurred (i.e., whether you were **prejudiced**).
- This also prevents the court of appeal from finding the trial court did not have a chance to make an informed decision.
- **Bottom line: Get a ruling** from the trial court on the record.

7. Request a Statement of Decision

- After trial, written findings of fact and conclusions of law are generally **not** required.
- Generally, the only way to learn the factual and legal basis for the decision may be to **request a statement of decision (SOD).**
  - C.C.P., §§ 632 & 634.
  - See also FVAP's training on requesting a SOD.
- Specifically authorized in custody, child support, and spousal support proceedings.
  - F.C., §§ 3022.3, 3082, 3087 & 3654.

7. Request a Statement of Decision (cont.)

- SODs only apply to "trials," not interlocutory motions.
- If the trial was 1 day, or fewer than 8 hours over several days, the request must be made **before the matter is submitted for decision.**
  - ***Tip***: It may be difficult to tell if the matter has been "submitted" in short hearings. If the judge appears to be ruling, interrupt with the request; or, request it before the hearing begins (e.g., in writing with the initial pleadings).
- If the trial was longer, the request must be made **within 10 days** after the court announces a tentative decision.

7. Request a Statement of Decision (cont.)

- The request must specify the controverted issues as to which the party is requesting a SOD.
- After a party has requested the SOD, **any party** may make proposals as to the content of the SOD.
  - C.C.P., § 632; Cal. R. Ct., rule 3.1590(d).

7. Request a Statement of Decision (cont.)

- **Domestic violence** rulings:
  - Order denying a **TRO** "**shall** include the reasons for denying the petition"—without having to ask.
    - F.C., § 6320.5, emphasis added.
  - Order denying a **Restraining Order After Hearing** "**shall** provide a **brief** statement of the reasons for the decision **in writing or on the record**. A decision stating 'denied' is insufficient."
    - Fam. Code, § 6340, subd. (b), emphasis added (added by A.B. 2089, eff. Jan. 1, 2015).
- You can still request a **SOD**: you'd have more control over the issues addressed.

7. Request a Statement of Decision (cont.)

- Why request a SOD?
  - Force the trial judge to focus on the hard issues and give reasons to support their resolution of those issues.
  - You can draft the SOD or objections to the SOD as a guide to attempt to lead the court to the right outcome.
  - Court may change its mind or modify its tentative decision.

7. Request a Statement of Decision (cont.)

- Why request a SOD? (cont.)
  - **Doctrine of implied findings:** Without a SOD specifying the factual and legal bases for the court's decision, it will be **presumed on appeal** that the court decided in favor of the prevailing party on **all** facts and issues.
  - The order may not be reversible for abuse of discretion if the record does not explain the trial court's reasoning.
  - A SOD that strengthens favorable findings and weakens unfavorable findings can bolster your position on appeal.
  - Helps establish baseline circumstances for future hearings on custody or support where **"changed circumstances"** will be reviewed.

8. Object to Defective Statement of Decision

- After a request for a SOD, the judge is supposed to then issue and serve a **"proposed" SOD**.
  - Cal. R. Ct., rule 3.1590(f).
- **Any party** may file objections.
  - Cal. R. Ct., rule 3.1590(g).
  - ***Tip***: Not all judges will title the document "proposed," but treat it as such and object anyway. This is true if the proposed SOD and proposed FOAH are combined.

8. Object to Defective Statement of Decision (cont.)

- A statement of ultimate facts is acceptable—i.e., a statement of evidentiary facts is not required
- But a statement that is so general that it does not comply with C.C.P. § 632 is defective.
- Issuance of an SOD that is so inadequate as to constitute a failure to issue an SOD altogether is reversible error per se.

8. Object to Defective Statement of Decision (cont.)

- Why object to an SOD?
  - Force the trial court to **focus** on the hard issues and **give reasons** for the ruling.
  - If the SOD is ambiguous on an issue and you fail to object, the **doctrine of implied findings** will apply: the appellate court assumes the court ruled in favor of the prevailing party on that issue.
    - C.C.P., § 634.

9. File a Timely Notice of Appeal

- Timely filing of a notice of appeal is **mandatory;** untimely filings **will be dismissed.**
- Under Cal. R. Ct., rules 8.104 and 8.108:
  - **60 days** after the superior court clerk or opposing party serves:
    - Notice of Entry (NOE) of judgment, or
    - File-stamped copy of the judgment,* **OR**
  - **180 days after entry of judgment** (if no NOE or file-stamped copy of judgment or order).
- There is **no extension of time** for mailing of the notice of entry of judgment.

Tip: If the clerk served the parties in court, but did not file a Proof of Service, send your own copy and file a Proof of Service.

9. File a Timely Notice of Appeal (cont.)

- **180 days:**
  - No NOE or file-stamped order.
  - There will be a **minute order** memorializing the judgment. The **controlling date** can be either:
    - The date when the minute order was entered, if it does not specifically require a subsequent formal written order; **or**
    - The date of the later written order, if the minute order expressly directs for one to be prepared.

9. File a Timely Notice of Appeal (cont.)

- **Cautionary tale regarding timeliness:**
  - March 11: Trial court entered judgment after trial.
  - March 18: Trial court entered judgment again, with handwritten changes to March 11 judgment.
  - May 17: Wife **only** appealed from the March 18 judgment.
  - Appeal dismissed as untimely.
    - The time to appeal ran from the March 11 judgment because the March 18 judgment was not a substantial modification.
    - The deadline was therefore May 10, 60 days after March 11.
  - *Ellis v. Ellis* (2015) 235 Cal.App.4th 837.

10. Don't Disobey the Trial Court Order

- Even if you disagree with the trial court's order and are appealing it, you must follow the order.
- If you don't, you will likely waive your right to appeal it—the so-called "disentitlement doctrine."
  - *IRMO Hofer* (2012) 208 Cal.App.4th 454, 459.
- For example, a father who removed the child from the state (and country) in violation of a custody order waived his right to appeal the trial court's award of fees and costs to the mother.
  - *MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277.

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