ORANGE COUNTY BAR ASSOCIATION

FAMILY LAW SECTION WEBINAR

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Wednesday, August 19, 2020

HOW TO WIN YOUR APPEAL AT TRIAL

THE HONORABLE FRANZ E. MILLER (Ret.)

MARJORIE G. FULLER, Attorney at Law

LISA R. McCALL, Certified Family Law Specialist

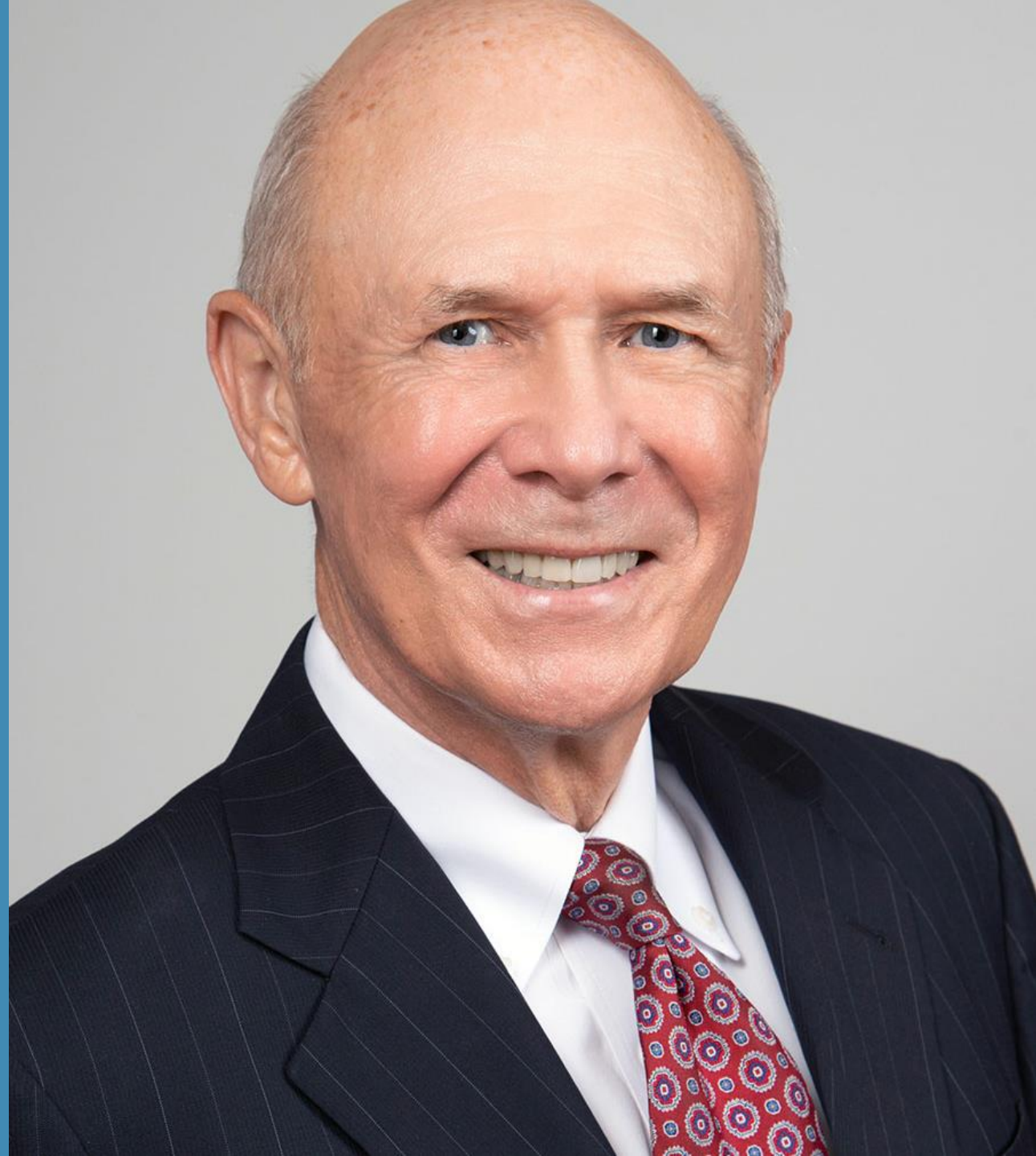
HONORABLE FRANZ E. MILLER (RET.)

