MIDWIFERY AND THE LAW: WAIVER OF APPELLATE REVIEW

by

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BACKGROUND

Parties have a right to appeal trial court decisions made in their cases. Appellate courts review cases for "trial court error." A trial court errs when, for example, it incorrectly allows or precludes evidence, rules against the great weight of evidence, or applies laws or rules to a case when it has no authority to do so (lack of jurisdiction.)

For the right to have an appellate court review an issue, parties must "preserve" the error at the original trial and present the issue properly to the appellate court. An attorney preserves an error at trial by making a timely motion to the trial court followed by argument about why the action would be a mistake and how the court can correct or prevent it. For example, a lawyer objecting to an opposing counsel's question to a testifying witness tells the court it would be wrong to allow the answer into evidence. The stated ground for the objection is the attorney's *argument*. Objections then are motions that preserve errors for appeal. Without an objection, a trial court would not err by letting a witness answer, even if the question was objectionable. When a judge sustains an objection, the non-objecting party may make a motion to show the trial court how precluding the testimony would be unjust. If overruled, the motioning party can later appeal, citing the sustained objection as error.

Parties must also preserve issues concerning the constitutionality of laws or state actions. Typically, a party must present and argue to the trial court how a law or action violates the constitution to preserve that issue for later appeal. Appellate courts can exercise discretion to rule on the constitutionality of a law or action without preservation in the trial court. But the *right* to have an appellate court rule on the matter requires preservation.

In cases involving midwives, waiver of appellate review has concerned the validity of licensing rules, constitutionality of laws and bond conditions, jurisdiction, conclusions of law, and judge bias.

Examples

In 1992, South Dakota law allowed only licensed nurse-midwives or doctors to practice midwifery.[i] A lay midwife, Jones, was permanently enjoined from engaging in any acts or medical functions of a nurse-midwife after assisting in births.[ii] In 1995, Jones was indicted on a separate charge of practicing as a nurse, but was acquitted. Later, the State Boards of Nursing and Medical and Osteopathic Examiners learned Jones was engaging in midwifery and requested she be held in contempt for violating the 1992 injunction. Jones filed a "response affidavit" and a "statement of indigence."

The trial court found Jones had violated the injunction and sentenced her to jail, but suspended the sentence on condition she file a $5000 bond and not violate the injunction again. Jones filed a "motion for reconsideration." Her motion did not raise the issue of subject matter

jurisdiction, the constitutionality of the bond condition, or the licensing statute. Nor did Jones argue the bond issue to the court. The court denied the motion for reconsideration, and Jones appealed on grounds that the Boards did not sufficiently show subject matter jurisdiction, that the $5,000 bond amount was unconstitutional because she was indigent, and that the law requiring licensure for midwives was unconstitutional.

On appeal, the South Dakota Supreme Court stated that, though Jones had not raised the issue of jurisdiction in the trial court, it would address it because subject matter jurisdiction by law could not be agreed upon or waived.[iii] The Court ruled that the Board's pleadings were sufficient to show jurisdiction. But the appellate court declined to review Jones' point about the constitutionality of the bond condition and licensing statute because Jones did not raise the issues in the trial court and because the matter did not present an "existing emergency to public policy." In addition, Jones' affidavit of indigence by itself did not preserve error on the bond issue. Preservation of that issue required argument in the trial court.

In 1984, Indiana considered midwifery to be the limited practice of medicine[iv] and thus required at least a limited medical license to practice it. A lay midwife, Smith, conducted manual and internal vaginal examinations, pelvic measurements, exams for fluid retention, cervical examinations and dilations, monitoring fetal heartbeats, uterine measurements, blood and urine exams, assisted women in childbirth, prescribed vitamins, and gave advice about diet.[v] The Indiana State Court enjoined Smith from practicing "medicine and midwifery." At the hearing, Smith filed a motion with the trial court to correct errors, which was denied. Her motion did not allege that the statutes requiring a medical license to practice midwifery were unconstitutionally vague. Thus, when Smith appealed on those grounds, the Indiana Appellate Court ruled that her right to review of it had been waived.

