Should You Appeal?

Practical considerations in bringing a domestic relations case to the Court of Appeals of Virginia

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I. Does an appealable issue exist?

A. Interlocutory v. final orders

"The Court of Appeals of Virginia is a court of limited jurisdiction. Unless a statute confers subject matter jurisdiction to that court over a class of appeals, the Court of Appeals is without authority to review an appeal… [T]he provisions of Code § 17.1-405 grant subject matter jurisdiction to the Court of Appeals over 'any final … decree of a circuit court involving … affirmance or annulment of a marriage; … divorce; [and] any interlocutory decree … entered in [such] cases … adjudicating the principles of a cause.' Code §§ 17.1-405(3)(a), (b) and -405(4)(ii). *Lewis v. Lewis*, 271 Va. 520, 524-525 (2006).

"[An] interlocutory order that adjudicates the principles of a domestic relations dispute must respond to the chief object of the suit, … which is to determine the status of the parties' marriage and the custody of the parties' children, and, if appropriate, to award spousal and child support." … [A]n interlocutory order that adjudicates the principles in a divorce case must respond to the chief object of the suit which [is] to secure a divorce." *Id*.

B. Standards of review

1. Must be stated in opening brief for each assignment of error

Rule 5A:20. Requirements for Opening Brief of Appellant

…(e) The standard of review and the argument (including principles of law and authorities) relating to each assignment of error. When the assignment of error was not preserved in the trial court, counsel shall state why the good cause and/or ends of justice exceptions to Rule 5A:18 are applicable. With respect to each assignment of error, the standard of review and the argument -- including principles of law and the authorities -- shall be stated in one place and not scattered through the brief. At the option of counsel, the argument may be preceded by a short summary.

2. Questions of fact, questions of law, and mixed questions

"When a court hears evidence at an ore tenus hearing, its decision is entitled to great weight and will not be disturbed on appeal unless plainly wrong or without evidence to support it." *Wheeler v. Wheeler*, 42 Va. App. 282 (2004).

"[T]he interpretation of statutes presents a pure question of law subject to de novo review by this Court." *Ainslie v. Inman*, 265 Va. 347 (2003).

"[A] trial court by definition abuses its discretion when it makes an error of law." *Duva v. Duva*, 55 Va. App. 286 (2009).

"[W]e accord deference to the circuit court's findings of historical fact, but review questions of law de novo... [A]pplying the language of a written document to an undisputed fact … [is] a pure question of law, subject to review de novo on appeal." *Keener v. Keener*, 278 Va. 435, 441-442 (2009).

"While the question of unconscionability [of a premarital agreement] is a matter of law, the underlying facts must be determined by the fact finder, and on appeal we determine whether there is sufficient evidence to support the factual findings. If there is credible evidence in the record supporting the factual findings made by the trier of fact, we are bound by those findings regardless of whether there is evidence that may support a contrary finding." *Chaplain v. Chaplain*, 2011 Va. App. LEXIS 15 (2011).

3. Weight of evidence

"When reviewing a trial court's decision on appeal, we view the evidence in the light most favorable to the prevailing party, granting it the benefit of any reasonable inferences. That principle requires us to 'discard the evidence' of the appellant which conflicts, either directly or inferentially, with the evidence presented by the appellee at trial." *Congdon v. Congdon,* 40 Va. App. 255 (2003).

"On appeal, we view the evidence in the light most favorable to wife, the party prevailing below… Also, because the trial court's classification of property is a finding of fact, that classification will not be reversed on appeal unless it is plainly wrong or without evidence to support it." *Robinson v. Robinson*, 46 Va. App. 652 (2005).

4. Credibility of witnesses and experts

"The trial court determines a witness' credibility and the weight to give an expert's opinion. The trial court was entitled to not believe the husband's explanation concerning his mental condition and that he was not deriving benefits from his business that Lane had absorbed. The trial court was not required to believe or to give weight to the expert opinions." *Street v. Street*, 25 Va. App. 380 (1997).

"On appeal, we review issues involving … the credibility of the witnesses … for abuse of discretion by the trial court." Carrington v. Carrington, 2008 Va. App. LEXIS 250 (2008).

"We defer to the trial court's evaluation of the credibility of the witnesses who testify *ore tenus*." *Shackelford v. Shackelford*, 39 Va. App. 201, 208 (2002).

