

1 **NUTS & BOLTS**
APPELLATE PROCEDURE

PARENT ATTORNEY ADVOCACY COMMITTEE CLE
JUNE 28, 2017
CAROLYN ALTMAN

2 **What type of Appeal?**

- Adjudication/Disposition of Dependency: Direct Appeal
OCGA §5-6-34(a)(1)
- Permanent Guardianship: Direct Appeal
- Adoption: Direct Appeal
- Termination of Parental Rights: DISCRETIONARY APPEAL
OCGA §5-6-35(a)(12)

3 **Which Appellate Court has Jurisdiction?**

The Court of Appeals has jurisdiction under Article VI of the Constitution of Georgia, Section V, Paragraph III. Juvenile Court matters are not cases within the exclusive or general appellate jurisdiction of the Supreme Court under Article VI, Section VI, Paragraphs II and III. Const. Art. IV. Sct. VI, Para III states "The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law."

4 **Discretionary Appeal of a TPR**

- Must be filed within 30 days of the entry of the TPR order (date the order is filed, not the date the TPR hearing).
 - No extensions, unless there is an emergency.
 - No right to a transcript for a Discretionary Application
- If you need more time to prepare the Discretionary Application:

5 **Motion for New Trial: OCGA §5-5-20 - §5-5-25**

- File within 30 days of the entry of the TPR order. NO EXTENSIONS FOR FILING MOTION FOR NEW TRIAL
- Prepare and serve with Rule Nisi & COS to all parties in the TPR. Bowen v. Ball, 215 Ga. App. 640 (1994)
- Failure to serve a rule nisi renders Motion for New Trial void. Craig v. Holsey, 264 Ga. App. 344 (2003)
- Ruling dismissing or denying Motion for New Trial is a final disposition that commences the 30 day period for filing an appeal in OCGA §5-6-38(a) Craig v. Holsey, supra
- Juvenile Court must schedule a hearing on the Motion for New Trial; denying the motion without a hearing is reversible error. Kuriantnyk v. Kuriatnyk, 286 Ga. 589 (2010)

6 **Motion for New Trial: Transcripts**

- Uniform Superior Court Rules require appellants to order a transcript before filing a motion for new trial & subject an attorney who fails to do so to disciplinary action. Rule 41.3
- The trial court does have *discretion* to postpone briefing and hearing on the motion until the transcript has been prepared. Uniform Superior Court Rule 41.
- Trial courts do have the authority to decide new trial motions without a transcript. Evans v. State, 230 Ga. App. 728 (1998)
- OCGA §5-5-40(c) Where the grounds of the motion require consideration of the transcript of evidence or proceedings, the court may in its discretion grant an extension of time, except in cases where the death penalty is imposed, for the preparation and filing of the transcript, which may be done any time on or before the hearing; or the court may in its discretion hear and determine the motion before the transcript of evidence and proceedings is prepared and filed.

7 **Motion for New Trial: Grounds**

§ 5-5-20. Verdict contrary to evidence and justice: In any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the judge presiding may grant a new trial before another jury.

§ 5-5-21. Verdict against weight of evidence: The presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding.

§ 5-5-22. Illegal admission or exclusion of evidence: The courts may grant new trials in all cases when any material evidence may be illegally admitted to or illegally withheld from the jury over the objection of the movant.

8 **Motion for New Trial: Grounds cont.**

§ 5-5-23. Newly discovered evidence: A new trial may be granted in any case where any material evidence, not merely cumulative or impeaching in its character but relating to new and material facts, is discovered by the applicant after the rendition of a verdict against him and is brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial.

§ 5-5-24. Error in instructions; objection required in civil cases; requested instructions; review of charges involving substantial error

§ 5-5-25. Other grounds: In all motions for a new trial on other grounds not provided for in this Code, the presiding judge must exercise a sound legal discretion in granting or refusing the same according to the provisions of the common law and practice of the courts.

9 **Motion for New Trial: Strategy**

Vague or Specific?

1. Treat the Motion for New Trial as your appellate brief/argument. Include all of your arguments & lay out your best arguments.

Benefits: Best prepared. Most of the work will be on the front end and the application for discretionary appeal will be much easier.