The Honorable Franz E. Miller (Ret.) served 16 years on the Orange County Superior Court, with his tenure equally divided between the Family Law Panel and the Civil Law Panel, where he was supervising judge during the last two years of that assignment.

Prior to serving on the Superior Court, Judge Miller worked as a senior staff attorney at the court of appeal, assigned to Justice Edward J. Wallin. He has taught appellate practice courses at law schools. and written articles in legal journals and given presentations on the extremely technical statement of decision process, post-judgment motions and preserving the record for appeal.

During his legal career, Judge Miller was very active in the Orange County legal community, serving as president of the Orange County Bar Association in 1997, and in his local community, where he was a planning commissioner.

Since leaving the bench, Judge Miller has joined JAMS, where he currently serves as a private neutral, conducting mediations, arbitrations, and other ADR proceedings.



MARJORIE G. FULLER
ATTORNEY AT LAW

Marjorie G. Fuller is a former trial attorney with a practice now limited to civil appeals and writs and trial consultation. A graduate of the University of Michigan, and University of Southern California Law School, Ms. Fuller also holds a master's degree in English, was a professional writer and editor, and taught English and Legal Studies at California State University, Fullerton. Among her many honors, Ms. Fuller received the Franklin G. West Award, Orange County Bar Association's highest award, for lifetime achievement in law and justice. She was named Attorney of the Year by the Orange County Women Lawyers and received the Anti-Defamation League's Jurisprudence Award. In 2014, she was awarded the Presiding Justice David G. Sills Award for Appellate Excellence from the Orange County Bar Association Appellate Law Section. Ms. Fuller has also been selected as a 2019 and 2020 Southern California Super Lawyer.

Ms. Fuller has been principal attorney on more than 750 appeals, writ petitions and petitions for review in state and federal reviewing courts; 60 of her cases resulted in opinions published in California Official Reports (indicating an important new ruling or new interpretation of law). She has authored numerous articles in her field, and is a featured speaker on law, appellate procedure and legal writing for bar associations, law schools and professional groups.

LISA R. MCCALL
CERTIFIED FAMILY LAW SPECIALIST

Lisa R. McCall has been a licensed practicing attorney over twelve years. Ms. McCall is a Family Law Specialist certified by the State Board of Legal Specialization and has completed both the Houston Family Law Trial Institute, an extensive family law trial training program, and the Orange County Bar Association College of Trial Advocacy.

Ms. McCall has written articles in legal journals and presented to her peers on the extremely technical statement of decision process, post-judgment motions and preserving the record for appeal.

Ms. McCall earned her J.D., *cum laude*, from Whittier Law School in 2006, where she was a senior member of the Whittier Law School Journal of Child and Family Advocacy, a teaching assistant in first-year legal writing, and an active member of the Public Interest Law Foundation. During law school, she became a certified mediator and mediated small claims cases at the Orange County Superior Court. She became a member of the bar of the United States Supreme Court in December 2010. Ms. McCall has served in leadership roles on both the appellate section and the family law section of the Orange County Bar Association, as well as the Association of Certified Family Law Specialists Orange County Chapter, and was invited to teach an appellate advocacy course at Whittier Law School as an adjunct law professor.

TIME IS OF THE ESSENCE

Don't wait to contact an appellate attorney until after your ruling – it may be too late.

Most of the ways to win your appeal at trial happen within 10-15 days of trial.

Some timelines begin before you have even submitted your case.

If certain things are not done at trial, you may have waived issues on appeal.

IF IT'S NOT IN THE RECORD, IT DIDN'T HAPPEN

"When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two."

Protect Our Water v. County of Merced (2003)
110 Cal.App.4th 362, 364.

THE DOCTRINE OF IMPLIED FINDINGS

THE DOCTRINE OF IMPLIED FINDINGS

- "The doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support the judgment. [Citation.] The doctrine is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is **presumed correct;** (2) all intendments and presumptions are indulged in favor of **correctness**; and (3) the **appellant bears the burden** of providing an adequate record affirmatively proving error. [Citations.]" *Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42.