In 1986, The State of Missouri sought to enjoin a lay midwife from practicing midwifery or medicine.[vi] Missouri prohibited unlicensed practice of midwifery.[vii] At trial, the lay midwife, Southworth, testified that she had assisted at childbirth, but did not have an office and did not advertise or earn a regular living from midwifery. The court permanently enjoined her from practicing midwifery in Missouri. Southworth appealed on grounds that the statute prohibiting the unlicensed practice of Midwifery was unconstitutionally vague by not defining "midwifery" or "medicine." Southworth also mentioned in the "jurisdiction statement" section of her appellate brief that she did not have an office and did not advertise or earn a regular living from midwifery. She did not, however, mention it in the "points to be argued" section of her brief. The Missouri Supreme Court elected to review the vagueness issue, but noted that contentions not presented in the "points to be argued" section of an appellate brief were waived.

In Firman v. State Bd. Of Medicine,[viii] a nurse-midwife in Pennsylvania, Firman, forged a prescription for herself in Maryland. She pled guilty to obtaining a controlled substance by fraud and for possessing the substance. The State Board of Nursing in Pennsylvania then suspended Firman's nurse-midwife license under Pennsylvania's medical practice act which mandated suspension of a license if the license holder was convicted in another state of an offense that would have been a felony had it occurred in Pennsylvania.

On appeal Firman argued that the automatic suspension rule was inapplicable because the offenses she was convicted of in Maryland would not be felonies in Pennsylvania. But because Firman did not raise the issue in the "Statement of Questions Involved" section of her appellate brief, the issue was waived.[ix]

In 1966, Maryland considered midwifery to be nursing.[x] A couple had hired a lay midwife, Hunter, to perform prenatal care and to deliver the baby at home. Hunter told the couple she was a "traditional" midwife, not a licensed nurse-midwife, and charged a fee. After complications arose, the baby died and the State of Maryland charged Hunter with unauthorized practice of registered nursing.[xi] At trial, there was conflicting testimony between Hunter and an investigator who had been at the arrest. Hunter felt the judge was not impartial, but she did not file a motion to recuse the judge. During trial, the judge determined that the investigator's testimony was the more credible, partly based on the judge's experience in hearing the investigator testify in other cases. The trial court convicted Hunter of unauthorized practice. On appeal, Hunter argued that the trial judge had been biased against her, and offered the trial court judge's comments as evidence. The appellate court ruled that Hunter had waived her right to review the judge's alleged bias because she had made no motion to recuse the judge during trial.

In 1988,[xii] Florida required a license to practice midwifery, whereupon qualified applicants became licensed "nurse-midwives." Two lay midwives applied for the license. Before the Board decided on the candidates' qualifications, Florida passed new requirements changing the qualifications to ones the candidates now did not meet, and their applications were denied.

The lay midwives petitioned the Department of Administrative Hearings to have the rules declared invalid and to have their applications judged by the former rules. The hearing officer found that the new rules were "invalid exercises of delegated legislative authority" and that the midwives should have the previous rules applied to them. The Department of Health did not contest the hearing officer's finding that the new statute was invalid, nor did they argue against it. Thus it waived the right to contest the validity of the hearing officer's finding on appeal.

In 1987, a non-physician in Utah, Hoffman, who had diagnosed a patient's stomach pains to be various ailments and had prescribed celestial water and special pillows as cures, was charged with engaging in the unauthorized practice of medicine.[xiii] At trial, after all evidence was presented, Hoffman asked the court to direct a verdict of "not guilty." Hoffman did not propose an alternate jury instruction or object to the original instruction given. The trial court denied the motion and then read the jury instructions. The jury found Hoffman guilty.

When Hoffman cited on appeal that the trial court did not instruct the jury properly about the definition of "practicing medicine," the Utah Supreme Court ruled that because Hoffman did not propose an alternate jury instruction, or object to the original instruction given, he had not preserved his argument.

Hoffman also argued on appeal that the statute was unconstitutionally vague and overbroad. The Utah Supreme Court pointed out that Hoffman had not distinguished between "vagueness" and "overbreadth," and in fact was arguing only "overbreadth." The review court nonetheless ruled that the statute was neither vague nor overbroad as it applied to Hoffman.

