

APPEALING FAMILY COURT ORDERS

IS AN APPEAL OF YOUR DIVORCE JUDGMENT OR OTHER ORDER THE RIGHT DECISION FOR YOU?

What is an appeal? Who can appeal? What is the basis of an appeal? Those are questions that are asked at the end of a case when someone is not

WHILE AN APPEAL COULD BE AN APPROPRIATE STEP TO TAKE IF YOU ARE UNHAPPY ABOUT THE RESULTS OF YOUR DIVORCE TRIAL, POST-JUDGMENT MOTION OR RESTRAINING ORDER HEARING, MAKE SURE THAT YOU TALK OVER ALL THE IMPLICATIONS IN DETAIL WITH YOUR ATTORNEY INCLUDING A COST-BENEFIT ANALYSIS OF THE APPEAL PROCESS.

satisfied with the results. The mere fact that the outcome is not favorable to you is not enough of a reason to appeal. First, you cannot appeal any agreement such as a Property Settlement Agreement or Consent Order. You can, however, appeal a final Judgment or any final Order by right.

There are three levels of courts – Trial Court, Appellate Court and Supreme Court. Your trial or hearing is at the trial level and if you are unhappy with the result, you seek relief from the Appellate Division. The purpose of being able to appeal to a higher court is to make sure that the judge at the trial level did his or her job properly by applying all the facts presented in the hearing or motion to the existing law. An appeal is not a “do over” to allow you to correct mistakes or omissions that were made by you at the trial level. The Appellate Division simply reviews the record at the trial level and makes a decision based **only** on the record as

to whether the judge made a correct decision after relying **only on what was presented to the court**. In other words, the trial judge is not expected to guess at evidence that was not shown or assume any facts that you did not present to the court but maybe should have presented. The Appellate court is only concerned that the trial judge properly weighed the **evidence presented** by the litigants and based the decision only on what was presented. You do not get to reargue your case or present new evidence or testify on appeal.

The Appellate Division consists of panels of one, two or three judges who review each case. You won't know how many judges hear your case until it is either decided on the papers and you read the decision or at oral argument when you see how many judges are sitting. Oral argument is not always necessary or sought. Some people believe it is always important to ask for oral argument and others do not feel the need for every appeal.

The Appellate court gives great deference to family court judges when the issues on appeal are about facts for which the judge has discretion such as deciding how much money to distribute by way of equitable distribution as long as the facts on which the judge relied were in evidence. The trial judge cannot assume facts and then make a decision when nothing was presented. The trial judge can be found to have abused discretion if he or she decides a case on facts not in evidence. However, if the trial judge fails to apply the law to the facts that were presented, the Appellate court does not have to give deference to the decision. For example, if the case revolves around a matter such

as college tuition, the trial court needs to apply all the factors that are listed in case law to the facts presented. If the court fails to address every factor and apply it to the facts of the case, that judge may have been found to have erred in its legal findings. If the trial court fails to apply the two prong step procedure that the law requires be applied to the facts of the case in deciding if a Final Restraining Order should be entered, that judge has failed to apply the law and can be reversed.

So, how do you know if your case is one of the ones that is appealable given the limited bases for an appeal? Even if the basis is there, is it reasonable to always appeal? You need to discuss the options and outcomes with your attorney in detail. Don't hesitate to ask about the cost of appeal which is not just the out-of-pocket amount that you will have to pay an attorney to prepare the paperwork. You need to keep in mind that the cost of the appeal itself may outweigh the cost of not appealing and accepting the Order. You should do a detailed cost-benefit analysis which has to include figuring out if the cost that you have to pay is going to be less than the cost of the appeal, the possible outcome of losing the appeal and still having to pay the ordered cost, the cost of winning the appeal but being sent back to the trial court – a remand- to have a rehearing of the issues which will be explained below. You may have won the appeal but the cost of a rehearing may result in a financial net loss.

You will need to speak to your attorney and ask if there is enough of a basis for an appeal. Does the attorney believe that the court's error was so substantial that the decision will be reversed? Many errors by judges are considered minor and the Appellate court will not reverse them. Many trial lawyers do not do their own appeals since the process is somewhat specialized. So, you may be advised by your trial lawyer to meet with another attorney who will review the transcript and the record and let you know if that person believes an appeal is not only appropriate but cost-effective.

What are the odds of winning an appeal? Most clients ask about the "odds". While I never give odds, I will tell you that likelihood of winning appeals is not great. If the trial court erred in its

application of the law to your case, you have the best chance of winning. If you are claiming that the trial court erred in fact finding, your chances are slimmer.

What happens if you win the appeal? The outcomes of a win on appeal can vary. The Appellate Division can remand the case- send it back to their trial court for a new hearing on the entire case or a particular part of the case that was erroneously decided. The Appellate Division can reverse the decision altogether and the prior Orders will remain in effect. The Appellate Division can reverse the decision and send it back to another judge to hear if the court finds that there would be prejudice to the litigants if the original judge were to re-hear the matter. On rare occasions, the Appellate Court can take original jurisdiction and make its own findings and enter a final Order. If the matter is remanded, you will have to retry the issues which will, again, increase your counsel fees since you will be paying for the rehearing. You can seek counsel fees at the Appellate level for the appeal if you win but fees are not frequently granted so your expenses will continue to accrue and the matter could take a long time to be finalized if a remand is ordered.

This article is not an attempt to discourage appeals; rather it is meant to caution you to give very careful and thorough consideration of bases, costs, options and likelihood of success and what can happen even if you win an appeal, before you start the often frustratingly long appellate process. Listen, carefully, to the advice of your attorney before you take an appeal.

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