Fox Rothschild Podcast

Texas Family Law Podcast Series: Appellate Court Issues

Featuring Laura S. Hayes and Jamie-Lee Denton of Fox Rothschild LLP and Chad Ruback, Appellate Lawyer

Laura Hayes: Hi, welcome to episode six of the Fox Family Law podcast. Today, we are here with my associate Jamie-Lee Denton, and an appellate lawyer Chad Ruback who is going to talk to use today about family law and appellate court issues.

Jamie-Lee Denton: Hi everyone, we are happy to be back and happy to be here with Chad—one of the most well-known appellate attorneys in the DFW area, or even America as some of his honors have shown. You have been on Super Lawyers, spoken at law schools; you really do it all, Chad. We are happy to have you here today.

Chad Ruback: Thanks for having me, Jamie-Lee.

Jamie-Lee Denton: Like we discussed, I just want to introduce this and talk about appellate law and the process of what you look for and what goes into the appeals process first.

Chad Ruback: Thank you very much. The very first thing that I like to tell anybody who asks about appellate law is the sooner you start thinking about it in a case, the better. I wish that people would start thinking about potential appellate issues as early as possible in every case. It seems like that is becoming more and more common in business litigation cases, much less so in family law cases. I cannot recommend it more to family lawyers and to their clients.

Jamie-Lee Denton: If someone had no idea what an appeal is, or what happens in the court of appeals, or anything of that nature, how would you explain that process?

Chad Ruback: Let them know that, in the court of appeals, there are no witness stands, there are no court reporters, and there is no new evidence. In probably about half of cases, there is not even an in-person hearing. You can certainly request one. If the court grants one, the entire hearing, which is 45 minutes and that is total for both sides and everything they have to say. The most important thing to remember about a court of appeals oral argument, or the court of appeals practice, is there is no new evidence. If it is not in the record in the trail court, it did not happen. They cannot hear about new things that happened, they cannot hear about something you forgot to say in the trial court. If it is not in the record, on black and white paper, it did not happen.

Jamie-Lee Denton: So you are saying if someone said, "My husband did this to me last week and I really want to bring it up," that cannot be seen or heard by a court of appeals?

Chad Ruback: No new evidence, regardless of whether it happened after the trial court proceedings or beforehand and people just forgot to mention it. If it is not in the record, it did not happen.

Jamie-Lee Denton: So how would you recommend attorneys can help prepare a record, and help prepare for this during the trial, or the discovery phase?

Chad Ruback: First off, just think about it. It is not on most people's radar screens. I think having the appeal on your radar screen early, that takes care of 90 percent of the issues. Think about it. I let folks know that when you are about to file a petition for divorce, think about the appeal before you even file your petition, when you're going to file your answer to the petition, when you're going to file your counter claims. Keep thinking about the appeals; do not just be singularly focused on the trial court.

When you have a case in the trial court, you should have, in my opinion, three objectives. The first one is obvious, the first one is on everyone's radar screen already, and that is to win in the trial court. If you are filing a motion, you want to win that motion in the trial court. If you are going to trial, you want to win that trial in trial court. That is not something anyone needs any help on, that is something they will already know. If that is not on your radar screen, then you have bigger problems than those that I can solve.

The second objective, one that many people do not think about as often, is not just winning but winning in such a way that you're going to be able to maintain that win on appeal. It does not do you or your client any good at all if you win in the court, you win resoundingly, you get the judge to sign an order favorably on your motion, and you get the judge to sign an order favorably on your decree, on your modification proceeding, what have you. It does not help you ultimately if you cannot win it on appeal. Your client is going to be thrilled when the judge signs that order saying "your client wins and wins resoundingly," gets everything he or she wanted, but ultimately your client is not going to be very happy with you or the process in general if you can't keep that win on appeal. So do not just think about winning, think about winning in such a way you can maintain that win in a court of appeals.

To do that, you need to be especially careful when the judge absolutely loves you. I know you are lovable Jamie-Lee and all your clients are as well, but that is where you need to be really, really careful. Occasionally you will be in a situation where the judge likes you a lot more than the judge likes your opposing counsel. Many people think that is a great situation to be in—the judge will give me everything that I want. Yes and no, as to that being an ideal situation. Sure, it is great, but it is also fraught with danger. If a judge is going to give you everything you ask for, you need to be careful not to ask for anything you can't keep on appeal, because if you ask the

judge for more than you can keep, and the judge loves you so much, the judge is going to give you everything you ask for, is going to sign everything you put in front of the judge, then you need to deal with that on appeal. Your client is not going to be very happy if your case gets reversed on appeal and sent back for a do-over from the trial court because you asked for more than you are entitled to. It's going to mean the client is going to need to spend a lot more money, not just defending the case on appeal, but the re-do of everything you've already done in the trial court. It is going to be a lot more stressful for the client because you are going to be dealing with that for another few years.