5. Domestic relations discretionary realms

a) Custody and visitation

Although trial court must examine all factors set out in Va. Code Ann. § 20-124.3, it is not required to quantify or elaborate exactly what weight or consideration it has given to each of the statutory factors. As long as evidence in the record supports the trial court's ruling and the trial court has not abused its discretion, its ruling must be affirmed on appeal. *Brown v. Brown*, 30 Va. App. 532 (1999).

b) Spousal support

"Code § 20-107.1 enumerates factors that must be considered by a court in determining whether and how much spousal support is appropriate in a given case. The trial court must consider each enumerated factor and failure to do so is reversible error. When a court awards spousal support based

upon due consideration of the factors enumerated in Code § 20-107.1, as shown by the evidence, its determination will not be disturbed except for a clear abuse of discretion." *Dodge v. Dodge*, 2 Va. App. 238, 246 (1986).

c) Equitable distribution

"In all divorce cases in which equitable distribution issues are presented, fashioning the decree is left largely to the discretion of the trial court as empowered and instructed by Code § 20-107.3 … Unless it appears from the record that the chancellor has abused his discretion, that he has not considered or has misapplied one of the statutory mandates, or that the evidence fails to support the findings of fact underlying his resolution of the conflict in the equities, the chancellor's equitable distribution award will not be reversed on appeal." *McClanahan v. McClanahan*, 19 Va. App. 399 (1994).

C. Was the issue preserved?

Rule 5A:18. Preservation of Issues for Appellate Review

No ruling of the trial court or the Virginia Workers' Compensation Commission will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review.

1. Proper objections at trial

a) Specificity

Broad, vague objections (such as signing orders "seen and objected to") are NOT sufficient to preserve an alleged error. To reiterate:

5A:18 …A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review.

"The words 'seen and objected to' over counsel's signature do not alert the trial judge to the nature of the alleged error, much less provide a statement of the grounds therefor." *Lee v. Lee*, 394 S.E.2d 490 (Va. Ct. App. 1990).

"[N]either the Code nor Rules of Court mandate a specific procedure to preserve for appeal an issue objected to in the trial court… However, neither the Code nor Rule 5A:18 is complied with merely by objecting generally to an order. Since the rule provides that '[a] mere statement that the judgment or award is contrary to the law and the evidence is not sufficient,' it follows that a statement that an order is 'seen and objected to' must also be insufficient." *Lee v. Lee*, 12 Va. App. 512 (as corrected 1991).

b) Timeliness

"[A]n objection must be made . . . at a point in the proceeding when the trial court is in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error." N*usbaum v. Berlin*, 273 Va. 385 (2007).

"The contemporaneous objection rule … is based on the principle that a litigant has the responsibility to afford a court the opportunity to consider and correct a perceived error before such error is brought to the appellate court for review. The contemporaneous objection rules … exist 'to protect the trial court from appeals based upon undisclosed grounds, to prevent the setting of traps on appeal, to enable the trial judge to rule intelligently, and to avoid unnecessary reversals and mistrials.' These rules are not limited to evidentiary rulings and require objection while the tribunal is in a position to correct a claimed error." *Blake v. Blake*, 2007 Va. App. LEXIS 306 (2007).

c) Formality

Good news for prospective appellants: Despite the stringency of the above requirements, Virginia law does permit some flexibility in the manner in which objections are relayed to the trial court.

> *§ 8.01-384. Formal exceptions to rulings or orders of court unnecessary; motion for new trial unnecessary in certain cases*
>
> *A. Formal exceptions to rulings or orders of the court shall be unnecessary; but for all purposes for which an exception has heretofore been necessary, it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal. No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court. No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal…*

2. Record on Appeal

The burden is on the appellant to provide the Court of Appeals with a record sufficient for review of any claimed errors, and errors not preserved in the record will not be considered on appeal.

"On appeal, a judgment of a lower court is presumed to be correct and the burden is on an appellant to present to the appellate court a sufficient record from which it can determine whether the lower court has erred in the respect complained of. If the appellant fails to do this, the judgment will be affirmed." *Crawley v. Ford*, 43 Va. App. 308 (2004).

a) Transcripts v. written statements of proceedings

Transcripts or written statements of key proceedings in the trial court are integral aspects of a record sufficient for review of alleged error, and again, the burden is on the appellant to provide these.

Transcripts from a court reporter are the ideal means of ensuring this part of the record exits. However, if no court reporter was present, the Rules permit an alternative in the form of a written statement. This is far from an ideal solution however: First, as discussed later, the cost of preparing an acceptable written statement can be substantial. Second, recollections of trial proceedings often fail to converge,

and if opposing counsel and/or the trial judge recall the proceedings differently, the result could be the loss of preservation of error.

> *5A:8. Record on Appeal: Transcript or Written Statement*
>
> *…(b)(4)(ii) When the appellant fails to ensure that the record contains transcripts or a written statement of facts necessary to permit resolution of appellate issues, any assignments of error affected by such omission shall not be considered.*

"If a transcript or statement of facts is indispensable to the determination of the entire appeal, the absence of the transcript or statement of facts from the record is a jurisdictional defect that requires dismissal of the appeal. However, the absence of a timely filed transcript or statement of facts does not deprive this Court of jurisdiction over an appeal if issues remain that may be decided without reference to a transcript or statement of facts." *Roberts v. Roberts*, 2006 Va. App. LEXIS 244 (2006).

b) Citations to record for assignments of error

Do not plan on assigning error to any issue for which a clear basis in the record cannot be found.