2. Be as vague as possible. Argue general grounds – Not in the best interest of the child;

interests of justice require reversal; there was insufficient evidence to support the ruling.
 Benefits: The order denying the motion for new trial will not contain any new findings or conclusions of law. Laying out the entire appellate argument for the trial court, gives the trial court the opportunity to correct any defects in the termination order. The trial court essentially gets to issue a supplemental termination order.

10 **Motion for New Trial: What to File**

- File in the Juvenile Court
- Motion for New Trial. State grounds for New Trial (OCGA §5-5-20 through 25) and arguments/evidence in support of the grounds.
- Rule Nisi
- Certificate of Service to all parties in the termination

11 **Motion for New Trial:**

- Juvenile Court will schedule a Hearing on the Motion for New Trial
 - *There are no time requirements for when the hearing must be. Could be 30-90 days after you filed the motion (depends on the transcript, etc.)*
- You will argue your Motion/brief
- You will be DENIED
- Court will enter an order Denying/Dismissing Motion for New Trial

12 **APPLICATION FOR DISCRETIONARY APPEAL**

- Must file within 30 days of the entry of the TPR order OR the order denying the Motion for New Trial
- No Extensions of Time COA Rule 16(i)
 Unless file an Emergency Motion for Extension of Time Rule COA Rule 40(b)
- No Late Filings COA Rule 31(l)
No pleadings will be accepted on an application for discretionary appeal which are filed more than 30 days after the date of the order granting, denying, or dismissing the application or denying or dismissing the motion for reconsideration.

13 **Discretionary Appeal: Filing Deadlines**

Calculating Filing Deadlines:

Filing deadlines are unforgiving and absolute.

For e-filing, due by 11:59 p.m. AS LONG AS THEY COMPLY WITH THE COURT'S RULES. Rule 4.

If the filing gets rejected/returned, the filing will not be timely.

If the filing deadline falls on a Saturday, Sunday, state holiday, or day clerk's office is closed (ex: inclement weather), deadline is the next day. Rule 3.

14 **Discretionary Application: Burden of Proof**

RULE 31: Application will be granted only when:

- (1) Reversible error appears to exist
- (2) The establishment of precedent is desirable

- (3) Further development of the common law, particularly in divorce cases, is desirable; or
- (4) The application is for leave to appeal a judgment or decree of divorce that is final under OCGA §5-6-34(a)(1) & is determined to have possible merit

***If using grounds 3 or 4, must include a certificate of good faith standing*

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15 **Discretionary Application: Contents**

1 Contents of Brief:

- Cover Page
- Statement of Jurisdiction
- Statement of Judgment Being Appealed
- Standard of Review
 - Statement of Facts
- Enumeration of Errors
- Argument & Citation to Authority
- Word Count Certification
- Signature Line
- COS

2 What to File:

- Brief & COS
- Application Index
 - Petition for TPR
 - TPR Order
 - Motion for New Trial
 - Order Denying Motion for New Trial
 - Order of Appointment/Evidence of Indigency

16 **Discretionary Application: Notice of Filing Appeal**

- Once you file the application in the Court of Appeals, file a *Notice of Filing of Application for Discretionary Appeal* in the Juvenile Court
- Protect Appellant's right under O.C.G.A. §5-6-35(h) that "The filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as supersedeas."

17 **Discretionary Application: Time Frames**

- 30 days from the entry of the final order to file Discretionary Application
- Opposing party has 10 days to file a response. No response is required, unless ordered by the court. Rule 31(j)
- Court of Appeals will rule on the Application within 30 days
- If application is granted, applicant has 10 days to file Notice of Appeal (in the Juvenile Court) and proceed with the Appeal.

18 **DIRECT APPEAL**

- Have 10 days from the entry of the COA's order granting the application.
- OR have 30 days from the entry of the order being appealed (adjudication/disposition; permanent guardianship)

- File "Notice of Filing of Appeal" & COS in the Juvenile Court
- Request preparation of the record & transcript
- Then you WAIT.

