

May 4, 2022

Setting Up Your Discretionary Review Cases for Success

I. Technical assistance resources

- a. **Please** call our MDR resource attorneys if you are considering filing an MDR
- b. Division I: Jan Trasen | jan@washapp.org (206) 587-2711
- c. Division II & III: Jodi Backlund | jodi@washapp.org (360) 339-4870
- d. Procedural questions: appellatehelp@opd.wa.gov

II. Differences between NDR and appeal

- a. NDR is not an appeal; COA must first decide whether to even consider your issues
- b. To be eligible for discretionary review, a case must meet the criteria of RAP 2.3(b)
 - i. obvious error which would render further proceedings useless;
 - ii. probable error that substantially alters the status quo or substantially limits the freedom of a party to act
 - iii. so far departed from the accepted and usual course of judicial proceedings as to call for review by the appellate court; or
 - iv. superior court certification
- c. Except for (iv), these are almost always arguable—*almost*

III. Types of issues that make a strong vs. weak NDR

- a. Legal issues (de novo review) vs. factual issues (substantial evidence) vs. discretionary decisions (abuse of discretion)
- b. Legal issue examples (strongest):
 - i. Was the court authorized to order ICPC for out-of-state parent before a dependency finding?
 - ii. Did the court err by refusing to return children home after finding no reasonable efforts at shelter care?
 - iii. Were trial court's factual findings sufficient to support legal conclusion that active efforts had been provided?
- c. Factual issue examples (weaker):
 - i. Was the juvenile court correct in finding the parent had not made substantial progress?
 - ii. Did the social worker's testimony about parental deficiencies justify the juvenile court's refusal to return child home?
- d. Discretionary issue examples (weakest):
 - i. Did trial court abuse its discretion by removing the child from relative placement at an interim review hearing?
 - ii. Did the court abuse its discretion by reducing family time at a review hearing?

IV. Mootness, ripeness, redressability

- a. Mootness—when the appellate court can no longer provide effective relief due to change of circumstances—dooms many MDRs. Moot cases can still be argued, but ideally we want to have these heard promptly enough that they aren't always moot.
- b. Redressability—the appellate court needs to be able to provide a remedy. Often tied to mootness, but even when a case isn't moot, we must be able to articulate what remedy we are seeking, and it must be a valid remedy within the appellate court's powers.
- c. Ripeness—less common, but still important. Appellate court will not consider unripe issues, will not order the Department or juvenile court to refrain from taking an action it hasn't yet taken, and may not take.

V. Strategies

- a. Call your resource attorneys!
- b. Consider how you can bolster the evidentiary record. Can you make a proffer, file a declaration, file an expert report, etc.?
- c. Consider filing a motion to reconsider. If the juvenile court misapprehended the facts, a motion to reconsider may be a faster, more certain way to correct that than trying to get into the Court of Appeals
- d. Consider filing a stand-alone motion, getting the court to focus on an issue that may not have been adequately considered at a review hearing, for instance
- e. Propose changes to the draft order—make sure that any problematic parts of the trial court's oral ruling make it into the order. If the trial court relied on improper or insufficient evidence, make sure that the order specifies exactly what the findings and conclusions are based on.
- f. Counseling your client—try to set realistic expectations for your client. Let them know this isn't an appeal, the court may refuse to hear it. Don't file MDRs purely to vent the client's anger, they are a poor tool for venting.
- g. Motion to stay—ask in the trial court first. Staying an order is the surest way to ensure that an appeal doesn't become moot!
- h. Emergency motions—can't be used in every case, but for truly emergent issues (like leaving the country with the child) they may be needed