VIRGINIA BEACH BAR ASSOCIATION

2024 Annual Bench ~ Bar Conference: The Virginia Beach Circuit Court with Guests from the Virginia Court of Appeals

Preserving Error at the Trial Court and General Tips Before the Court of Appeals

****Materials Graciously Provided by Jennifer Eaton, Esq., L. Steven Emmert and Your VBBA Board**

Panelists:

The Hon. Robert Humphreys, Virginia Court of Appeals

The Hon. Steven C. Frucci, Virginia Court of Appeals

The Hon. Kevin C. Duffan, Virginia Beach Circuit Court

E-Filing Updates- Tina Sinnen, Clerk of Court

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The Virginia Court of Appeals and the Virginia Beach Circuit Court ~ 2024 Annual Bench Bar Panel

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Preserving Error at the Trial Court & Tips in Practice Before the Court of Appeals

The Basics

Virginia Supreme Court Rule 5:25. Preservation of Issues for Appellate Review.

No ruling of the trial court, disciplinary board, commission, or other tribunal before which the case was initially heard 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 this Court 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.

**Virginia Supreme Court (Court of Appeals) Rule 5A:18 ~ same

§ 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 (i) 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 or (ii) move for reconsideration in order to preserve his right to appeal a ruling, order, or action of the court, even if such ruling, order, or action is without prejudice to a motion to reconsider. 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.

B. The failure to make a motion for a new trial in any case in which an appeal, writ of error, or supersedeas lies to or from a higher court shall not be deemed a waiver of any objection made during the trial if such objection be properly made a part of the record.

General Considerations:

1.) The Court of Appeals- Rule 5A:18 provides that "no ruling of the trial court . . . will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice."

2.) "The purpose of Rule 5A:18 is to provide the trial court with the opportunity to remedy any error so that an appeal is not necessary." *Knight v. Commonwealth*, 18 Va. App. 207, 216, 443 S.E.2d 165, 170 (1994). *See Newsome v. Newsome*, 18 Va. App. 22, 24-25, 441

S.E.2d 346, 347 (1994). Rule 5A:18 bars consideration of any questions on appeal that are not properly preserved.

3.) The Virginia Supreme Court Rule- Rule 5:25 is the same..."[N]o ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling."

4.) The statute and rules have been interpreted to mean that "[a] party must state the grounds for an objection 'so that the trial judge may understand the precise question or questions he is called upon to decide.'" *Brandon v. Cox*, 284 Va. 251 (Va. 2012) *citing Scialdone v. Commonwealth*, 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010) (quoting *Jackson v. Chesapeake & Ohio Ry. Co.*, 179 Va. 642, 651, 20 S.E.2d 489, 492 (1942)).

5.) "To satisfy the rule, 'an 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." *Id.* (*quoting Johnson v. Raviotta*, 264 Va. 27, 33, 563 S.E.2d 727, 731 (2002)).

6.) Rule 5:25 (and 5A:18) exists "'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.'" *Brandon*, supra. *citing Reid v. Boyle*, 259 Va. 356, 372, 527 S.E.2d 137, 146 2000) (*quoting Fisher v. Commonwealth*, 236 Va. 403, 414, 374 S.E.2d 46, 52, 5 Va. Law Rep. 1019 (1988)).

7.) The primary reason for requiring such an objection is to afford both opposing counsel and the circuit court a fair opportunity to address the challenge or prevent error. *Bethea v. Commonwealth*, 297 Va. 730, 743-44, 831 S.E.2d 670 (2019); *Scialdone v. Commonwealth*, 279 Va. 422, 437, 689 S.E.2d 716 (2010).

8.) Specificity and timeliness undergird the contemporaneous-objection rule . . . [']so that the trial judge . . . know[s] the particular point being made in time to do something about it.'" *Bethea*, 297 Va. at 743 (quoting *Dickerson v. Commonwealth*, 58 Va. App. 351, 356, 709 S.E.2d 717 (2011)).