In 2003, a midwife, Miller, per a plea agreement, pled guilty to attempted unauthorized practice of medicine and misdemeanor drug possession in return for the state dropping an illegal drug possession charge. When the prosecutor subpoenaed Miller to testify before the grand jury about where she had obtained the drugs, Miller asserted her right against self-incrimination. The state filed a motion to compel the midwife to testify and to give the midwife immunity, which the trial court granted. Before the grand jury again, the midwife evaded key questions about where she got the drugs. The trial court found the midwife in civil contempt of court and ordered her jailed until she testified. The midwife appealed, arguing that the prosecutor's use of

the grand jury was a harassment or punitive tactic, that it violated her procedural due process, and that she had not been formally granted immunity when the hearing occurred because no official court order had actually been made.[xiv]

The appellate court held that Miller had waived those arguments because she had not made a motion to dismiss before the contempt hearing commenced, had not challenged the court's previous order to compel the midwife to testify, and made no due process challenge *before* the hearing.

COMMENTARY

Typically, a party may not wait until they appeal to raise an issue. Some issues, like jurisdiction and the validity of rules and statutes, may sometimes be reviewed without active preservation, but lawyers should present and argue all pertinent issues at trial. Response petitions, affidavits, and other pleadings may not, by themselves, preserve error. One may also need to *argue* the issues in the trial court. When the argument on appeal concerns a law's vagueness, not arguing that in the trial court will almost certainly waive the right to review of it on appeal. A party may waive her right to review of issues on appeal by not listing them in her "points of error" or other appropriate section of the appellate brief.[xv] If a party believes a trial judge is biased, she should immediately file a motion to recuse in the trial court to preserve that issue for appeal. Likewise, one should object to, or otherwise act upon, improper jury instructions in the trial court. In sum, waiting to argue issues until one appeals may be fatal to the case.

A party should also argue or plead the *correct* issue. This mistake occurs when two or more issues are conceptually similar. For example, an appellate court may feel disinclined to review a midwife's claim that a law was "vague" when the argument really spoke to the law being too "broad." Further, a party arguing vagueness and overbreadth, should do so separately, and distinguish between the two in the trial court and in the appellate brief and oral argument.

It is sad the frequency of which midwives waive their right to appellate review of critical issues. The obvious question in such cases is: Why didn't the attorney raise the issue properly in the trial court? Perhaps raising it for the first time on appeal was an act of desperation, or an afterthought to the attorney who, at trial, was preoccupied with evidence issues, etc. Regardless of present mental state, one's lawyer must present and argue all important issues at trial. Naturally, your lawyer is the best judge of what issues to pursue under the particular circumstances. But a midwife can ask her attorney what he believes to be the important issues in her case and how he intends to preserve them for appeal.

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[i] SDCL 36-9A-13.

[ii] Jones v. South Dakota Board of Nursing and South Dakota Board of Medical and Osteopathic Examiners, 1997 SD 78 (SD 1997.) Functions of nurse-midwife defined in SDCL 36-9A-13.

[iii] Referred to Honomichl v. State, 333 N.W. 2d. 797 (S.D. 1983); as cited in State v. Lyerla, 424

N.W.2d. 908, 912 (S.D. 1998.)

[iv] Indiana Code Sect. 25-22.5-5-5 (1982.)

[v] Smith v. State ex rel. Medical Licensing Board, 459 N.E. 2d 401 (Ind.App.2 Dist. 1984.)

[vi] State Ex. Rel. Missouri Sate Board of Registration for the Healing Arts v. Southworth, 704 S.W.2d 219 (Mo.Banc 1986.)

[vii] Sect. 334.010, RSMo. 1978.

[viii] 697 A.2D 291 (PA.Cmwlth. 1977)

[ix] Under Pa.Rule of Appellate Procedure 2116(a) which read in relevant part: ... This rule is to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby...."

[x] Md. Code Health Occupations art., sect. 8-701(a.)

[xi] Hunter v. State, 676 A.2d 968 (Md.App.1966.)

[xii] Department of Health v. Petty-Eifert, 443 SO.2d 266 (Fla.App. 1 Dist. 1983.)

[xiii] State v. Hoffman, 733 P.2d 502 (Utah 1987.)

[xiv] Ohio v. Miller 03-LW-0707 (5th)

[xv] States vary as to the title to use for this section of an appellate brief. Such sections may be called "Statement of Questions Involved," "Points Relied On," etc.