> *Rule 5A:20. Requirements for Opening Brief of Appellant*
>
> *…(c) A statement of the assignments of error with a clear and exact reference to the page(s) of the transcript, written statement, record, or appendix where each assignment of error was preserved in the trial court.*

"Appellant failed to comply with Rule 5A:20(c). She did not list any questions presented. She made statements throughout her opening brief regarding what she argued to be the trial court's errors, but she did not refer to the pages of the record showing that the issues were preserved… We find that appellant's failure to comply with Rule 5A:20(c) … is significant, so we will not consider her issues." *Obst v. Obst*, 2010 Va. App. LEXIS 95 (2010).

3. Matters not pleaded

The trial court's failure to award a certain type of relief would *not* be an appealable matter if such relief were never pleaded in the first place.

"No court can base its decree upon facts not alleged, nor render its judgment upon a right, however meritorious, which has not been pleaded and claimed. Pleadings are as essential as proof, the one being unavailing without the other." Thus, without a valid pleading for spousal support, the trial court erred in granting a reservation of spousal support to the wife under Va. Code Ann. § 20-107.1(D). *Harrell v. Harrell*, 272 Va. 652 (2006).

4. Approbation and reprobation

"[Appellant's] complaints on appeal regarding the trial court's decision — which was reached using a procedure that she herself initially advocated — amount to approbating and reprobating. 'A party may not approbate and reprobate by taking successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory. Nor may a party invite error and then attempt to take advantage of the situation created by his own wrong.'" *Pascarella v. McCoy*, 2011 Va. App. LEXIS 8 (2011).

5. Motions to reconsider

Counsel may meet the mandates of Rule 5A:18 in many ways. For instance, counsel may make clear the ground for his objection in a motion to strike the evidence or in closing argument. Counsel may also state the grounds therefor during a motion to set aside the verdict or a motion to reconsider. *Lee v. Lee*, 12 Va. App. 512 (1991).

Because here, as in *Weidman v. Babcock*, 241 Va. 40 (1991), a motion for rehearing was both filed and ruled upon within the twenty-one day period, we conclude that wife properly preserved this assignment of error for appeal. *Smith v. Smith,* 18 Va. App. 427 (1994).

Neither the filing of post-trial or post-judgment motions, nor the court's taking such motions under consideration, nor the pendency of such motions on the twenty-first day after final judgment, is sufficient to toll or extend the running of the 21-day period prescribed by this rule; the running of time under this rule may be interrupted only by the entry, within the 21-day period after final judgment, of an order suspending or vacating the final order. *Berean Law Group, P.C. v. Cox*, 259 Va. 622 (2000).

To be safe, either schedule hearing on motion to reconsider well within the 21 day post-final-order period, or have the court enter an order suspending the finality of the order within the 21 day period.

D. Selecting your issues

1. Initial identification

If the issue is not appealable because it is outside the jurisdiction of the Court or because it was not preserved at the trial level, or if it is a matter squarely within the discretion of the trial judge, it should be eliminated on the first pass. Issues that are borderline discretionary or mixed questions of fact and law will require closer scrutiny to determine whether they make the first cut.

2. Limiting and narrowing issues

Just because an issue is technically appealable does not mean you *should* appeal it. Commentators (including several Va. Court of Appeals judges) suggest three as the "magic number" of issues in an appeal, and in this author's opinion, under no circumstances should you exceed four. Although it is sometimes difficult to convince the client of this, the "shotgun" approach rarely suceeds; in fact it can actually dilute the force of your better arguments and *reduce* your chances of winning on them.

3. Honing issues on brief

When a contention is not fully developed in an appellant's brief, an appellate court need not address the question. Statements unsupported by argument, authority, or citations to the record do not merit appellate consideration. An appellate court will not search the record for errors in order to interpret the appellant's contention and correct deficiencies in a brief. *Buchanan v. Buchanan*, 14 Va. App. 53 (1992).

II. How much will it cost?

A. Flat fee v. hourly arrangements

Clients will likely want to know a ballpark figure, especially given that they may have just expended considerable funds on attorney's fees at the trial level. For this reason, a flat fee arrangement is often attractive – just make sure you charge enough! If your hourly rate is $250 per hour, it is doubtful that you will be able to rigorously bring the appeal for less than $15,000. If there are numerous issues and/or supplemental motions, the cost could be much higher.