- "The doctrine of implied findings provides that, if the parties in a *civil court trial* waive a statement of decision, then on appeal the appellate court will presume that the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record; i.e., the necessary findings of ultimate facts will be implied, and the only issue on appeal is whether the implied findings are supported by substantial evidence." *McMillin Companies, LLC v. American Safety Indemnity Co.* (2015) 233 Cal.App.4th 518, fn. 21.

PRESUMPTION OF CORRECTNESS

- "The trial court's judgment is presumptively correct, such that error must be affirmatively demonstrated, and **where the record is silent the reviewing court will indulge all reasonable inferences in support of the judgment.** This means that an appellant must do more than assert error and leave it to the appellate court to search the record and the law books to test his claim. The appellant must present an adequate argument including citations to supporting authorities and to relevant portions of the record. Of course this also means that during trial, the parties must ensure that an adequate record is made of errors by which they are or may be aggrieved; ordinarily, **errors not reflected in the trial record will not, and indeed cannot, sustain a reversal on appeal.** " (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556-557 [internal citations omitted].)

PRESERVING YOUR APPEAL AT TRIAL

- TELL THE COURT WHAT YOU WANT IT TO DO
- KNOW THE DIFFERENCE BETWEEN EVIDENCE AND ARGUMENT
- DESCRIBE YOUR GESTURES OR WHAT YOU'RE LOOKING AT – "it was about this far" / "this document"
- MAKE SURE YOUR CLIENT IS SWORN IN BEFORE TESTIFYING
- MAKE SURE YOUR EXHIBITS ARE RECEIVED IN EVIDENCE
- KEEP TRACK OF HEARING LENGTH

OFFERS OF PROOF (EV. C. 354)

- A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:
- (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;
- (b) The rulings of the court made compliance with subdivision (a) futile; or
- (c)The evidence was sought by questions asked during cross-examination or recross-examination.

MAKING AND PRESERVING OBJECTIONS (EV. C. 353)

- A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
  - There appears of record an **objection** to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; &
  - The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a **miscarriage of justice**.
- Need to **state all grounds**; those not urged are waived if objection overruled.
- "When inadmissible evidence is offered, the opposing party must object and specifically state the grounds of his objection in such a manner that it clearly informs the court of the point on which a ruling is desired and the proponent of the defect to be corrected. An objection specifying the wrong grounds, or a general objection, amounts to a waiver of all grounds not urged." *Rupp v. Summerfield* (1958) 161 Cal.App.2d 657, 662.
- One rationale: Evidence rulings are discretionary; appellate court can't review discretion that hasn't been exercised.

THE STATEMENT OF DECISION

What is it and why does it matter?

CODE OF CIVIL PROCEDURE SECTION 632

- In superior courts, **upon the trial of a question of fact** by the court, written findings of fact and conclusions of law shall not be required. The court **shall** issue a statement of decision **explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial** upon the request of any party appearing at the trial.

CODE OF CIVIL PROCEDURE SECTION 634

When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue.

WHAT IS A STATEMENT OF DECISION AND WHEN DO YOU GET ONE?

"…upon the trial of a question of fact…"

NOT:

No statement of decision on a jury trial (only court trial) (CCP 632)

No statement of decision on a motion (*Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 Cal.App.4th 672, 678.)

No statement of decision on a purely legal issue

THE STATEMENT OF DECISION PROCESS

How to request one, what it looks like,

and what to do next

REQUEST
(TRIAL LONGER THAN ONE DAY)

Within **10 days** after announcement or service of the tentative decision, whichever is later, any party that appeared at trial may request a statement of decision to address the principal controverted issues. The **principal controverted issues** must be specified in the request. (Cal. Rules of Court, rule 3.1590(d), CCP 632.)

REQUEST
(TRIAL IN ONE DAY)

When a trial is completed within one day or in less than eight hours over more than one day, a request for statement of decision must be made **before the matter is submitted for decision** and the statement of decision may be made orally on the record in the presence of the parties. (CCP 632.)

WHAT IS A PRINCIPAL CONTROVERTED ISSUE?