It's not at all uncommon when a case that is won in the trial court, in the family courts, but maybe everything wasn't done right like the court of appeals wants—if it gets sent back to the trial court for a do-over, then gets sent back up on appeal, ping pongs back and forth, then it's going to cost the client a lot more money than if everything were done the first time around in a way that the court of appeals would rubber stamp, would approve of everything that's been done. That is objective number two, remembering win the war, do not just win the battle. It's a lot of fun winning battles, but it doesn't help you winning battles if it's going to ultimately cause you to lose the war.

Also something to keep in mind is the judge who absolutely loved you the first time around, gave you everything you asked for, if you ask that judge to give you something and the judge goes along with what you're asking for, and that judge gets reversed on appeal, that looks really bad for the judge and the judge might not like you so much the second time around. You might have gotten the sun and the moon, everything conceivable the first time around, if you get that judge ticked off at you for causing that judge to have a black mark, reversed on appeal, having that judge's perfect record spotted, if you will, next time around the judge might be favoring opposing counsel instead of you.

Jamie-Lee Denton: It affects your reputation and your ability to advance your client's next case, or the next client.

Chad Ruback: Exactly. The judge is going to remember that. The judge is going to remember the lawyer the judge really trusted, the judge really counted on to keep the judge going in the right direction. If the lawyer betrays that trust, that is not just going to hurt that client years and years down the line. Potentially even if that client has a different lawyer. It is going to hurt that lawyer years and years down the line, even with different clients. You definitely want to win in the trial court, no doubt, but win in such a way that you can keep your win. It is going to be best for you, it is going to be best for your client, it is best for the legal system in general. Keep that in mind—win, but win in a way you can keep that win on appeal.

Your third objective in my mind is, heaven forbid, there is a chance you could lose in the trial court. You want to make a record when in the trial court so that, heaven forbid you lose, you can

get that loss reversed on appeal. I will often get calls from lawyers after the case is completely over saying, "we just lost an appeal, now what?" Well, there are certainly some things an appellate lawyer can do to help things out at that point, but if you haven't thought about the appeal at all until you've lost, you're really going to hamstring the ability for an appellate lawyer to help you in a reversal on appeal. There are a lot of things that need to be done in the trial court as you are going along if you are hoping for an appeal.

Other side of that coin, I will get calls from lawyers who have not thought about the appeal before they win an appeal, and the other side has filed an appeal and is making some points that are persuasive to the appellate court. That is not the time to be calling an appellate lawyer for the first time. I suggest to folks that they be thinking about the appeal throughout, whether they want to handle the appellate issues in the trial court themselves, or consult with an appellate court lawyer—there is not a right or wrong there. There are plenty of lawyers who handle their own appellate issues while also handling the trail court strategy. That is A-OK, I have no problem with that at all. I think it's wise to at least be considering the possibility of consulting with an appellate lawyer to the extent you as a trial lawyer have any questions about appellate issues.

I liken trying to handle objectives two and three—thinking about the appellate issues, while also working on issue one, winning the darn thing at the trial court—to juggling while driving your car. Not very easy to do. In theory, it is possible, so I do not want to say no they cannot do it. First off, if you are going to be doing it you need to be giving a lot of thought to both, you need to be an expert at concentrating on the juggling and on the driving. You cannot just neglect the juggling because you are busy driving, and vice versa. You cannot neglect either of your two tasks. Sometimes it makes sense to visit with someone, or somewhere bring in the appellate lawyer to be part of the team. To be there for everything they do, maybe that is right for a case, maybe it is not. Another option is to have an appellate lawyer as kind of a behind the scenes consultant—maybe calling the appellate lawyer for an hour every few months, just saying, "listen, here is where we are in that case we talked about a few months ago. Do you have half an hour to visit with me and talk about strategy for the next filing?" Another option would be thinking about all these things yourself and not talk to appellate lawyer at all.

I would say there is some CYA value involved in at least bringing this to the attention of the client early in the case, say "listen, there are a lot of things we are going to need to be doing at the same time. It might make sense for us to consult with an appellate lawyer from time to time as to crazy appellate issues that might come up in the trial court." Explain to them the three objectives here, you do not just want to win in the trial court, you want to win in such a way that you can maintain your win on appeal and, if heaven forbid you lose, well you can get that reversed on appeal. Say, "This is something we might want to consider."