B. Fundamental labor-intensive elements of the appeal

1. Brief

Writing well is inherently time-consuming, and even more so when extensive legal research is involved. We all write and research at different speeds; it is important to know yourself in this regard and not underestimate how much time you will need to devote to completing the brief. While this will of course vary with an individual attorney's familiarity with the legal topics involved, is not unrealistic to plan on spending 20-30 hours researching and writing (and re-writing!) a solid two-issue appellate brief.

2. Oral argument

Preparation for oral argument is critical. Several important (and potentially time-consuming!) aspects of such preparation that may be inadvertently overlooked include:

a) Narrowing briefed issues

b) Preparation of podium notebook

c) Reviewing all briefs and record

d) Updating research

e) Practice and moot courts

C. Less obvious cost generators

1. Number of issues on appeal

Each assigned error multiplies the amount of research, writing, and preparation for oral argument that you will need to do. Working with a large number of issues also means an increased time burden in fitting your arguments into the length constraints for a written brief under the Rules (a limit of 3,500 words under Rule 5A:19, exclusive of appendices, cover page, table of contents, table of authorities and certificate).

Ironically – but perhaps not that surprisingly – writing under strict length limits often takes much *longer* than if one had unlimited space. (As Pascal famously writes to an acquaintance: "My apologies for this lengthy letter; I did not have time to compose a shorter one.")

2. Review of record and designation of appendix

The record on appeal is covered by Rule 5A:7:

Rule 5A:7. Record on Appeal: Contents

(a) Contents. --*The following constitute the record on appeal from the trial court:*

(1) the original papers and exhibits filed or lodged in the office of the clerk of the trial court, including any report of a commissioner in chancery and the accompanying depositions and other papers;

(2) each instruction marked "given" or "refused" and initialed by the judge;

(3) each exhibit offered in evidence, whether admitted or not, and initialed by the trial judge (or any photograph thereof as authorized by § 19.2-270.4 (A) and (C)). (All non-documentary exhibits shall be tagged or labeled in the trial court and the tag or label initialed by the judge.);

(4) the original draft or a copy of each order entered by the trial court;

(5) any opinion or memorandum decision rendered by the judge of the trial court;

(6) any deposition and any discovery material encompassed within Part Four offered in evidence (whether admitted or rejected) at any proceeding; and

(7) the transcript of any proceeding or a written statement of facts, testimony, and other incidents of the case when made a part of the record as provided in Rule 5A:8, or the official videotape recording of any proceeding in those circuit courts authorized by the Supreme Court to use videotape recordings. This Court may require that any videotape proceedings be transcribed, in whole or in part, and made a part of the record as provided in Rule 5A:8, except that the transcript shall be filed within 60 days after the entry of the order requiring such transcript; and

(8) the notice of appeal.

(b) Disagreement on Contents. --*If disagreement arises as to the contents of any part of the record, the matter shall, in the first instance, be submitted to and decided by the trial court.*

In a domestic relations case, the record can be quite voluminous, yet must be reviewed in its entirety (or at lease skimmed) when making decisions as to what to include in the appendix. Compilation of the appendix is covered by Rule 5A:25. This rule, too, allows for the possibility of argument over the contents of the appendix, which can generate costs over and above the cost of reviewing the record and assembling the appendix.

Rule 5A:25. Appendix

(a) When Required. --*An appendix shall be filed by the appellant in all cases no later than the time of filing his opening brief.*

(b) Filing. --*If the combined lengths of the appendix and the opening brief of the appellant do not exceed the limitation prescribed in Rule 5A:19, the appendix may be filed as an addendum to the opening brief and within the same cover. If the combined lengths of the appendix and the opening brief exceed the limitation prescribed in Rule 5A:19, the appellant shall file the appendix as a separate volume. The number of copies filed and mailed to opposing counsel shall conform to Rule 5A:19(f).*

(c) Contents. --*An appendix shall include:*

(1) the basic initial pleading (as finally amended);

(2) the judgment appealed from, and any memorandum or opinion relating thereto;

(3) any testimony and other incidents of the case germane to the assignments of error;

(4) the title (but not the caption) of each paper contained in the appendix, and its filing date;

(5) the names of witnesses printed at the beginning of excerpts from their testimony and at the top of each page thereof; and

(6) exhibits necessary for an understanding of the case that can reasonably be reproduced.