9.) This principle applies to rulings in final orders and decrees to which a party has not previously had the opportunity to object with specificity. *See Lee v. Lee*, 12 Va. App. 512, 514-16, 404 S.E.2d 736, 7

Va. Law Rep. 2647 (1991) (en banc). When potentially objectionable language is contained in a circuit court's final order, additional rules of court provide a party with twenty-one days in which to bring the claim of error to the circuit court's attention and obtain a ruling on it. *See* Rule 1:1(a) (noting that "final judgments, orders, and decrees . . . remain under the control of the trial court . . . for twenty-one days after . . . entry" and may be "modified, vacated, or suspended" during that time); *See also* Rule 3A:15(b) (providing for motions to set aside a verdict in criminal cases); *Copeland v. Commonwealth*, 42 Va. App. 424, 441, 592 S.E.2d 391 (2004) (holding that "[u]nder appropriate circumstances," counsel may satisfy Rule 5A:18 by "mak[ing] the grounds of the objection known within twenty-one days of the court's final order"); *cf.* Rule 4:15(d) (referencing motions for reconsideration in civil cases).[6]

10.) Recognizing that the purpose of the rule is not "'to obstruct .....efforts to secure writs of error or appeals'" the Court has consistently focused on whether the trial court had the opportunity to rule intelligently on the assigned error. *Scialdone*, 279 Va. at 437, 689 S.E.2d at 724 (*quoting Kercher's v. Richmond, Fredericksburg & Potomac R.R. Co.*, 150 Va. 108, 115, 142 S.E. 393, 395 (1928)). The purpose of the rule is to "'to put the record in such shape that the

case may be heard in this [C]ourt upon the same record upon which it was heard in the trial court.'" *Id.*

11.) A motion to reconsider is insufficient to preserve an argument not previously presented unless the record establishes that the court had an opportunity to rule on the motion. *Brandon v. Cox*, 284 Va. 251, 256, 736 S.E.2d 695, 697 (2012).

12.) Exemption for Summary Contempt. Virginia Code § 8.01-384(A) provides that if a party "[had] no opportunity to object to a ruling or order at the time it [was] made, the absence of an objection shall not thereafter prejudice him . . .on appeal." *See Amos v. Commonwealth*, 61 Va. App. 730 (Va. App. 2013) holding that this exemption to apply to the appellant who was inappropriately found in summary contempt and taken into custody at trial without the ability to raise the objection. Whatever situations Code § 8.01-384(A) may cover, it plainly applies when a litigant has been *foreclosed from* making a timely objection "at the time the ruling or order was made." And it provides that a party shall not be prejudiced on appeal from that lack of opportunity to object at the time the ruling or order was made. A principal purpose of the contemporaneous objection rule is to place the trial court "in a position, not only to consider the asserted objection, but also to rectify the effect of the asserted

error." *Johnson v. Raviotta*, 264 Va. 27, 33, 563 S.E.2d 727, 731 (2002) (citation omitted). Requiring a party to file a motion to reconsider in order preserve an issue might be perfectly sensible in some, perhaps even most, contexts. The same cannot be said, however, with regard to summary contempt. Summary contempt is "immediate[ly] punish[ed.]" *In re Oliver*, 333 U.S. 257, 274-75, 68 S. Ct. 499, 92 L. Ed. 682 (1948). A contempt finding is effective upon oral pronouncement from the bench. *See Petrosinelli v. People for the Ethical Treatment of Animals, Inc.*, 273 Va. 700, 709, 643 S.E.2d 151, 156 (2007) (noting that a "court's contempt power encompasses written orders as well as 'oral orders, commands and directions of the court'" (quoting *Robertson v. Commonwealth*, 181 Va. 520, 537, 25 S.E.2d 352, 359 (1943))). Given the immediacy of summary contempt, it is crucial to afford the contemnor the opportunity to object immediately before or after the contempt is pronounced. That way, the trial court will be "in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error." *Johnson*, 264 Va. at 33, 563 S.E.2d at 731.

Your Brief Guide to the Court of Appeals ~17 Judges

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1. **What types of cases does the Court have jurisdiction over?**
    a. Appeals as a Matter of Right
        i. Final decisions of a circuit court in criminal and civil cases
        ii. Final decision of a circuit court on appeal from a decision of an administrative agency
        iii. Final decision from the Virginia Workers' Compensation Commission
        iv. Final decision of a circuit court on appeal from a grievance hearing decision issued pursuant to Virginia Code § 2.2-3005 *et. seq.*
        v. Final judgment, order, or decree of a circuit court involving:
            1. Application for a concealed weapon permit
            2. Involuntary treatment of prisoners
            3. Declaratory or injunctive relief under Virginia Code §57-1 *et. seq.*

vi. Interlocutory decree or order

vii. Final conviction in a circuit court of a traffic infraction or crime

viii. Appeal of a partial final judgment from circuit court

b. Discretionary Appeals (by petition)

i. Criminal appeals brought by the Commonwealth, county, city, or town previously brought by writ of error

ii. Commonwealth appeals pursuant to Code § 19.2-398

iii. Multiple Claimant litigation under Code § 8.01-267.1 *et seq.*

iv. Certified interlocutory appeals

v. Immunity appeals under Code § 8.01-675.5(B)