Ultimately, that is the client's decision, but I liken that to a physician mentioning the possibility of a patient consulting with a specialist in an area. If your physician mentions to you "hey, you might want to talk to a hematologist about this. They might have something to bring to the

table that an internist wouldn't necessarily know." If the patient says, "No, I don't want to talk to a hematologist." That is A-OK, but the internist in that case has covered his tail, because then if later thing are not quite what they seemed, the patient cannot visit with the doctor and say "I wish you would have told me that I should have consulted with a specialist two years ago." So I think there is some CYA value there. You do not need to push your client to talk to an appellate lawyer. I think not only can it benefit the case, but also it can benefit the lawyer's reputation. If you mentioned "hey listen, in the past we have brought in an appellate lawyer to visit with for an hour or two hours every few months, just to make sure we're going in the right direction. Is that something you would be willing to consider?" I do not see a downside to doing that. There, I have talked entirely too much.

Laura Hayes: Well, that actually leads to a question. Many of our clients come to us and they are overwhelmed by the divorce process in general. How do I hire a lawyer, and then how do I get this done? Now we have added an extra step of the appellate process, so that may seem very overwhelming to a potential client. So how would you explain to a client to address those concerns and those anxieties of "Oh my gosh not only do I only have to think about a divorce, but now I have to think about how do I appeal it if I lose, or if I win."

Chad Ruback: I would use the physician example that I just used. When you go in and get some bloodwork and something just looks a little tiny bit different than usual, is it a bad idea to talk to a hematologist, just to get an hour of that person's time? I think that is something that an intelligent person could appreciate. It does not hurt to have someone visiting, consulting as part of the team.

Sometimes the client will want to speak to me directly—they will be very hands on and want to ask me his or her questions directly. Other times, the client will say something like "I trust you, if you want to consult with someone else, and then bring whatever information is helpful back to me, do it but I don't want to know how sausage is made." That is fine, too. I have had both as clients. I've had some clients that I've never met, that I've never spoken to, who have signed a consulting agreement with me saying they'll pay for an hour or two of my time here and there, but other than that they have had no contact with me. I have had other clients that I talk to more than I talk to the trial court lawyers. I have one of those clients right now who probably calls me 2-3 times per week. I have had days where I have talked to him more than I have talked to my wife. He just wants to make sure, "are my trial lawyers dotting all their I's and crossing all their T's?" He has outstanding trial lawyers and I tell him that every time. I say, "Sir, your trial lawyers are doing a great job for you. They will let me know if there is something they need to visit with me about." It gives him some comfort level knowing there is someone helping. I think they love the fact that he is calling me and bugging me and I am saying nothing but wonderful things about the work that they are doing. It reassures him and gives him a comfort level with them because he does not feel comfortable always evaluating the work they are doing. He loves seeing someone else watching over their shoulder and saying, "Wow, they're great. They're doing a rock star job for you." It helps them both.

Jamie-Lee Denton: Another thing I wanted to ask, how can you prepare your documents, or your pleadings, to focus on what the court of appeals will be looking for at the trial court level?

Chad Ruback: Think of the court of appeals justices; just think of them—that helps a lot. The judge has likely seen your client, if not heard your client speak a number of times at hearings. Court of appeals judges will never see your client; will never hear your client speak. So think about how things are going to look on the written page for someone who does not know that your client is such a wonderful person. Think about that when you are drafting affidavits. Think about that when you are drafting motions. Think about that when you are speaking on the record at a hearing, you or your client, either one. The court of appeals justices will not have the benefit of seeing how honest looking your client is, and how sincere and what a wonderful parent your client is. All they are seeing is what is in black and white on the page. I think keeping that in mind that will get you 95 percent of the way there.

Jamie-Lee Denton: More description, more elaboration, even if you think the trial court already knows, you may need to add a little bit more just to preserve the record.

Chad Ruback: Yeah, just think about "when I'm saying this, I'm not just saying this to the judge who already knows how wonderful my client is, what a wonderful parent, what a wonderful spouse, that sort of thing. I am saying this for the benefit of people who have never seen my client and will never see him or her. Will never hear his or her voice, who won't have all this background." So maybe include a little more detail for the benefit of your other audience. That is something to be very much cognizant of, you do not just have the trial court judge as your audience, you have the court of appeals justices and your audiences and potentially you might even have the Supreme Court justices as an audience down the road. I hope not. I do not want any of my friends to ever need my services because by the time someone needs to visit with an appellate lawyer, it means they are not necessarily in the most fun situation to deal with. But that's the best thing to do, without getting into a lot of technical issue, is just be cognizant you have another audience and they don't know your client the way the trial court judge does.

Jamie Lee-Denton: I think that is a great point. Sometimes you have deadlines and you are coming up against those and you have to remember, "OK, let's take a little extra time and preserve this for the other audience."