- "It is settled that the trial court need not, in a statement to decision, "address all the legal and factual issues raised by the parties." It "is required only to set out ultimate findings rather than evidentiary ones." " '[U]ltimate fact[ ]' " is a slippery term, but in general it refers to a **core fact**, such as an element of a claim or defense, without which the claim or defense must fail. (See Black's Law Dictionary (8th ed.2004) p. 629 ["A fact essential to the claim or the defense.—Also termed *elemental fact; principal fact.*"].) It is **distinguished conceptually from "evidentiary facts" and "conclusions of law."** (See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 339, pp. 436–437.) (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556-557 [internal citations omitted].)

TRIAL COURT NOT REQUIRED TO ANSWER INTERROGATORIES

"In issuing its statement of decision, the court need not address each question listed in appellants' request. All that is required is an explanation of the factual and legal basis for the court's decision regarding such principal controverted issues at trial as are listed in the request." (*Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1130.)

WHAT DOES A REQUEST FOR STATEMENT OF DECISION LOOK LIKE?

LISA R. McCALL, CFLS [SBN 251877]
Law Offices of Lisa R. McCall
A Professional Corporation
Main Street Town Center
2677 North Main Street, Suite 815
Santa Ana, CA 92705
(714) 644-8760 / (714) 644-8767 Fax

Attorney for Elizabeth Smith

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, LAMOREAUX JUSTICE CENTER

In re the Marriage of: Petitioner: ELIZABETH SMITH and Respondent: JOHN SMITH	Case No. 19D12345 **PETITIONER'S REQUEST FOR STATEMENT OF DECISION** *Assigned for All Purposes to the Honorable Michael Jackson, Dept, 16*

NOTICE IS HEREBY GIVEN that Petitioner ELIZABETH SMITH requests the court issue a statement of decision setting forth the factual and legal basis for its tentative decision on the following principal controverted issues. For convenience of the court, the parties will be referred to by their first names.

1. The determination that the issue to be tried in this matter is whether or not to set aside the parties' prenuptial agreement.

2. The determination that the value of Elizabeth's interest in the residence located at 1234 Panasonic Drive, Laguna Beach, CA 92651 (herein "Panasonic") is $15,000, and the method of determining that value.

3. The determination that the condominium located at 123 View, Laguna Niguel, CA 92677 (herein "View"), purchased by John after separation of the parties, is community property.

4. The determination that John is entitled to reimbursement for 100 percent of his $100,000 down payment on View, purchased after separation of the parties, and from whence the reimbursement is to come.

5. The determination that John is credited with $50,000 in the "division of community property" for reimbursement for mortgage, property tax and homeowners' association payments he made on View after separation of the parties.

6. The determination that Elizabeth is to be charged with $35,000 for her post-separation withdrawal on the Home Equity Line of Credit (HELOC), secured by John's separate property Panasonic, to pay her attorney's fees.

7. The determination that Elizabeth is charged $110,000 in the "division of community property" for the rental value on View for the five years she occupied the residence after separation of the parties.

8. The determination that John is to receive credit for and Elizabeth is charged with the state and federal income taxes he paid on the $15,000 distribution from his IRA.

9. The determination that the HELOC secured by John's separate property View is a community obligation.

10. The determination of the amount of existing community property subject to division.

11. The mathematical calculation supporting the determination that Elizabeth owes John an equalization payment of $300,000.

12. The determination that the amount of spousal support John shall be ordered to pay Elizabeth is $1,500 per month.

DATED: May ___, 2019

Respectfully Submitted,

LAW OFFICES OF LISA R. McCALL, APC

_____

LISA R. McCALL, Attorney for Petititioner, ELIZABETH SMITH

PROPOSALS

If a party requests a statement of decision under (d), any other party may make proposals as to the content of the statement of decision within **10 days** after the date of request for a statement of decision. (Cal. Rules of Court, rule 3.1590(e), CCP 632.)

PROPOSED STATEMENT OF DECISION

- If a party requests a statement of decision under (d), the court must, within 30 days of announcement or service of the tentative decision, prepare and serve a proposed statement of decision and a proposed judgment on all parties that appeared at the trial, unless the court has ordered a party to prepare the statement. A party that has been ordered to prepare the statement must within 30 days after the announcement or service of the tentative decision, serve and submit to the court a proposed statement of decision and a proposed judgment. If the proposed statement of decision and judgment are not served and submitted within that time, any other party that appeared at the trial may within 10 days thereafter: (1) prepare, serve, and submit to the court a proposed statement of decision and judgment or (2) serve on all other parties and file a notice of motion for an order that a statement of decision be deemed waived. (Cal. Rules of Court, rule 3.1590(f).)
- The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties. (CCP 632.)