vi. Injunction Petitions

c. Original Jurisdiction

i. Writs of mandamus, prohibition, and habeas corpus

ii. Writs of actual innocence based on nonbiological evidence

d. Contrast with Supreme Court of Virginia

2. When is an appeal ripe?

a. In civil cases, focus on finality and Rule 1:1

b. But there are instances where a pre-trial appeal may be appropriate in both the criminal and civil context (such as with interlocutory appeals and orders)

c. How long does a party have to note an appeal?
    i. The notice of appeal is due within 30 days after entry of the final judgment or an appealable order (Virginia Code § 17.1-407(a) and Rule 5A:6).
        1. Unless a Commonwealth pre-trial appeal, then "not more than 14 days after the notice of transcript or written statement of facts required by § 19.2-405 is filed or, if there are objections thereto, within 14 days after the judge signs the transcript or written statement of facts."
    ii. Copies sent to all counsel and to the AG in criminal cases
    iii. Make sure to note appeal in the right court (circuit court, not Court of Appeals), tribunal, or commission.
    iv. Notice of appeal not needed in most interlocutory appeals. Rule 5A:6(a2).
    v. Pay the $50 filing fee with the notice of appeal. Rule 5A:6(c).
d. What happens next?
    i. Filing of appeal bond
        1. $500 appeal bond is required in civil appeals *or* the filing of an irrevocable letter of credit. Code § 8.01-676.1(A).

2. A party filing the appeal bond must give notice in writing to the appellee. Rule 5A:17(b).

ii. Filing of record

iii. Filing of assignments of error

1. For Appellant, within 15 days of filing of the record. Rule 5A:25(d).
2. For Appellee (if cross-errors), within 10 days after the appellant files a statement of assignments of error. *Id.*
3. File the Assignments of Error with the Designation of the Appendix. *Id.*

iv. Filing of Appendix (if required)

3. **What are some key rules to keep in mind while brief writing?**

a. Briefing Generally

i. Why is it called a brief? Because it should be brief ☺

ii. Deadlines (unless otherwise provided by statute or Order of the Court)

1. Opening Brief – within 40 days after the filing of the record with the Court.
2. Appellee Brief – within 30 days after the filing of the Opening Brief.

3. Reply Brief – within 14 days of the Brief of the Appellee.
4. Amicus Brief – "on or before the date on which the brief of the party supported if required to be filed." Rule 5A:23(b).

iii. Word/Page Limits

1. Opening Brief and Appellee Brief: the longer of 50 pages or 12,300 words. Rule 5A:19(a).
2. Reply Brief: the longer of 20 pages or 3,500 words. *Id.*
3. *Amicus* Brief: Must comply with the word limits that apply to briefs of the party being supported.

b. Change to Appendix requirements

i. in cases where there is an electronic record, no Appendix is required. Rule 5A:25(a)(1).

c. Know all aspects of Rule 5A

i. Rules 5A:7 & 5A:8 – Appellant Must Provide an Adequate Record

1. Transcript or Written Statement of Facts and Exhibits

ii. Rule 5A:12 – Assignments of Error (Criminal Petitions)

iii. Rule 5A:18 – Specific Contemporaneous Objection Requirement

iv. Rule 5A:20 – Assignments of Error

v. Rules 5A:12 and Rule 5A:20 – Citation to Record, Standard of Review, Arguments Must Be Developed on Brief

4. **How does the Court handle continuance requests?**

   a. Mandatory deadlines such as time to file a notice of appeal, petition for appeal, petition for review, petition for rehearing, and request for rehearing en banc are mandatory. Rule 5A:33(a). But the Court may grant and extension of those deadlines "in order to attain the ends of justice."

   b. The deadlines for a notice of appeal (from the trial court (Rule 5A:6) or the Virginia Workers' Compensation Commission (Rule 5A:11)), a petition for panel rehearing (Rule 5A:33), opening brief in a criminal case (Code § 17.1-408), and a petition for rehearing en banc (Rule 5A:34) are all mandatory but may be extended in order to attain the ends of justice.

      i. What does "ends of justice" mean?

   c. All other deadlines may be extended by the Court "upon a showing of good cause sufficient to excuse the delay."

   d. All requests for extensions of time must be made by written motion filed in the clerk's office within the pertinent periods as set forth in Rule 5A:3(c).

