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TO: All Fourth Department Family Court Clerks, Public Defenders, Legal Aid Society Directors, and Assigned Counsel Administrators

FROM: Frances E. Cafarell, Esq., Court Clerk Specialist 

RE: Family Court Guidelines and Forms

DATE: May 10, 2004

Enclosed are updated instructional guidelines on Family Court appeals for distribution to all attorneys, retained or assigned, in Family Court cases. The guidelines cover the duties and obligations of trial counsel and assigned appellate counsel and provide information on the preparation and perfection of Family Court appeals, in accordance with the rules of the Court, as amended to March 13, 2003. Also enclosed are sample forms that attorneys practicing in Family Court, and pro se litigants, may find helpful.

It would be greatly appreciated if you would make these guidelines and forms available, in your offices, and/or in direct mailings to members of the Family Court bar and assigned counsel panels, and publicize their availability. You may also distribute the sample forms to pro se litigants. I will be happy to send additional copies to you, or to individual attorneys, upon request.

If you have any questions concerning this matter, please feel free to call me directly at (585) 530-3112.

\Enclosures

May, 2004

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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]; 22 NYCRR 1022.11a).

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 or 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 or the Appellate Division) 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 in an abuse or neglect, permanent neglect or termination of parental rights proceeding wishes to appeal, the party's 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 [1], [5]). Counsel is **not** statutorily required to file and serve poor person motion papers in proceedings not enumerated in section 1121, but **may** be required to do so pursuant to local rules or guidelines.

(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 (any Monday, or the first business day of the week if Monday is a legal holiday, on notice to all parties);

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 if the papers are personally served or served by electronic means (13 days if service is made by regular mail; 9 days if service is made by overnight mail);

3) a date-stamped copy of the notice of appeal (from the Family Court Clerk's Office);

- 4) proof, or admission, of service of the notice of appeal;
- 5) a copy of the order appealed from, showing the date the order was entered in the Family Court Clerk's Office;
- 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 sections 262 and 1121 of the Family Court Act, an affidavit demonstrating merit to the appeal, pursuant to CPLR section 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 03-00702). 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 **cannot** 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 or her appeal **must** be perfected within nine months of the date of service of the notice of appeal or the 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 demonstrating (1) a reasonable excuse for the delay; (2) an intent to perfect the appeal within a reasonable time; and (3) sufficient facts to demonstrate a meritorious 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 or her of counsel's name and address.

Unless a specific deadline date is given, an assignment order directs that the appeal 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 or her to advise you of potential issues. If he or she cannot be reached at the address stated in the letter accompanying the order of

assignment, you may be able to locate him or her 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 or she 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 (see Family Court Act § 1121 [7]).

2. Filing Delays If the transcript is not promptly filed, contact the administrative court reporter.

In the **Fifth Judicial District**, contact Ms. Valerie L. James, Management Analyst, Office of Court Administration, Fifth Judicial District Office, 600 S. Salina Street, Syracuse, NY 13202; (315) 671-2121.

In the **Seventh Judicial District**, contact Mr. Michael J. DeVito, Principal Management Analyst, Room 140, Hall of Justice, Rochester, NY 14614; (585) 428-5069.

In the **Eighth Judicial District**, contact Mr. James Gainey, Principal Management Analyst, 110 Franklin Street, Buffalo, NY 14202; (716) 845-2127.

If the filing of the transcript is substantially delayed, consider making a motion for summary reversal. Such motion must be supported by proof that the missing transcript is relevant and necessary to a determination of the appeal and cannot be otherwise reconstructed.

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 cannot 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 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, and 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, section 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 Family Court order settling the record 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:

- the CPLR 5531 statement
- date-stamped copy of the notice of appeal
- proof of service of the 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
- the **original** stipulation of counsel or the Family Court order settling the record (original or certified copy)

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. Where there are audiotapes instead of stenographic minutes, the Family Court is required to send the audiotapes to a transcription service, certified by the Office of Court Administration, for transcription. Assigned counsel is **not** required to arrange, or to pay, for such transcription.

b. Format of the record

Both the CPLR and Court rules require that

- the record be reproduced on 8 ½ 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. **Note:** The Court will not approve disbursements for professional printing (as opposed to binding) of a record or brief.

You may **not** use three-ring binders and should not use staples or metal prongs that protrude (metal fasteners may be 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, appellate counsel 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 ½ 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.

The brief should indicate, in the upper right hand corner of the cover, 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). If no oral argument time is requested on the cover of the brief, the appeal will be deemed submitted and counsel will not be permitted to argue.

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.

- a respondent on appeal must make a formal motion on notice to all parties and the law guardian to obtain an **extension** of time to file a responsive brief (letter requests will not be accepted).

- 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 to all attorneys or parties a notice to appear for oral argument on a specified date during that term.

E. Timely Request Extension of Time to Perfect Appeal

1. **Extension application** If, for good cause, an appeal cannot 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**.

- If an assigned counsel misses a conditional dismissal extension date, assigned counsel **must** make a formal **motion** to vacate the dismissal and extend the time to perfect the appeal. The motion must include an affidavit showing (1) a reasonable excuse for the failure to comply with a Court-ordered extension date; (2) an intent to perfect the appeal within a reasonable time; and (3) sufficient facts to demonstrate a meritorious appeal. The motion must also be made on notice to all parties and must be made within one year of the date of the dismissal (22 NYCRR 1000.13 [g]).

IV. Duties of Appellate Counsel upon Receipt of Decision-Order:

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

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

Questions:

If you have any questions concerning a Family Court assignment of counsel, you may contact Frances E. Cafarell, Esq., Court Clerk Specialist, at (585) 530-3112 or fcfarell@courts.state.ny.us. If you have any questions

concerning a Family Court motion in general, you may contact Alan L. Ross, Esq., Court Clerk Specialist, at (585) 530-3137 or aross@courts.state.ny.us. If you have any questions concerning the filing of a Family Court record or brief, you may call the Court at (585) 530-3100 and ask to speak to one of the Court's Calendar Attorneys.