WHAT DOES A STATEMENT OF DECISION LOOK LIKE?

LISA R. McCALL [SBN 251877]
Law Offices of Lisa R. McCall
A Professional Corporation
2677 North Main Street, Suite 815
Santa Ana, CA 92705
(714) 644-8760 / Fax (714) 644-8767

Attorneys for Respondent, Paige Beckett

SUPERIOR COURT OF THE STATE OF CALIFORNIA

LAMOREAUX JUSTICE CENTER, COUNTY OF ORANGE

In re the Marriage of: Petitioner: HAROLD BECKETT, and Respondent: PAIGE BECKETT.	Case No. 19D123456 **[PROPOSED] STATEMENT OF DECISION [CAL. RULES OF COURT, RULE 3.1590(e)]** *Assigned for All Purposes to the Honorable Marilyn Monroe, Dept. 54*

On May 30, 2017, Judgment of Dissolution of Marriage was entered in this matter, awarding joint legal custody and joint physical custody to the parties.

On September 15, 2018, Respondent PAIGE BECKETT filed a post-judgment Request for Order regarding a legal custody issue (school choice). Hearing on her Request for Order commenced on April 29, 2019 and concluded on April 30, 2019. The matter was deemed submitted at 5:00 p.m. on April 30, 2019.

A request for statement of decision having been timely made by Respondent on May 1, 2019, the court now makes this written statement of decision.

1. **School Selection:** Petitioner's request to have the minor child remain in attendance at Carden Academy is granted. Respondent's request to have the minor child attend The Pegasus School is denied.

a. **Supporting Law:**

i. Family Code section 3042, subd. (a) provides, "If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation."

ii. Family Code section 3042, subd. (f) specifies a child may express his or her preference or provide other input regarding custody or visitation to the court.

iii. Family Code section 3042, subd. (b) incorporates Evidence Code section 765, which requires the court to "take special care to ensure that questions are stated in a form which is appropriate to the age or cognitive level of the witness. The court may, in the interests of justice, on objection by a party, forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age or cognitive level of the witness."

b. **Supporting Facts:**

i. The court received testimony from the 13-year-old minor child in chambers, with both parties' counsel present. The court found it was in the best interest of the minor child for the court to hear directly from her regarding the disputed issue.

ii. The minor child expressed her preference that she would like to attend The Pegasus School. The minor child explained she prefers The Pegasus School because it is a nice school, the children use iPads instead of carrying heaving books, the teachers are nicer than at her current school and explain things better, she has three friends at the school who live down the street from her mother's house, and she wants to attend school with her step-brother.

iii. The minor child stated her current school, Carden Academy, is a good school and has good teachers. She has friends in her classes, some of whom live in her neighborhood. She does not like the dress code and having a lot of homework there, and does not believe the teachers explain things well.

iv. The court did not consider the minor child's preference because Family Code section 3042 is inapplicable to the facts and circumstances of the present case: although the minor child gave her preference to the court as to what school she would like to attend, she did not offer any testimony regarding either parent being granted sole legal custody over educational decisions.

v. Respondent is sincere in her belief that The Pegasus School is the right choice for the minor child. Petitioner is sincere in his belief that Carden Academy remains the best choice for the minor child.

vi. The parties stipulated the two schools are academically equivalent. The minor child is an engaging 13-year-old 7th grader who presently attends Carden Academy. She is a model student who is performing at a very high level, receiving straight A's. Neither party expressed any concern over her educational performance, the school environment, or her socialization at Carden Academy.

vii. Based on all of the foregoing, there is no persuasive evidence that would support the court endorsing a change of schools at this time. The minor child's best interests are served by permitting her to remain in the school setting she knows and in which she has thrived.

Dated: May __, 2019

LAW OFFICES OF LISA R. McCALL, APC

_____

LISA R. McCALL
Attorneys for Respondent, PAIGE BECKETT

IS IT ACTUALLY A STATEMENT OF DECISION?