(d) Determination of Contents. --*Within ten days after the filing of the record with the Court of Appeals or, in a case in which a petition for appeal has been granted, within ten days after the date of the certificate of appeal issued by the clerk of the Court of Appeals, counsel for appellant shall file in the office of the clerk of the Court of Appeals a written statement signed by all counsel setting forth an agreed designation of the parts of the record to be included in the appendix. In the absence of such an agreement, counsel for appellant shall file with the clerk of the Court of Appeals a statement of the assignments of error and a designation of the contents to be included in the appendix within fifteen days after the filing of the record or, in a case in which a petition for appeal has been granted, within fifteen days after the date of the certificate of appeal; not more than ten days after this designation is filed, counsel for appellee shall file with the clerk of the Court of Appeals a designation of any additional contents to be included in the appendix. The appellant shall include in the appendix the parts thus designated, together with any additional parts he considers germane.*

(e) Table of Contents; Form of Presentation. --*At the beginning of the appendix there shall be a table of contents, which shall include the name of each witness whose testimony is included in the appendix and the page number of the appendix at which each portion of the testimony of the witness begins. Thereafter, the parts of the record to be reproduced shall be set out in chronological order. When matter contained in the transcript of proceedings is set out in the appendix, the page of the transcript or of the record at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial matters (such as captions, subscriptions and acknowledgements) shall be omitted. A question and its answer may be contained in a single paragraph.*

(f) Costs. --*Unless counsel otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issue presented, he may so advise the appellee, and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case.*

(g) Penalty. --*Nothing shall be included in the appendix that is not germane to an assignment of error. As examples, no pleadings (other than the basic initial pleading as finally amended) shall be included unless an assignment of error is presented relating to it, and then only the portion thereof to which the assignment relates; and testimony relating solely to the amount of damages shall not be included unless error is assigned relating to the amount of damages. If parts of the record are included in the appendix unnecessarily at the direction of a party, this Court may impose the cost of producing such parts on that party.*

(h) Assumptions. *--It will be assumed that the appendix contains everything germane to the assignments of error. The Court of Appeals may, however, consider other parts of the record.*

3. Document preparations services and printing fees

While one could simply rely on a paralegal who is a Word wiz to format your brief, compile tables of authority, etc., and then send them down to FedEx/Kinkos to print and bind everything, professional appellate printers offer a much less stress-free alternative. Companies like Counsel Press and the Lex Group are familiar with Virginia appellate rules, and used to dealing with deadlines and the Court's filing procedures.*

Such valuable assistance is not without a price however. If, e.g., you are facing a lengthy appendix, the printing costs could make up a substantial portion of the costs you will need to cover in setting your fee for the appeal. We recently handled an appeal in which the printing costs for the initial appendix alone totaled $12,000!

*Despite the assistance such service companies can provide, the responsibility for ensuring that all papers are timely filed and formatted according to the Virginia Rules lies with the appellate counsel of record.

4. Travel and accommodations

You will need to travel, at least for oral argument, to one of the four locations in the Commonwealth where the Court normally sits: Alexandria, Chesapeake, Richmond and Salem. As your argument is likely to be in the morning, and could be bumped up in the day's docket without notice (and since dealing with the stress of traffic and parking is not something you want on the day of argument!), you may want to consider staying near the panel location the night before, which of course has costs associated with it.

If you are taking on an appeal from a trial court that is distant from your home city, keep in mind that there are circumstances that may require your presence there as well (though this is less likely), including preliminary review of the record and residual motions in the trial court, as discussed below. Don't neglect to address these travel expenses in your cost calculations.

5. Residual proceedings in trial court

a) Motions to reconsider

Motions to reconsider were covered in more detail earlier. If trial counsel has not already filed one, this is something you may want to do as appellate counsel, if you are brought on board early enough.

b) Preparation and approval of written statement

If no court reporter was present for the trial and/or key hearings, written statements of these proceedings must be prepared pursuant Rule 5A:8. Keep in mind that you must budget not only for the cost of preparing the statements themselves (which alone can be a gargantuan task) but also for the cost of shepherding them through the approval process:

5A:8 (c) Written Statement in Lieu of Transcript. --A written statement of facts, testimony, and other incidents of the case becomes a part of the record when:

(1) within 55 days after entry of judgment a copy of such statement is filed in the office of the clerk of the trial court. A copy must be mailed or delivered to opposing counsel on the same day that it is filed in the office of the clerk of the trial court, accompanied by notice that such statement will be presented to the trial judge no earlier than 15 days nor later than 20 days after such filing; and

(2) the statement is signed by the trial judge and filed in the office of the clerk of the trial court. The judge may sign the statement forthwith upon its presentation to him if it is signed by counsel for all parties, but if objection is made to the accuracy or completeness of the statement, it shall be signed in accordance with paragraph (d) of this Rule.

The term "other incidents of the case" in this subsection includes motions, proffers, objections, and rulings of the trial court regarding any issue that a party intends to assign as error or otherwise address on appeal.

