State Court Administrative Office
Child Welfare Services Training Division

Materials for this presentation can be found at the following site:

http://courts.michigan.gov/scao/services/CWS/TrainingDevelopment.htm

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Avoiding Preservation Pitfalls: How trial attorneys can preserve issues for appellate review

"Spotting, Preserving and Evaluating Issues for Appeal"

Professor Vivek Sankaran
Child Advocacy Law Clinic
University of Michigan Law School
Ann Arbor, MI
vss@umich.edu

Spotting Issues

Basic Issues

Evidentiary Errors

Examples

Rules of evidence apply at the adjudication trial
Rules of evidence apply at some TPR hearings
Rules of evidence apply when adjudicating rights of non-offending parents

Spotting Issues

Trial court's findings

Standard for challenging findings of fact – clear error

Types of errors

Judge made simple mistake
Judge ignored overwhelming contrary evidence
No properly-admitted evidence supports finding

Spotting Issues

Conclusion of unfitness – constitutional requirement

Findings as a whole do not add up to clear and convincing evidence of unfitness.

No nexus between parent's "problem" and harm to child

Improper legal standard applied

Not "clear and convincing evidence"
Burden-shifting to parent to prove fitness
Does failure to comply with services establish unfitness?

Spotting Issues

Constitutional Issues (State or Federal)

Substantive and Procedural Due Process
Right to Counsel(?)

Equal Protection – In re CR(?)

Others

Spotting Issues

Violations of Federal and State Statutes

ASFA/ICWA/CAPTA/Fostering Connections/ADA
- Reasonable efforts

ICPC

Funding Statutes v. Enforceable Rights

Preserving Issues

Is the issue preserved?

Most issues must be "preserved" at trial level
Preservation = issue must be raised first before trial judge
Gives trial judge chance to "fix" problem (if it needs fixing)

Why is issue preservation important?

- Affects standard of appellate review
- People v. Carines, 460 Mich 750 (1999)
- Unpreserved errors are reviewed under the "plain error" standard. The inquiry is whether "the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." Tough standard to meet.

Preserving Issues

How does trial counsel preserve issues?

Objections

Offers of proof

Preserving Issues

Objections – Did trial counsel object?

Specificity

Timing

Running/ongoing objections permitted?

Consider making the objection in writing

Preserving Issues

Offer of proof – Did trial counsel make one?

Oral

Written (affidavit of counsel or witness)

Preserving Issues

Offer of proof

Content of offer of proof

Identify error of law

- Why was the document admissible?
- Why did trial counsel have the right to call the witness?

Identifying information that *would have been* admitted or excluded if the judge had ruled correctly.

- What would witness have said if judge had properly allowed further examination?
- What would witness have said if judge had properly allowed counsel to call her?
- What would document have shown had judge properly admitted it?

Preserving Issues

Can appellate counsel preserve or "create" the issue?

Post-trial motions

Motions for new trial (Ineffective assistance, other reasons)

Remand for a Ginther hearing – People v Ginther; 390 Mich 436 (1973)

Preserving Issues

Does the particular issue *need* to be preserved?

Subject matter jurisdiction

Certain ICWA issues

Evaluating Issues

Harmless errors – MCR 2.613

What is "harmless error?"

- **Appellate courts only care about the mistakes that matter**
- **Which errors matter? Ones that call the final result into question**

Evaluating Issues

Harmless Error Analysis

Can you track the mistake to the final result and show that the mistake affected the result?

If it didn't affect the result, error was harmless

If error was harmless, it is *almost* never worth arguing on appeal

Evaluating Issues

Types of harmless errors

Harmless Error 1. Trial court erred in admitting evidence but made no finding based on that evidence.

- Ex: Trial court erred in admitting child sexual abuse hearsay but made no findings about sexual abuse.

Evaluating Issues

Types of harmless errors:

Harmless Error 2. Trial court made finding based on improperly-admitted evidence but other evidence (properly admitted) supports the finding.

Ex: Trial court erred in admitting child sexual abuse hearsay but properly admitted certified copy of Father's conviction for sexually abusing child.

Evaluating Issues

Types of harmless errors

Harmless Error 3. Even if the finding is not supported by properly-admitted evidence, that finding is not important to the conclusion of unfitness.

Ex: Trial court made finding about sexual abuse based purely on improperly-admitted evidence. But even without that finding, the court had ample evidence of physical abuse, made findings about physical abuse, and relied primarily on physical abuse to terminate Father's rights.

Evaluating Issues

Is the issue one that doesn't implicate a harmless error analysis (a/k/a "structural error")?

Do you *need* to show harm?

Is the error so basic to fundamental rights or so basic to a fair trial that the error can't be harmless?

Open question whether structural error analysis applies in civil cases. See, e.g., In re Hudson, 483 Mich 928 (2009).

Evaluating Issues

Is the issue one that doesn't implicate a harmless error analysis (a/k/a "structural error")?

Types of potential structural errors:

- Counsel issues
- Judicial bias

Evaluating Issues

Counsel Issues

Denial of counsel

- Counsel not appointed
- Counsel improperly struck
- Counsel improperly waived

Evaluating Issues

Counsel Issues

Constructive denial of counsel

- Attorney appointed so close to trial that he/she could not possibly provide any meaningful assistance
- Attorney not member of bar, fraudulently obtained license
- Attorney slept through trial or missed significant portions of trial
- Attorney did absolutely nothing on case (but must distinguish from run-of-the-mill ineffective assistance)
- Attorney had conflict of interest

Evaluating Issues

Judicial bias

- Close personal/professional relationship with party or attorney
- Information from extra-judicial sources
- Prejudice against class
- Extreme behaviors calling into question judge's role as impartial arbiter

Questions/Comments

- Feel free to contact Vivek with questions:

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vss@umich.edu

- Use the ABA parents' attorneys list serv
- More information at http://new.abanet.org/child/Pages/parentrepresentation_home.aspx