5. **How do the judges hear cases?**

   a. Oral waiver cases

b. Merit Panels (4 Regions, but multiple locations in each region)

1. Chesapeake/Norfolk
2. Richmond
3. Salem
4. Lexington
5. Alexandria
6. Bristol
7. Winchester
8. Loudon
9. Leesburg
10. Newport News
11. Hampton
12. Virginia Beach
13. Williamsburg
14. Law Schools

c. Standing Panels

i. Summary affirmance reviews

ii. Appeals in which oral argument is waived

iii. Actual innocence petitions

iv. Various procedural requests and motions

v. Petitions for review (emergency injunctions) under § 8.01-626

d. En Banc

i. At least 13 judges

6. What does oral argument look like?

a. Panels

i. Presiding Judge

ii. Presence of all 3 judges required

iii. Rotating order for assignments

iv. Except in extraordinary circumstances, the clerk will give at least 30 days advance notice to counsel of the date, time, and place for oral argument of panels. Although the clerk is only required to give 15 days' notice for arguments, 30 days is necessary for adequate scheduling flexibility. Rule 5A:28(a).

b. Time

i. Each side in an appeal will be allowed 15 minutes for oral argument, even in consolidated cases, but the panel may, by majority vote, grant additional time in consolidated cases and cross-appeals, if necessary.

c. When is there no oral argument even when requested?

i. When appeal is wholly without merit (resolved via "summary disposition" per Rule 5A:27); or

ii. "the dispositive issue or issues have been authoritatively decided, and the appellant has not argued that the case law

should be overturned, extended, modified, or reversed." Code §17.1-403.

7. **When should practitioners expect an opinion?**
    a. Generic timeline
        i. Oral argument
        ii. Judges' post-argument conference
        iii. Opinion drafting/exchange between chambers
        iv. Opinion published online
    b. Published opinions may take longer given full court review
    c. Published opinions are available online to the public here: https://www.vacourts.gov/wpcap.htm
    d. Unpublished opinions are available online to the public here: https://www.vacourts.gov/wpcau.htm

8. **What can an attorney do to challenge a ruling after an opinion has been issued?**
    a. File a Petition for Rehearing (within 14 days of decision) - Rule 5A:33.
        i. Page Limit: the longer of 25 pages or 5,300 words.
    b. Request an *En Banc* hearing (within 14 days of decision) - Rule 5A:34
        i. Page Limit: the longer of 25 pages or 5,300 words.

c. Appeal to the Supreme Court of Virginia (within 30 days after entry of the judgment appealed from or a denial of a timely petition for rehearing)– Rule 5:17

   i. Page Limit: the longer of 35 pages or 6,125 words.

   ii. The Supreme Court of Virginia has appellate review of most decisions of the Court of Appeals.

   iii. Some decisions of the Court of Appeals, however, are final:

      1. Appeals involving the denials of a concealed handgun permit.
      2. Involuntary treatment of prisoners pursuant to Code §§ 53.1-40.1 or 53.1-133.04.
      3. Appeals in criminal cases pursuant to subsections A or E of Code §§ 19.2-398 and 19.2-401.

   iv. Appeals from the Court of Appeals to the Supreme Court of Virginia are generally brought by petition. Code § 8.01-670.

   v. There are some limited rights of appeal to the Supreme Court.

      1. State Corporation Commission Appeals;
      2. Virginia State Bar disciplinary cases; and
      3. Appeals from the circuit court involving a writ of habeas corpus.

vi. Procedure to appeal to the Supreme Court of Virginia is virtually the same as before the Court of Appeals.

What are some common practitioner missteps?

1.) Not preserving error

2.) Trial court v. appellate court arguments

3.) Using proprietary programs for video exhibits???

4.) Omitting white space on briefs

5.) Waiving arguments in briefs

6.) Waiving an opportunity to argue case

7.) Not making a proper proffer

8.) Failing to note appeal in right court

9.) Relying on the "ends of justice" exception

Questions??

June 24, 2024

SCV ANNOUNCES SIGNIFICANT RULE CHANGES
By: L. Steven Emmert

Professional journalists who cover government are fond of observing that when the government wants to hide news despite its being in plain view, they announce it on Friday afternoon. I am not about to ascribe any such ulterior motives to the Supreme Court of Virginia; it's probably just a case of coincidental timing that the court on Friday afternoon announced entry of an order that makes significant changes to several Rules of Court.

By law, there's a 60-day waiting period before the new rules take effect, so you have time to get used to the new provisions before August 20. Let's take a peek at a few of the changes, with more emphasis on those in the appellate courts.