Chad Ruback: It is easier said than done. It is very easy to say, "Oh, be aware you have two audiences." You already have a bunch of short deadlines and what not. I do not want you to think that I am saying this is easy to do all this. It is not. That is why some trial court lawyers choose to consult with an appellate court lawyer. Sometimes someone will say, "Hey, Chad, could you spend 20 minutes just skimming over this thing I drafted and make sure that it's going to make sense to an appellate justice in addition to the trial court judge? I know my trial court judge," the trail lawyer is going to say. "I know she is going to like this, I know she is going to understand it. She's going to be impressed with it, but when it goes to the second floor in the

court of appeals, are they going to understand it?" I do not think it hurts sometimes to pay someone for 15 to 20 minutes of time to have that second set of eyes look at it with a very different perspective.

Jamie-Lee Denton: OK. I wanted to ask one of your favorite family law cases that you have appealed. Can you talk a little bit about that?

Chad Ruback: That is an easy one. The highlight of my career was two years ago in March 2019. I was able to win a significant win here in the Dallas Court of Appeals. It followed a significant loss.

A few months before that, I had a family law case in which I was representing the ex-wife and my client had missed a deadline. Long, long before I had ever heard of her, she was represented by someone else long, long ago. She missed a deadline—specifically the deadline was a two-year deadline to seek enforcement related to arguably tangible property. In the family code, you have two years to seek enforcement related to tangible property. Her trial court lawyer didn't think it was a deadline being missed, didn't think it was a deadline at all because the issue that needed enforcing was money and the trial court lawyer thought, ultimately and rightly so, money is not tangible property, we don't have a two year deadline to do that. Trial court lawyer won in trial court, it was all good, and everything was great.

The ex-husband filed an appeal. I was representing again the ex-wife on the appeal and I lost. I lost on appeal. I lost badly. It was a 3-0 unanimous opinion by the three justices saying that money is tangible property, the two-year deadline did apply, and my client missed the two-year deadline. So I lost, she can never enforce this family court judgement as to the money because the money, according to the three-judge court of appeals panel, was tangible property.

I then sought en banc review, which is a review from the entire court. The Dallas Court of Appeals, for example, has 13 appellate court justices on it. They generally divide into panels of three justices for each case. So I lost 3-0 and I decide this is a case that merits my seeking review from the whole court. I am going to ask all 13 of them to review this matter. They do not do it very often and the reason they do not is that it would defeat the purpose of dividing into panels of three if every single time someone was unhappy with what their panel of three judges did, we will ask all 13 to do it. There would be no point of dividing into panels of three, there would be no efficiency gained if every time someone was unhappy, which is every single case.

So I sought review from all 13 of the judges. In the interim, two of the three judges who were on my panel left the court. There was an election in the interim. Surprisingly the chief justice asked them to come back and sit on the en banc court. So I was not just arguing to the 13 justices who comprised the entire court, I was arguing to all 15 justices—the 13 on the court, plus the two who had been on my panel that had since left the court. I was thinking that is not a good thing.

The three people who voted against me, all three of them are going to be sitting with the other justices on the court hearing this.

I thought it was still worth a shot. Turned out, I won in a 15-0 decision. Not only did I convince all the judges who knew nothing about the case, I convinced the three that they had gotten it wrong. Dallas Court of Appeals in a 15-0 en banc decision ruled in my favor that money is not tangible personal property and, consequently, there was no two-year deadline, so my client did not miss the deadline. To the best of my knowledge, there has never been a 15-0 decision in any other case in the history of Texas jurisprudence. So that's why it's the highlight of my career. I will never, ever be able to do that again, but I was thrilled to do it once. Maybe another day I will get another 13-0, but I am not ever going to get another 15-0.

Jamie-Lee Denton: Congrats, and that was a family law one. I have one last big question for you. What is your favorite family law movie, or TV show?

Chas Ruback: I'm going to go old school on you. *Kramer vs. Kramer* 1979.

Jamie-Lee Denton: See I have not seen that, am I going to be in trouble?

Chad Ruback: You are not. I did not see it when it came out. I was in the first grade when it came out and you were undoubtedly not yet born. The spouses were played by Dustin Hoffman and Meryl Streep. As you know, they are both outstanding actors. The movie tells the story of the couple's divorce and its impact on their young son. The reason I am saying that it is my favorite is because people did not talk about it much then. People did not talk about the impact of divorce on small children. Additionally, the film brought up a bunch of other issues people didn't talk about much in the 1970s—gender roles, women's rights, father's rights, work-life balance, co-parenting. I do not even know that co-parenting was a word in 1979, but co-parenting was a very important issue for spouses who were divorcing with kids and this 1979 movie *Kramer vs. Kramer* brought that issue to the forefront. That was something people talked about in desperate times; it was not something considered dinner conversation. Now it's something people talk about all the time, but not back then. I would say because it brought a bunch of issues to the forefront of consciousness, that is going to be my call today.

Jamie-Lee Denton: OK, well thank you so much. I am going to go check out that movie. Thanks for joining us, Chad.

Chad Ruback: Thanks for having me.