- Although it bears the caption "STATEMENT OF DECISION," the minute order herein does not constitute such within the meaning of section 632 because it fails to explain "the factual and legal basis for [the court's] decision as to ... the principal controverted issues at trial." Such an explanation is an essential element of a statement of decision. **By labeling the minute order a statement of decision and ignoring appellants' request for the issuance of such a statement, the trial court deprived appellants of an opportunity to make proposals and objections concerning the court's statement of decision.**"(*Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1129.)

OBJECTIONS

Any party may, within 15 days after the proposed statement of decision and judgment have been served, serve and file objections to the proposed statement of decision or judgment. (Cal. Rules of Court, rule 3.1590(g).)

"The statutes thus describe a **two-step process**: first, a party must request a statement of decision as to specific issues to obtain an explanation of the trial court's tentative decision (§ 632); second, if the court issues such a statement, a party claiming deficiencies therein must bring such defects to the trial court's attention to avoid implied findings on appeal favorable to the judgment (§ 634)." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1134.)

WHAT ARE PROPER OBJECTIONS TO A PROPOSED STATEMENT OF DECISION?

- **The statement is incomplete/fails to resolve a specified controverted issue.**
- **The statement is ambiguous.**
- The findings are not supported by the evidence.
- The findings are immaterial/not pertinent to the court's ultimate determination.
- The statement is simply a legal conclusion, and does not provide the basis for it.

ASK FOR A HEARING ON OBJECTIONS

The court **may** order a hearing on proposals or objections to a proposed statement of decision or the proposed judgment. (Cal. Rules of Court, rule 3.1590(k).)

DISCRETIONARY – but doesn't hurt to ask

YOU CAN ASK FOR AN EXTENSION OF TIME

The court may, by written order, extend any of the times prescribed by this rule and at any time before the entry of judgment may, for good cause shown and on such terms as may be just, excuse a noncompliance with the time limits prescribed for doing any act required by this rule. (Cal. Rules of Court, rule 3.1590(m).)

POST-JUDGMENT MOTIONS

And how they can help you preserve your appeal

TIME IS OF THE ESSENCE

STANDARD TIMELINES TO APPEAL

- 60 days after superior court clerk serves Notice of Entry
- 60 days after party filing the notice of appeal serves Notice of Entry
- 180 days after judgment

- *Post-judgment motions may extend some of these timelines.*

MOTION FOR NEW TRIAL – CCP 657

GROUNDS FOR NEW TRIAL THAT APPLY TO FAMILY LAW

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial. . .

2. Accident or surprise, which ordinary prudence could not have guarded against.

3. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial. . . .

4. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.

5. Error in law, occurring at the trial and excepted to by the party making the application.

TIMELINES AND PROCEDURE FOR MOTION FOR NEW TRIAL (CCP 659)

- (a) The party intending to move for a new trial shall file with the clerk and serve upon each adverse party a **notice of his or her intention to move for a new trial**, designating the grounds upon which the motion will be made and whether the same will be made upon affidavits or the minutes of the court, or both, either:
- (1) After the decision is rendered and before the entry of judgment.
- (2) Within **15 days** of the date of mailing notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or service upon him or her by any party of written notice of entry of judgment, or within **180 days** after the entry of judgment, whichever is earliest; provided, that upon the filing of the first notice of intention to move for a new trial by a party, each other party shall have 15 days after the service of that notice upon him or her to file and serve a notice of intention to move for a new trial.
- **NO EXTENSIONS OF TIME / NO MAILBOX RULE**

TIMELINES AND PROCEDURE FOR MOTION FOR NEW TRIAL (CCP 659A)

Within 10 days of filing the notice, the moving party shall serve upon all other parties and file any brief and accompanying documents, including affidavits in support of the motion. The other parties shall have 10 days after that service within which to serve upon the moving party and file any opposing briefs and accompanying documents, including counter-affidavits. The moving party shall have five days after that service to file any reply brief and accompanying documents. These deadlines may, for good cause shown by affidavit or by written stipulation of the parties, be extended by any judge for an additional period not to exceed 10 days.

