



The DV LEAP Custody and Abuse TTA Project

THE BASICS: MAKING THE RECORD FOR APPEALS, AND TAKING A CASE TO THE SUPREME COURT

I. MAKING THE RECORD

A. Working Definitions:

- **The Record:** The formal record of what happened in the trial court litigation (i.e., the transcript of the proceedings, and/or the formal court file), which is what the appellate court will review.
- **Making the Record:** Making sure that the record contains:
 - (i) All evidence you want to argue about on appeal;
 - (ii) Specific objections to the exclusion of evidence and a description (“proffer”) of the evidence you wanted admitted; and
 - (iii) Specifically stated (or written) objections to procedural violations or legal errors, including specifically stated constitutional claims (if you want to preserve a shot at Supreme Court review).

B. How Do You Make the Record?

1. Make sure to move for admission of *all* evidence you want the court to consider. If you (under pressure from the judge) do not ask for the witness to testify or the evidence to be admitted, your motion will not be preserved in the record and the court of appeals cannot review its exclusion.
2. If the court excludes your evidence, make sure to “proffer” what you *would* have put into evidence, either orally or in writing, so that it is preserved in the record.
3. Make objections and/or arguments explicitly, either orally or in written motions, e.g.:
 - Move for the opportunity to cross-examine the GAL
 - Object on the record to the admission of the evaluation without the opportunity to cross-examine the author
 - Argue on the record that the court needs to apply the statutory presumption
 - Put the court on notice that the ex parte hearing which resulted in your loss of custody violated your constitutional right to due process

II. FEDERAL CONSTITUTIONAL ISSUES

A. Call it constitutional!! If you object to a procedural violation but *do not* call it a constitutional violation, then you have not preserved the constitutional issue for appeal (or Supreme Court review).

B. Possible constitutional issues that could ultimately be reviewed by the Supreme Court:

a. Procedural Due Process Violations:

**Note that actual rights to due process can be very fact-specific so there is no absolute universal rule that applies in all cases. Moreover, some unfair procedures may be permitted under state statutes or practices. But the following are the types of procedures that implicate due process rights and may constitute constitutional violations:

- Ex Parte Hearings (one-sided hearings without notice to opposing side)
- Court hearings without adequate notice to the party
- Denial of a right to a hearing or to present (significant) evidence
- Admission of a GAL report without opportunity to cross-examine the GAL
- Admission of a Custody Evaluation without opportunity to cross-examine the evaluator or review the written report
- Denial of transcript for appeal because you cannot afford to pay for it
- Denial of access to the court for nonpayment of fees/costs when you can't afford to pay them
- *Possibly*, advocacy on behalf of child which contradicts the child's express wishes

b. Sample Substantive Constitutional Violations

- Functional deprivation of parental rights without a finding of unfitness (e.g. complete cutoff of visitation can be characterized as termination of parental rights, even though that label was invented to apply only to state neglect proceedings where they seek to end parental status.) *See In re D.B.*, No. 03-FS-196 (D.C. May 1, 2008).

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