Rule 1:4 – General provisions as to pleadings. The order adds what I regard as a salutary provision to the paragraph on responsive pleadings, subparagraph (e). The new provision imports from the rule on requests for admission (Rule 4:11) language requiring a responding party to "fairly respond to the substance of" an allegation. It adds that "A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest." This is as it should be. A responding party shouldn't be able to deny an entire numbered paragraph merely because of a disagreement with one minor aspect of the pleading.

Rule 1:5 – Counsel and parties appearing without counsel. The court will now expressly authorize the signing of pleadings, notices, and briefs electronically or by a digital image of the signature. The current rule is a little ambiguous on whether counsel had to affix a handwritten signature every time. The new change also allows unrepresented parties to use e-signatures or digital images.

Rule 4:7A – Audio-visual depositions. There's a simple adjustment here. After an A/V deposition, a witness now may read and sign (or try to correct) a transcript, though there's still no provision for her approving or changing the video itself.

Rule 5:1B – Electronic filing. Rejoice! The old requirement for "a handwritten signature" will vanish in August, yielding to the steamroller of progress (and to e-signatures). In fairness, currently all e-filed document may be e-signed.

Rule 5:26 – General Requirements for all briefs. It's here that we get a whopper of a change. For the first time – as far as I know, it's the first time in the court's history, going back to the 1770s – the Supreme Court has authorized the filing of sur-reply briefs. They're limited to situations where the appellee has assigned cross-error and the appellant has filed a reply brief, so an appellee can't file two briefs in a row. This brings Virginia appellate practice roughly into conformity with the Federal Rules of Appellate Procedure (FRAP 28.1(c)(4)) on this point. The language of the new provision authorizes the filing "in support of the cross-error," so I believe the appellee won't get a second crack at the appellant's assignments. The sur-reply is due 14 days after the appellant files the reply brief.

Rule 5:29 – Requirements for reply brief and reply brief in support of cross-error. This rule gets a new name and new provisions for the sur-reply. Heading off some appellees who might be a bit too clever, the court forbids the filing of a sur-reply unless the appellant has actually filed a reply brief. (Why would any appellee think to do such a thing, you ask? Why, to try to get around the page limits, of course.)

Rule 5A:1 – Scope, citation, applicability, filing and general provisions. Here the rules allow e-signatures in the Court of Appeals as well.

Rule 5A:10 – Record on appeal: preparation and transmission. The significant change to this rule is one of elision: Subparagraph (c), allowing for appeal on an abbreviated record, will vanish on August 20. This is probably a casualty of electronic transmission of the record, as it's just as easy for the circuit-court clerk to transmit the whole record as it is to send up a portion of it. Candidly, I'm not sure how often parties used this procedure, so the elimination may not generate a noticeable change at ground level.

Rule 5A:12 – Petition for appeal and other petitions for discretionary review. The order inserts a new subparagraph (f) – thereby demoting the last

two subparagraphs of the existing rule, which will now be (g) and (h) – that deals with the record. It requires the parties to cite to record pages in their briefs, assuming the trial court has sent that record up electronically. Currently, it's permissible to cite documents descriptively, such as "defendant's demurrer brief at 4," but that'll end soon. Petitions for interlocutory review must be accompanied by the relevant parts of the record, presumably because the circuit court won't send the record up in those cases.

Rule 5A:13 – Brief in opposition. A new subparagraph (b)(3) now requires that the appellee also cite to pages of the record where it has arrived electronically, mirroring the provision in Rule 5A:12 for appellants.

Rule 5A:19 – General requirements for all briefs. The Supreme Court imports an existing requirement into this rule, where it's more visible and hence more likely to be adhered to. New subsection (b)(1) sets out the appellant's obligation to list assignments of error within 15 days after the clerk's certificate of his receiving the record. The requirement exists now, but it's buried in the middle of a long subparagraph of Rule 5A:25. I applaud its more prominent placement here. The rule also requires the inclusion of granted assignments of error and cross-error in the appellant's opening brief.

Rule 5A:20 – Requirements for opening brief of appellant. In what every experienced advocate already knows, a new provision in subparagraph (c) states that assignments of error in the appellant's brief "are binding on the appellant for substantive purposes, unless the Court has granted a motion to amend." We all know not to change our assignments of error without the court's permission, right?

Rule 5A:21 – Requirement for brief of appellee or guardian ad litem. This rule gets a parallel provision on the binding nature of assignments of cross-error. Not a surprise.

Rule 5A:22 – Requirements for reply brief and reply brief in support of cross-error. The sea-change of a sur-reply brief applies in the Court of Appeals, too. It has the same requirements and limitations as its SCV cousin in Part Five.