(d) Objections. --Any party may object to a transcript or written statement on the ground that it is erroneous or incomplete. Notice of such objection specifying the errors alleged or deficiencies asserted shall be filed with the clerk of the trial court within 15 days after the date the notice of filing the transcript (paragraph (b) of this Rule) or within 15 days after the date the notice of filing the written statement (paragraph (c) of this Rule) is filed in the office of the clerk of the trial court or, if the transcript or written statement is filed before the notice of appeal is filed, within 10 days after the notice of appeal has been filed with the clerk of the trial court. The clerk shall give prompt notice of the filing of such objections to the trial judge. Within 10 days after the notice of objection is filed with the clerk of the trial court, the judge shall:

(1) overrule the objection; or

(2) make any corrections that the trial judge deems necessary; or

(3) include any accurate additions to make the record complete; or

(4) certify the manner in which the record is incomplete; and

(5) sign the transcript or written statement…

c) Disagreements about contents of record

Rule 5A:7. Record on Appeal: Contents

…(b) Disagreement on Contents. *--If disagreement arises as to the contents of any part of the record, the matter shall, in the first instance, be submitted to and decided by the trial court.*

d) Requests for stay of underlying order pending appeal

§ 8.01-676.1. Security for appeal

…D. Suspension of execution in decrees for support and custody; injunctions. -- The court from which an appeal is sought may refuse to suspend the execution of decrees for support and custody, and may also refuse suspension when a judgment refuses, grants, modifies, or dissolves an injunction…

e) Setting supersedeas bond

§ 8.01-676.1. Security for appeal

…C. Security for suspension of execution. -- An appellant who wishes execution of the judgment or award from which an appeal is sought to be suspended during the appeal shall, subject to the provisions of subsection J, file an appeal bond or irrevocable letter of credit conditioned upon the performance or satisfaction of the judgment and payment of all damages incurred in consequence of such suspension, and except as provided in subsection D, execution shall be suspended upon the filing of such security and the timely prosecution of such appeal. Such security shall be continuing and additional security shall not be necessary except as to any additional amount which may be added or to any additional requirement which may be imposed by the courts…

6. Additional pleadings in Court of Appeals

Not all appeals will involve pleadings in the Court of Appeals beyond the normal process of perfecting the appeal; however yours could. You might consider a separate cost bracket and additional retainer should these become necessary. Such additional pleadings, which will require time to prepare and argue, may include:

Rule 5A:2. Motions and Responses; Orders

(a) Motions and Responses.

(1) Motions. All motions shall be in writing and filed with the clerk of this Court. All motions shall contain a statement by the movant that the other parties to the appeal have been informed of the intended filing of the motion. For all motions in cases when all parties are represented by counsel -- except motions to dismiss petitions for a writ of habeas corpus -- the statement by the movant shall also indicate whether the other parties consent to the granting of the motion, or intend to file responses in opposition.

(2) Responses. Opposing counsel may have ten days after such motion is filed to file with such clerk a response to such motion, but this Court may act before the ten days expire, if necessary.

(3) Number of Copies. An original and three copies of all motions or responses must be filed.

(4) Oral Argument. No motion shall be argued orally except by leave of this Court.

a) Motions for extensions of time

Rule 5A:3. Filing Deadlines; Post Trial Proceedings Below; Timely Filing by Mail; Inmate Filing; Extension of Time

(a) Filing Deadlines and Extensions. *--The times prescribed for filing the notice of appeal (Rules 5A:6 and 5A:11), a petition for appeal (Rule 5A:12), and a petition for rehearing (Rule 5A:33) and a request for rehearing en banc (Rule 5A:34) are mandatory. Except for the petition for appeal which is addressed in Rule 5A:12(a) and Code § 17.1-408, a single extension not to exceed thirty days may be granted if at least three judges of the Court of Appeals concur in a finding that an extension for papers to be filed is warranted upon a showing of good cause sufficient to excuse the delay...*

(b) Extensions Generally. *--Except as provided in paragraph (a) of this Rule, the times prescribed in these Rules for filing papers, except transcripts (Rule 5A:8(a)), may be extended by a judge of the court in which the papers are to be filed upon a showing of good cause sufficient to excuse the delay...*

b) Motion to extend length of briefs

Rule 5A:19. General Requirements for All Briefs

(a) Length. *--Except by permission of a Judge of this Court, neither the opening brief of appellant, nor the brief of appellee, nor a brief amicus curiae shall exceed 12,300 words. No reply brief shall exceed 3,500 words. Word limits under this Rule do not include appendices, or the cover page, table of contents, table of authorities, and certificate. There shall be no exception to these limits except by permission of this Court on motion for extension of the limits.*

c) Motion to dismiss for deficiencies in opening brief

Can be raised *sua sponte* by the court or by the Appellee; in either event, Appellant will need to expend time to respond.

Rule 5A:20. Requirements for Opening Brief of Appellant

(e) The standard of review and the argument (including principles of law and authorities) relating to each assignment of error. When the assignment of error was not preserved in the trial court, counsel shall state why the good cause and/or ends of justice exceptions to Rule 5A:18 are applicable. With respect to each assignment of error, the standard of review and the argument -- including principles of law and the authorities -- shall be stated in one place and not scattered through the brief…

d) Motion for summary adjudication

Again, can be raised *sua sponte* by the court or by the Appellee, and again will involve additional (and perhaps unbudgeted) time to respond on behalf of Appellant.

