

10 TIPS FOR DOMESTIC LAW PRACTITIONERS

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1. **Pay close attention to our supreme court's new revised order concerning personal identifying information and other sensitive information in appellate court filings.**
 - Revised Order Concerning Pers. Identifying Info. & Other Sensitive Info. in Appellate Court Filings, 407 S.C. 607, 757 S.E.2d 421 (2014).
 - If a minor is the victim of a sexual assault or the victim in an abuse or neglect case, the minor's name must be completely redacted and a term such as "victim" or "child" should be used. In all other cases, the minor's first name and first initial of the last name or only the minor's initials should be used.
 - If the caption of the case contains any of the personal data identifiers mentioned in the order, the parties should file a motion to amend the caption to redact the identifier contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court.
 - Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted only to use the juvenile's first name and first letter of the juvenile's last name.
 - A party seeking to seal material beyond the personal identifiers included in the order must file a motion to seal with the appellate court in which the matter is pending—this is true even if the lower court or administrative tribunal may have issued an order sealing the record.
 - The supreme court also outlined the rules for filing a confidential reference list with an appellate court, which may be amended as of right.

2. ***Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011) clarified that appellate courts employ a de novo—not abuse of discretion—standard of review for family court decisions.**
 - In appeals from the family court, an appellate court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011).
 - "De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." *Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654–55 (2011).
 - However, while this court has the authority to find facts in accordance with its own view of the preponderance of the evidence, "we recognize the superior position of the family court judge in making credibility determinations." *Id.* at 392, 709 S.E.2d at 655. Further, de novo review does not relieve an appellant of his burden to "demonstrate error in the family court's findings of fact." *Id.*
 - "Consequently, the family court's factual findings will be affirmed unless appellant satisfies this court that the preponderance of the evidence is against the finding of the [family] court." *Id.* (citation omitted) (internal quotation marks omitted).

3. When dealing with Indian adoptions, be mindful of the important implications of the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901–63 (2006), that were not addressed by the U.S. Supreme Court in *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013).

- In the *Baby Girl* case, SCOTUS focused on the applicability of § 1912(d) (active efforts to prevent breakup of Indian families), § 1912(f) (TPR standards), and § 1912(a) (adoptive placements) to a noncustodial father in a voluntary adoption proceeding; however, voluntary private adoptions make up only 2% of the entire ICWA caseload. The majority of ICWA adoption and custody cases concern a child involuntarily removed from the parents' custody. Given that SCOTUS seemed to concentrate on the private adoption context, it is unclear if and to what extent the Court's analysis of § 1912(a) will apply to all adoptions.
- The majority referenced the dissent's analysis of § 1911(b) (transfer to tribal court), § 1913(a), (c) (governing procedures for a parent of an Indian child to consent to an adoption), § 1912(a) (notice), § 1912(b) (right to counsel), and § 1912(c) (access to court documents), and some argue this indicates the majority's acquiescence with the notion that these protections continue to apply to biological fathers even in the absence of a previously existing Indian family.
- Several articles discuss how the Court declined the opportunity to adopt the Existing Indian Family doctrine—which provides that ICWA does not apply when, in the view of the court, there has not been a prior Indian family—and, therefore, declined to create significant exceptions to ICWA's applicability.
- The decision does, however, have the potential to limit the applicability of Indian placement preferences because tribes must be extra vigilant in identifying potential Indian custodians and encouraging them to formally seek custody because of this ruling.

4. In its July 16 order, our supreme court concluded there should be very little reason for a party to need an extension to complete any of the steps required by Rule 242, SCACR, and significantly limited the circumstances under which the court will grant an extension in cases seeking a petition for a writ of certiorari to review a decision of the court of appeals.

- Order on Extensions in Cases Seeking a Petition for a Writ of Certiorari to Review a Decision of the S.C. Court of Appeals, No. 2014-07-16-01 (S.C. July 16, 2014).
- The court lamented that parties have been routinely seeking multiple extensions when, in its view, the procedures outlined in Rule 242, SCACR, provide ample time for the parties to file their briefs with the supreme court.
- Upon a showing of good cause, a party—or multiple parties if represented by the same counsel—may be granted extensions totaling no more than twenty (20) days during the proceedings before [the supreme court]. If multiple extensions are taken within the twenty (20) day cumulative limit, the minimum period that can be requested is five (5) days.
- Any extension beyond the twenty (20) days specified in (1) above will be granted only if extraordinary circumstances such as illness or other circumstances beyond

the control of the movant will warrant the granting of an extension. These extensions will generally be granted for no more than ten (10) days

5. Pay careful attention to the August 27 Family Court Benchmark administrative order, in which the court superseded its May 9, 2007 order.