Clerk of Court prepares record & sends the transcript and record to the Court of Appeals

19 **Direct Appeal: Docketing**

- Court of Appeals docket the case.
- Appellant has 20 days to file brief. Rule 23.
 - Can file Motion to Extend Time for Filing, for good cause.
- Appellee brief is due 40 days from the docketing date, or 20 days after Appellant files brief – whichever is later.
- Appellant can file reply brief 20 days from date of appellee's brief. Appellee does not get to file a reply brief, except as permitted under Rule 27 (Supplemental Briefs)

20 **Direct Appeal: Structure of the Brief**

(a) Appellant. Rule 25

The brief of appellant shall consist of three parts:

(1) Part One shall contain a succinct and accurate statement of the proceedings below and the material facts relevant to the appeal; a citation of the parts of the record or transcript essential to a consideration of the errors; and a statement of the method by which each enumeration of error was preserved for consideration. Record and transcript citations shall be to the volume or part of the record or transcript and the page numbers that appear on the appellate record or transcript as sent from the trial court.

(2) Part Two shall consist of the enumeration of errors and shall contain a statement of jurisdiction as to why this Court, and not the Supreme Court, has jurisdiction. A separately filed enumeration of errors is not required.

(3) Part Three shall contain the argument and citation of authorities. It shall also include a concise statement of the applicable standard of review with supporting authority for each issue presented in the brief.

21 **Direct Appeal: Structure of the Brief**

(b) Appellee. Rule 25

The brief of appellee shall be divided in the following manner:

(1) Part One shall point out any material inaccuracy or incompleteness of appellant's statement of facts and any additional statement of facts deemed necessary, plus citations to additional parts of the record or transcript deemed material. Failure to do so shall constitute consent to a decision based on the appellant's statement of facts. Except as controverted, appellant's statement of facts may be accepted by this Court as true.

(2) Part Two shall contain appellee's argument and the citation of authorities as to each enumeration of error. It shall also include the standard of review if different from that contended by the appellant.

22 **Direct Appeal: What to File**

Cover Page

Brief

COS

Evidence of Indigency/Order of Appointment

-Do not have to send attachments & exhibits, as in the Discretionary Application, because the record has already been provided to the Court of Appeals

23 **Formatting**

1. E-Filing:

All attorneys must e-file with the court. Rule 46

Register at <https://efast.gaappeals.us>

2. All documents must be in Searchable PDF form. Rule 2(a)(2)(i)

3. Filing Fees:

No filing fees required if have an Order of Appointment by the Juvenile Court or an affidavit of indigence. Rule 5

24 **Formatting**

8.5 x 11 paper. Rule 2(c)(1)

1" margins on all four sides. Rule (2)

Double Space (except for block quotes, headings, footnotes, and captions). Rule 2(c)(2)

Times New Roman 14 point font. (Or see

Rule 2(c)(3) for other acceptable fonts)

Pages must be numbered with Arabic numerals on the bottom of the page. Rule 24(e)

Word Count: 8,400 words Rule 23(f)

Citations: Do not need to parallel cite. Only need to cite the Official Report. Rule 24(e)

25 **Formatting:**

Word Count Certification: Rule 24(f)

Each submission must contain the following certification just above the signature block of the submitting attorney. "This submission does not exceed the word count limit imposed by Rule 24."

(Word Count limitation is 8,400 words for civil cases; 14,000 criminal cases; 4,200 reply briefs)

Signature: Rule 2(a)(2)(ii)

/s/ Carolyn Altman

Carolyn Altman

26 **Formatting:**

Certificate of Service: Rule 6

b) Service Process.

All documents shall show that copies have been served upon opposing counsel by United

States Postal Service, personal service, or electronic service. Service made by United States Postal Service or personal service shall be shown by signed written acknowledgment, certificate of counsel, or affidavit of server, to include the name and complete mailing address of all opposing counsel, signed by counsel and attached to the document filed.

(d) Electronic Service Process.

Parties utilizing electronic service shall strictly adhere to the following process: A party may serve a document via email if the filer certifies that, based upon a prior agreement with the recipient party, service of a .pdf copy of the document via email will be deemed sufficient service. The filer shall also, in the accompanying certificate of service, specifically list any recipients served electronically by full name and email address. Such certification shall state, "I certify that there is a prior agreement with (insert party or law firm name) to allow documents in a .pdf format sent via email to suffice for service."

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