Rule 5A:27. Summary Disposition

In cases in which appeal lies as a matter of right, if all the Judges of the panel of the Court of Appeals to which a pending appeal has been referred conclude from a review of the record and the briefs of the parties that the appeal is without merit, the panel shall forthwith affirm the judgment of the trial court or commission.

e) Motion for rehearing or rehearing en banc

Rule 5A:35. Procedure for Rehearing

(a) Rehearing by a Panel. *--When rehearing by a panel is granted on petition of a party, the clerk of the Court of Appeals shall notify all counsel promptly. No brief in addition to the petition may be filed by petitioner. Respondent may file in the office of the clerk seven copies of an answering brief, which shall not exceed 5,300 words in length, within 21 days following the date of the order of this Court granting a rehearing. Three copies of the respondent's answering brief shall be mailed or delivered to opposing counsel on or before the date the answering brief is filed. Respondent may be heard orally whether or not an answering brief is filed. The case will be placed on the docket for oral argument. When practicable, such a rehearing will be heard by the same panel that rendered the final decision in the case.*

(b) Rehearing En Banc. *--When all or part of a petition for rehearing en banc is granted, the clerk of this Court shall notify all counsel promptly. The mandate entered is stayed as to all issues decided by the panel pending the decision of the Court en banc. The appeal is reinstated on the docket of the Court for oral argument only as to issues granted. Briefing and oral argument shall proceed in the same order as before*

the three judge panel. The Court of Appeals may require any party to whom rehearing en banc has been granted to file 20 copies of an appendix, prepared in conformity with the provisions of Rule 5A:25, with the clerk of the Court within such time as the Court of Appeals shall specify.

(1) Issues Considered Upon Rehearing En Banc. Only issues raised in the petition for rehearing en banc and granted for rehearing or included in the grant by the Court on its own motion are available for briefing, argument, and review by the en banc Court. The Court may grant a petition in whole or in part. Any issue decided by a panel of this Court not subject to a petition for rehearing en banc remains undisturbed by an en banc decision.

(2) Appellant's Opening Brief Upon Rehearing En Banc. The party who was the appellant before the panel of this Court shall file in the office of the clerk 20 copies of a brief, which shall not exceed 12,300 words in length. Such brief shall be filed within 21 days following the date of the order of this Court granting rehearing en banc, and shall be accompanied by a certificate that three copies were mailed or delivered to opposing counsel on or before the date of filing. The brief shall bear a white cover.

(3) Appellee's Answering Brief Upon Rehearing En Banc. The party who was the appellee before the panel of this Court may file in the office of the clerk 20 copies of an answering brief not to exceed 12,300 words in length, within 14 days after the opening brief has been filed. Three copies of appellee's answering brief shall be mailed or delivered to opposing counsel on or before the date the answering brief is filed. The brief shall bear a blue cover. Appellee may be heard orally whether or not the answering brief is filed.

(4) Appellant's Reply Brief Upon Rehearing En Banc. The party who was the appellant before the panel may file in the office of the clerk a reply brief, not to exceed 3,500 words, within 14 days after the answering brief has been filed. Twenty copies of the reply brief shall be filed. Three copies of such brief shall be mailed or delivered to opposing counsel on or before the date the answering brief is filed. The brief shall bear a green cover.

D. Realistic fee estimates

As exemplified above, the cost of bringing a vigorous appeal encompasses much, much more than merely writing a brief or two. All of the potential tasks and scenarios should be taken into account when deciding on a fee structure and discussing costs with your client. Each appeal is different in terms of the number and complexity of issues involved, sheer physical distances to the trial and appellate courts, and the potential necessity of additional proceedings in both courts.

III. Is it worth it to the client?

A. Chances of prevailing

Given the vast number of issues that fall into the realm of the trial court's discretion, particularly in domestic relations cases, and the general disinclination of the Court of Appeals to find that an abuse of this discretion has occurred, a reversal on appeal is unlikely unless a clear legal error can be identified.

It is critically important to convey to your client the concept that an appeal to the Court of Appeals is *not* a *de novo* fact-finding exercise, and while it may turn out that the Court of Appeals on some level disagrees with the trial court's factual findings, this will not be sufficient for a reversal.

B. Risk of cross-appeal

"Rule 5A:21(b) provides that the appellee's brief must contain a 'statement of any additional questions the appellee wishes to present.' Rule 5A:21(e) provides that appellee's brief shall contain a 'statement of the precise relief sought, if any.' The two rules considered together clearly provide that additional questions separate from those presented by the appellant, and any additional relief sought separate from that requested by the appellant, may be raised by the appellee in his brief." *D'Auria v. D'Auria*, 1 Va. App. 455 (1986).