- Admin. Order on Family Court Benchmark, No. 2014-08-27-01 (S.C. Aug. 27, 2014).
- The new administrative order reiterates "that all domestic relations and juvenile cases in the State of South Carolina, with the exception of DSS Abuse and Neglect cases, shall be disposed of within 365 days of their filing. Further, the Family Court Chief Judges for Administrative Purposes (Chief Administrative Judges) shall direct and oversee the monitoring of all cases which are older than 365 days, and for which no final hearing has been requested."
- One of the newer provisions, however, provides that once a case is older than 365 days and has been scheduled for a final hearing, "only the Chief Administrative Judge for the circuit or county may continue it, even if the request for continuance is received by the assigned judge during the week of trial."
- The order also states that county clerks of court indicate on all domestic relations and juvenile cases—except DSS abuse and neglect cases—the following notice: "Written requests for a final hearing in this case must be delivered by a party or attorney to the Clerk's Office within 365 days of this filing date. Failure to comply with this notice shall result in the dismissal of this case by the Chief Judge for Administrative Purposes."
- "In the event no request for a final hearing is received by the Clerk of Court within the time period prescribed and there is no other order by the Chief Administrative Judge extending the case, the Clerk of Court shall prepare an Order of Dismissal without prejudice and provide the order and file for review by the Chief Administrative Judge. If it is determined that dismissal is appropriate, then the Chief Administrative Judge shall sign the Order of Dismissal. If a case is continued for any reason past 365 days, the Order of Continuance must include a time and date rescheduling the case."
- "In the event an action is dismissed without prejudice pursuant to this Administrative Order, any existing orders in the affected case file which were not final will be considered null and void and no longer subject to enforcement by this court (including, but not limited to, the enforcement and collection of child support and/or alimony), with any support arrearages being thereby dismissed."

6. The ABC Trial Rosters order regarding the family court docket provides guidance as to the order in which your cases will be heard.

- Order on ABC Trial Rosters in the Family Court, No. 2012-11-21-05 (S.C. Nov. 21, 2012).
- Any contested case set for three or more hours shall be designated as the "A" case. Each "A" case is to be backed up by a "B" case and a "C" case. If the "A" case goes on to trial, the "B" and "C" cases are to be continued and rescheduled as an "A" case. If any of the "A," "B," or "C" cases settle, the presiding judge shall

conduct a hearing(s) to approve the settlement(s) and dispose of the case(s) before commencing the contested case.

- On the same day, the court issued another order to clarify the duties of judges under the uniform ABC trial roster system. *See* Order on Duties of Family Court Chief Judges for Admin. Purposes, No. 2012-11-21-06 (S.C. Nov. 21, 2012).

7. Keep in mind that, on appeal, the court will rarely grant extensions in TPR, adoption, and DSS custody actions.

- Order Expediting Appeals from Termination of Parental Rights Proceedings, Adoption Proceedings, and/or Dep't of Soc. Servs. Actions Involving Custody of a Minor Child, No. 2011-10-20-01 (S.C. Oct. 20, 2011).
- In our supreme court's order expediting appeals, the court stated that, "[t]o facilitate expediency, there will be a presumption against granting motions for extensions of time to file petitions, returns, briefs, records, and other documents" in termination of parental rights (TPR) proceedings, adoption proceedings, and DSS actions involving the custody of a minor child.
- "A motion for an extension of time will only be granted in the most extraordinary of circumstances and for the most compelling reasons in the interest of justice."
- The order requires the court of appeals to expedite cases in the following manner:
 - Once the case is assigned to a panel, oral argument will be held, if at all, at the next practicable term of court.
 - Notice of oral argument will be sent at least fifteen days prior to the scheduled argument.
 - A written opinion from the court shall be entered within thirty days of being assigned to a panel or hearing oral argument, whichever is later.
 - However, if the case warrants additional consideration, the time for filing an opinion may be extended.

8. When the law requires you to address a set of factors, be sure to include and analyze each of them as they relate to your case.

- If the family court asks you to draft a proposed order, list all of the factors relevant to why a party is entitled to attorney's fees as well as why the fees are reasonable. Failure to do so could be reversible error (which, of course, only further delays your payment).
- This advice also applies to appellate briefs.
- It is easier for the court to make a decision if the factors from *E.D.M. v. T.A.M.*, 307 S.C. 471, 415 S.E.2d 812 (1992), and *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991), are clearly listed and explained.
- In fact, for any instance in which the law requires you to list factors in your analysis, be sure to address each factor—do not just leave one off because it is not as strong for your case.

9. On appeal, know the value of marital property in a divorce action!

- Attorney: We request this court grant a 50/50 equitable division.
- Appellate Court: What is the value of 50% of the marital property?
- Attorney: We are disputing the value of the house, accounts, and other assets.

- Appellate Court: So how much do you think it is worth?
- Attorney: [Repeats] We are disputing the value of the house, accounts, and other assets.
- [Puzzled Faces]
- In these situations, it is better for you to know specifically what you are asking the court to give your client. Knowing the numbers really helps paint a better picture of how the family court equitably divided the marital property, particularly in terms of how you would like the court of appeals to deviate from its conclusion. Remember, the court of appeals reviews the family court's decisions de novo.

10. Know the record!

- Family court cases may involve multiple proceedings and multiple cases stemming from a single divorce. Be sure to keep the procedural history and various actions separate and distinct.
 - Also, if asking for attorney's fees, make sure the requested fees are for services rendered for that particular action. For example, an attorney should not include fees associated with the prior appeal of the child custody award in a bill for the new, separate appeal of the alimony award.
- Know the timeline of the important facts in your case, particularly in divorce actions where the timing of certain events can have a huge impact on issues of alimony, child support, condonation, marital misconduct, etc.
- Always cite to the record in your briefs and come prepared to direct the judges to the appropriate page number(s) in the record when making your oral arguments. This not only helps you build credibility with the court, but also strengthens your arguments. Further, it will allow the parties and the court to catch any preservation issues with the arguments on appeal.