Rule 5A:25 – Appendix and preliminary designations of assignments of error. Here's a belt to go with those Rule 5A:20 suspenders. Also in subparagraph (f), the court provides for the situation where the appellant submits preliminary assignments of error that prove, upon his filing the opening brief, to be misleading. The new provision allows the appellee in such a case to request leave to file a supplemental appendix, and pass that cost on to the appellant.

For our purposes, the major news item in this order is the provision for a sur-reply brief by the appellee to address her cross-error. Previously, she was limited to just one crack at briefing, while the appellant got two, even if the appellee raised a significant issue on cross-error. This is no doubt more equitable. My only wonder is how long it will take for an appellee to try to sneak in some arguments on the appellant's assignments, and whether the court will smack the appellee down for that.

Meanwhile, the court continues to march into the Twenty-first Century by streamlining e-signing rules, and it sandpapers that one rough edge in the pleading rules, specifically Rule 1:4. I haven't covered all of the changes here, so if you're interested in agreements for payment of fines and costs over time (Rule 1:24) or specialty dockets (1:25), click on the link to the rule and check those out. Between Friday's notable changes and the court's promulgation a couple of weeks ago of a long-overdue rule on preliminary injunctions, June 2024 is proving to be a watershed month for the Virginia Rules of Court.

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VIRGINIA BEACH BAR ASSOCIATION

2024 Annual Bench ~ Bar Conference: The Virginia Beach Juvenile and Domestic Relations Court

VIRGINIA PRACTICE POINTERS AND LEGAL REFRESHERS FOR CIVIL PRACTITIONERS BEFORE THE COURT IN CUSTODY, VISITATION, AND SUPPORT CASES

PLUS: ***A COURTROOM-BY-COURTROOM OVERVIEW OF TIPS AND SUGGESTED GUIDANCE***

****Materials Graciously Provided by Your VBBA Board and GDC Committee**

Panelists:

The Hon. Timothy Quick, Chief Judge

The Hon. Cheshire I'Anson Eveleigh

The Hon. Adrianne L. Bennett

The Hon. Phillip C. Hollowell

The Hon. Jennifer Shupert

The Hon. James P. Normile

VBBA VBBA VBBA

VBBA ~ 2024 Annual Bench Bar

Virginia Beach Juvenile and Domestic Relations Court Presents...

PRACTICE POINTERS AND LEGAL REFRESHERS FOR CIVIL PRACTITIONERS BEFORE THE COURT IN CUSTODY, VISITATION, AND SUPPORT CASES

- ***A COURTROOM-BY-COURTROOM OVERVIEW OF TIPS AND SUGGESTED GUIDANCE***

OVERVIEW

- ***Once one leaves the classroom for the courtroom, it is often quickly discovered that "one approach does not fit all" when it comes to appearing before different courts. While the law is the same, the manner in which the bench approaches courtroom process and presentation may differ widely from courtroom to courtroom. This session will give a current view from our local JDR bench into these differences along with a refresher of the law applicable to the most presented civil cases before the JDR Court.***

CUSTODY~VISITATION~SUPPORT

REFRESHER

The Basics

In matters of custody, visitation, and related child care issues (including support), the court's paramount concern is always the best interests of the child." *Rhodes v. Lang*, 66 Va. App. 702, 708-09, 791 S.E.2d 744 (2016) (quoting *Farley v. Farley*, 9 Va. App. 326, 327-28, 387 S.E.2d 794, 6 Va. Law Rep. 1205 (1990)).

In child custody cases, Virginia Code § 20-124.2 provides that the court shall give primary consideration to the best interests of the child.

In turn, Virginia Code. § 20-124.3 lists ten (10) factors that the court shall consider in determining a child's best interests. Those factors are:

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;

2. The age and physical and mental condition of each parent;

3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual, and physical needs of the child;

4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers, and extended family members;

5. The role that each parent has played and will play in the future, in the upbringing and care of the child;

6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;

7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;

8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age, and experience to express such a preference;

9. Any history of (i) family abuse as that term is defined in § 6.1-228; (ii) sexual abuse; (iii) child abuse; or (iv) an act of violence, orce, or threat as defined in § 19.2-152.7:1 that occurred no earlier han 10 years prior to the date a petition is filed. If the court finds such history or act, the court may disregard the factors in subdivision 6; nd

10. Such other factors as the court deems necessary and proper to the determination.

Virginia Code § 20-124.3 provides that the judge shall communicate to the parties the basis of the decision either orally or in writing. Also, except in cases of consent orders for custody and visitation, the judge's decision shall set forth the express findings made regarding the relevant factors set forth in this section. *Rainey v. Rainey, 74 Va. App. 2d 359 (Va. App. 2022).*