C. Extended timeframe and delayed gratification

1. Custody/visitation issues

2. ED/Support issues

3. Petitions to modify as an alternative

Because of the sometimes vast time gaps (potentially nine months to a year) between final order and remand to the trial court upon an appellate victory, in domestic relations cases it may often be more effective to simply wait until a putative change in circumstances has occurred and then file a petition to reopen the case and to modify the prior ruling. Of course not all issues are modifiable (e.g., spousal support agreed to by the parties under §20-109(C)) – but these are issues that are likely to be not appealable either.

D. Perils of a remand

A domestic relations appellate victory frequently comprises a remand to the trial court, which means that your client will again be before the court that ruled against him or her the first time around. The trial court obviously must heed the lawful mandate from the Court of Appeals (see *Rowe v. Rowe*, 33 Va. App. 250 (2000)), however such mandates do *not* impose a specific outcome upon rehearing, but rather merely correct certain aspects – often procedural – of the first trial. Hence, in theory, your client could end up in the same or an even worse position upon rehearing after remand.

E. Status of appealed order pending appeal

1. Staying the underlying order

Under § 8.01-676.1, discretion to suspend the execution of decrees for support, custody and other injunctions pending appeal is vested with the trial court. If it grants a stay, the trial court may require additional security depending on the individual facts of the case and the amounts at issue.

2. Enforcing the underlying order

"When a final order of the trial court is on appeal, the appellate court acquires jurisdiction over that case to the exclusion of the trial court, except to the extent the trial court must act to enforce the order pending appeal." *Holden v. Holden*, 35 Va. App. 315 (2001).

3. Modifying the underlying order

"The orderly administration of justice demands that when an appellate court acquires jurisdiction over the parties involved in litigation and the subject matter of their controversy, the jurisdiction of the trial court from which the appeal was taken must cease. We acquired jurisdiction over this matter when [wife's] s petition for appeal was filed and docketed in the Clerk's Office of this Court, and thereafter corrections and alterations could be made only with leave of this Court." *Greene v. Greene*, 223 Va. 210 (1982).

F. Possibility of recouping attorneys' fees

A successful appellant *may* be awarded his or her attorneys' fees from the appellee at the end of successful appeal. This is far from a guarantee however, and if the case is close, the Court may well decide award appellate fees to neither party.

"Both husband and wife request an award of attorney's fees and costs they incurred in this appeal. It is true that '[t]he appellate court has the opportunity to view the record in its entirety and determine whether the appeal is frivolous or whether other reasons exist for requiring additional payment.' O'Loughlin v. O'Loughlin, 23 Va. App. 690, 695, 479 S.E.2d 98, 100 (1996). However, after examining the record, we find no reason to fashion such an award in this case. '[T]he litigation addressed appropriate and substantial issues and [] neither party generated unnecessary delay or expense in pursuit of its interests.' Accordingly, we deny each party's request for an award of appellate attorney's fees and costs." *Lightburn v. Lightburn*, 2009 Va. App. LEXIS 459 (2009).

G. Risk of owing appellee's fees

The daunting flip side of the potential to recoup fees as the appellant is the possibility that your client may end up owing the appellee his or her attorneys' fees in the end. This is one more reason to avoid bringing an appeal that is motivated by reasons other than well grounded appealable issues. The Court tends to award neither side their fees if the issues presented involve legitimate legal concerns, even if the appellant does not prevail.

"Upon a review of this appeal, we find that the husband's case presented questions that were not supported by law or evidence. Therefore, we award attorney's fees to wife and remand this case to the trial court for determination of attorney's fees and costs incurred in responding to this appeal, including any attorney's fees and costs incurred at the remand hearing, and any reasonable attorney's fees and costs of collection, if necessary." *Williams v. Williams*, 2007 Va. App. LEXIS 415 (2007).

H. Assisting your client with an educated risk/benefit analysis

1. Emotional aspects of a family law appeal

While any lawsuit is stressful for the participants, domestic relations cases – involving perhaps infidelity, the reality of a failed relationship, conflicts over children, etc. – are particularly emotional. Frequently parties will try to use litigation to assuage their emotional wounds, even when the prospect of success is bleak. A party who has lost custody of their child may, for example, feel the emotional need to exhaust every avenue before resigning themselves to the situation.

2. Working with client to keep issues limited and focused

While clients, fresh off an emotional trial-level loss, might be inclined to appeal every issue under the sun, it is important to convey to them that this approach can actually be counter-productive and reduce the chance of winning on your stronger points. This can be a difficult task, as clients often feel that the appeal is their "last chance" – and indeed it is. However, they need to understand that if the desire to incorporate every issue on which they lost at trial ends up sinking the appeal, the whole enterprise is futile.