TIMELINES AND PROCEDURE FOR MOTION FOR NEW TRIAL (CCP 660)

- The hearing and disposition of the motion for a new trial shall have **precedence** over all other matters except criminal cases, probate matters and cases actually on trial, and it shall be the duty of the court to determine the same at the earliest possible moment.
- Except as otherwise provided in Section 12a of this code, the power of the court to rule on a motion for a new trial shall expire **60 days** from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 or 60 days from and after service on the moving party by any party of written notice of the entry of the judgment, whichever is earlier, or if such notice has not theretofore been given, then 60 days after filing of the first notice of intention to move for a new trial. If such motion is not determined within said period of 60 days, or within said period as thus extended, the **effect shall be a denial of the motion without further order of the court.**

MOTION TO VACATE – CCP 663

A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for [the following cause], materially affecting the substantial rights of the party and entitling the party to a different judgment:

1. **Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts**; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected.

MOTION TO VACATE (CCP 663) TIMELINES

(a) Must file notice of intention, designating grounds for the motion, either:

(1) After the decision is rendered and before the entry of judgment.

(2) Within **15 days** of the date of mailing of notice of entry of judgment by the clerk, or service by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest.

TIMELINES AND PROCEDURE FOR MOTION TO VACATE ALSO SET FORTH IN CCP 659A (PER CCP 663A)

Within 10 days of filing the notice, the moving party shall serve upon all other parties and file any brief and accompanying documents, including affidavits in support of the motion. The other parties shall have 10 days after that service within which to serve upon the moving party and file any opposing briefs and accompanying documents, including counter-affidavits. The moving party shall have five days after that service to file any reply brief and accompanying documents. These deadlines may, for good cause shown by affidavit or by written stipulation of the parties, be extended by any judge for an additional period not to exceed 10 days.

MOTION TO VACATE (CCP 663A) TIMELINES

Except as otherwise provided in Section 12a , the power of the court to rule on a motion to set aside and vacate a judgment shall expire **60 days** from the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 , or 60 days after service upon the moving party by any party of written notice of entry of the judgment, whichever is earlier, or if that notice has not been given, then 60 days after filing of the first notice of intention to move to set aside and vacate the judgment. If that motion is not determined within the 60-day period, or within that period, as extended, the **effect shall be a denial of the motion without further order of the court.**

NO EXTENSIONS / NO MAILBOX RULE

MOTION FOR RECONSIDERATION CCP 1008(A) – RARELY USEFUL

(a) When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of **written notice of entry of the order** and **based upon new or different facts, circumstances, or law**, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown.

MOTION FOR RECONSIDERATION
CCP 1008(D)

MAKE SURE YOU HAVE NEW FACTS!

(d) A violation of this section may be punished as a contempt and with sanctions as allowed by Section 128.7. In addition, an order made contrary to this section may be revoked by the judge or commissioner who made it, or vacated by a judge of the court in which the action or proceeding is pending.

MOTION TO SET ASIDE
CCP 473(B)

The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.

MOTION TO SET ASIDE (473(B)) TIMELINES AND PROCEDURE

Application shall be accompanied by copy of answer or pleading to be filed.

Shall be made **within a reasonable time, in no case exceeding six months,** after the judgment, dismissal, order, or proceeding was taken

Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an **attorney's sworn affidavit** attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, **direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties**. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310.

MOTION TO SET ASIDE
FC 2122

Motion to set aside family law judgment: grounds and timelines

- **Actual fraud** where the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding (w/in 1 year of discovery of fraud or should have discovered fraud)
- **Perjury** (w/in 1 year of discovery of perjury or should have discovered perjury)
- **Duress** (w/in 2 years of entry of judgment)
- **Mental incapacity** (w/in 2 years of entry of judgment)
- **Mistake of law or fact** (w/in 1 year of entry of judgment)
- **Failure to comply with disclosure requirements** (w/in 1 year of discovery of failure to disclose or should have discovered failure to disclose)

MOTION TO CORRECT CLERICAL ERROR (CCP 473(D))

The court may, **upon motion of the injured party, or its own motion**, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.

THINGS TO REMEMBER

- Consult with appellate counsel early and often
- Most timelines within 10-15 days – don't wait
- Make your objections, arguments, and offers of proof – even if the judge is mad at you
- Make sure your exhibits have been moved into evidence
- If the court of appeal can't look at it, it's not in the record
- Get definitive rulings

“Successful appellate practice begins in the trial court.”

Hon. David Sills, Presiding Justice,

Court of Appeal Fourth Appellate District Division Three