Modification

"In determining whether a change in custody is warranted, the trial court applies a two-part test: (1) whether a change of circumstances has occurred since the most recent custody award; and (2) whether such a change would be in the best interests of the child." *Khalid-Schieber v. Hussain*, 70 Va. App. 219, 228, 827 S.E.2d 6 (2019) (quoting *Parish v. Spaulding*, 26 Va. App. 566, 570-71, 496 S.E.2d 91 (1998)); *see also Keel v. Keel*, 225 Va. 606, 611, 303 S.E.2d 917 (1983).

"Whether a change of circumstances exists is a factual finding that will not be disturbed on appeal if the finding is supported by credible evidence." *Denise v. Tencer*, 46 Va. App. 372, 395, 617 S.E.2d 413 (2005) (quoting *Ohlen v. Shively*, 16 Va. App. 419, 423, 430 S.E.2d 559, 9 Va. Law Rep. 1363 (1993)).

The party requesting the change has the burden of proving the materials changes since the last order. In absence of such material change, reconsideration shall be barred by *res judiciata. See Sullivan v. Knick*, 38 Va. App. 773, 782, 568 S.E.2d 430 (2002).

After a court determines a material change has in fact occurred, the Court will consider the factors set forth in Virginia Code *§20-107.2 and §20-124.2.*

Relocation Cases

In **relocation** cases, the law is clear that the best interest of the children controls the issue of a custodial parent moving the children to another state, and the court may consider a benefit to the parent from such a relocation **only** if the move independently benefits the children; the "unity of interest" analysis, under which the interests of the children cannot be divorced from those of their primary caregiver, is not applicable under Virginia law. *Cloutier v. Queen*, 35 Va. App. 413, 545 S.E.2d 574, 2001 Va. App. LEXIS 240 (2001).

Adoptive Parents v. Bio Parents

An adoptive parent stands on the same footing and has the same rights and obligations as a biological parent and it follows that in a custody dispute between a biological parent, and an adoptive parent, preference cannot be given to the biological parent. *Carter v. Carter*, 35 Va. App. 466, 546 S.E.2d 220, 2001 Va. App. LEXIS 263 (2001). This has been held to be the same standard as applied in custody cases arising from a same sex divorce.

The Appointment of a Guardian *ad litem*

The Appointment of a Guardian *ad litem* is not an absolute right in contested custody and visitation cases; the trial court *may* appoint a guardian *ad litem* in contested custody cases

"in which the court makes a factual determination that it would be necessary to protect the interests of the child." *Scarberry v. Scarberry*, 2009 Va. App. LEXIS 28 (Va. Ct. App. Jan. 27, 2009) quoting *L.C.S. v. S.A.S.*, 19 Va. App. 709, 723, 453 S.E.2d 580, 588 (1995). However, there is no *requirement* that it do so. *Id.*

NOTE**There is a requirement of the appointment of a GAL in all abuse and neglect cases filed by DHS.

Prohibitions on Delegation of Decision-Making Authority in Court Orders

The court may not delegate its decision-making authority to third parties (i.e..) the GAL, a therapist, DHS, etc.). The court must make the ultimate custody and visitation determinations and it shall NOT delegate its judicial duty to adjudicate custody and visitation to third parties such as therapists. *Rainey v. Rainey, 74 Va. App. 2d 359 (Va. App. 2022).*

Legal Standards Governing Third-Party Custody and Visitation Cases

Legal standards governing third-party custody and visitation cases are many and ever evolving. Parents have a constitutional interest to "autonomy in child rearing." *Williams v. Williams*, 24 Va. App. 778, 782, 485 S.E.2d 651 (1997), *aff'd as modified*, 256 Va. 19, 501 S.E.2d 417 (1998); *see also Surles v. Mayer*, 48 Va. App. 146, 166, 628 S.E.2d 563 (2006). Nevertheless, by statute, certain third parties with "legitimate interests" may seek custody and/or visitation rights over the objection of the parent. *See* Virginia Code §§ 20-124.1, -124.2.

The term "custody" broadly encompasses both legal and physical "care and control" of a minor child, including access to the child, while "visitation" narrowly refers to only a "period of access to a child." *See* Virginia Code § 20-124.1; *see also Visitation, Black's Law Dictionary* (10th ed. 2014). In custody disputes between third parties and parents, "the rights of the parent are, if at all possible, to be respected." *Bailes* v. Sours, 231 Va. 96, 99, 340 S.E.2d 824 (1986).

"[T]he law presumes that the child's best interests will be served when in the custody of its parent." *Id.* at 100. **This presumption may be rebutted by "clear and convincing evidence" of these factors**: "(1) parental unfitness," "(2) a previous order of divestiture," "(3) voluntary relinquishment," "(4) abandonment," and (5) "special facts and circumstances" creating "an extraordinary reason for taking a child from its parent." *Id.*

The decisions of the Supreme Court of Virginia and of the Supreme Court of the United States guide the analysis for court-ordered visitation by a non-parent. Those decisions hold that "[t]he relationship between a parent and child is a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment." *L.F. v. Breit*, 285 Va. 163, 182, 736 S.E.2d 711, 721 (2013) (citing *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)); see also *Williams v. Williams*, 256 Va. 19, 21-22, 501 S.E.2d 417, 418 (1998). Thus, there is a "fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66.

In visitation disputes between third parties and parents, a trial court "shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award

custody or visitation to any other person with a legitimate interest." *See* Virginia Code § 20-124.2(B).

A person with a legitimate interest "shall be broadly construed to accommodate the best interest of the child." *See* Virginia Code § 20-124.1. However, "[f]or the constitutional requirement to be satisfied, **before visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the child's health or welfare without such visitation.**" *See Williams* supra., 24 Va. App. at 784-85. The best interest of the child is only considered after a finding of actual harm. *Id.* at 785. "Without a finding of harm to the child, a court may not impose its subjective notions of 'best interests of the child' over the . . . objection of the child's parents without violating the constitutional rights of those parents." *Id.*

As set forth above, the United States Supreme Court recognized that third-party visitation rights necessarily implicate the same constitutional liberty interest as parental custody. *See Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."). Because visitation—a narrower issue within the custodial liberty interest of parents—cannot be ordered without showing actual harm to the minor child in the absence of visitation, **custody also cannot be ordered without proving actual harm.** A third-party seeking custody must show present clear and convincing evidence that the child will be harmed—unless removed from the biological parent's custody—because of parental unfitness, a previous order of divestiture, voluntary relinquishment, abandonment, or "special facts and circumstances" that constitute "an extraordinary reason for taking a child from its parent." *Bailes*, 231 Va. at 99-100.

Actual harm is not established by "showing that 'it would be "better," "desirable," or "beneficial" for a child' to have visitation with a non-parent." *Griffin v. Griffin*, 41 Va. App. 77, 84, 581 S.E.2d 899

(2003) (quoting *Williams*, 24 Va. App. at 784). Actual harm requires "compelling circumstances which suggest something near unfitness of custodial parents" to even obtain forced visitation. *Id.* at 5. Neither speculation nor any "vague generalization about the positive influence" of a non-parent will suffice to meet the actual harm burden. *See Id.*

Foster Family/Safety Plan v. Biological Parent Custody and Visiation Petitions

In a case between a former foster parent (or safety plan), where the goal is to return the child to the parent, the former foster parent must meet the ACTUAL harm standard. *Moore v. Joe*, 76 Va. App. 509, 882 S.E.2d 534, 2023 Va. App. LEXIS 33 (2023). In looking at actual harm in cases in involving former foster parents and biological parents, it is important not to look through the lens of what might be better for the child or solely what occurred historically with the biological parent. For example, the fact that the foster parents have a two-parent home, long-term stability with employment, and go to church every Sunday does not negate a biological parent's fundamental right to their child. Moreover, mental health and substance abuse issues alone do not render a parent unfit *per se*. *See Moore*, supra. at 541.

• Practice Pointers from the Bench- BY COURTROOM

1.) Material Change Proffers

2.) Material Change Pre-trial Determination Hearing v. Material Change Determination at Trial

3.) Temporary Custody and Visitation Orders at Initial Hearing

4.) Pre-Trial Orders

5.) Discovery Issues

6.) E-Filing?

7.) General Do's and Don'ts from Your Bench

Questions ???

Virginia Beach Juvenile and Domestic Relations Court

Chief Judge: Timothy J. Quick, Courtroom #1

Presiding Judges:

Judge James P. Normile, Courtroom #3
Judge Phillip P. Hollowell, Courtroom #4
Judge Cheshire l'Anson Eveleigh, Courtroom #5
Judge Jennifer Shupert, Courtroom #6
Judge Adrianne L. Bennett, Courtroom #8

Vacant- Courtroom #2

Traffic Court- Courtroom #7

Clerk- Amy Burnham

E-Filing vbjdr