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MCLE Article: What is a PACA?
By John Nieman

Recurring Questions Under the Domestic Violence Prevention Act
By Alyce D. LaViolette and Warren R. Shiell

Requesting a Statement of Decision: How, When & Why
By Stephen D. Hamilton

Requesting a Statement of Decision: How, When & Why

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Introduction

The necessity of obtaining a statement of decision was impressed upon me early in my family law career. My client had been given an adverse ruling that was ripe for appellate consideration. I consulted with an appellate specialist, who emphasized the importance of obtaining a statement of decision. Given the strict procedural rules that apply to statements of decision, waiting until the conclusion of a trial or hearing to request one can be too late. I therefore concluded that addressing (and requesting) a statement of decision had to become part of my pre-trial routine and preparation.

Statutory Language

The purpose and use of a statement of decision is set forth in California Code of Civil Procedure, section 632. Section 632 provides that:

- A superior court conducting a **trial** of a question of fact is not required to issue "findings of facts or conclusions of law…";
- Upon request of a party, "the court **shall** issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controversies issues at trial…";
- "The request [for a statement of decision] **must** be made within ten days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day **in which event the request must be made prior to the submission of the matter for decision.**"
- A request for statement of decision "**shall specify those controverted issues** as to which the party" is requesting a statement.
- Once a statement of decision has been requested, "any party may make proposals as to the content of the statement of decision."
- The statement of decision **must be in writing** unless the parties agree otherwise, except in those cases where the trial was less than eight hours or concluded within one calendar day, in which case the statement of decision "may be made orally on the record in the presence of the parties."

Because this statute was first enacted in 1872, the case law interpreting it and addressing a statement of decision is expansive and beyond the scope of this article. Instead, this article will focus on the specific technical requirements identified in bold in the above summary of the statute, with the intention of providing a checklist and guidelines for family law practitioners.

What Constitutes a "Trial?"

Not all family law proceedings are "trials" for purposes of section 632. We are frequently before the court on pre- or post-trial motions or requests for orders that are governed by California Rules of Court, Rule 5.92. With certain statutory exceptions, a hearing on a motion or Request for Order is not a "trial" under section 632. As stated in *In re Marriage of Baltins*, 212 Cal.App.3d 66, 79-80 (1989), "(c)ases interpreting Code of Civil Procedure section 632 have uniformly held that a statement of decision is not required after a ruling on a motion." Thus, the First District affirmed the trial court's rejection of the husband's attempt to obtain a statement of decision following a post-judgment motion to set aside portions of a final judgment.

In re Marriage of Fong, 193 Cal.App.4th 278, 294 (2011) stated that the references in section 632 to "trial" and the cases interpreting that section "suggest a statement of decision is required only in the event of a trial, as that term is commonly understood." "... [A] statement of decision ordinarily is not required in connection with a ruling on a motion [citations omitted], even if the motion involves an extensive evidentiary hearing."[1] The Second District in *Fong* held that husband was not entitled to a statement of decision following a motion for attorney's fees.

Non-Trial Proceedings in Which a Statement of Decision May Be Requested

There are statutory and judicial exceptions to the rule that a party may only request a statement of decision following a trial. Pursuant to Family Code section 2127, a statement of decision can be requested following a motion to set aside a judgment under Family Code section 2120 if the court has "resolved controverted factual evidence." Under Family Code section 3654, upon request by a party, "an order modifying, terminating, or setting aside a [child] support order shall include a statement of decision." Family Code section 4332 requires the court to "make specific factual findings with respect to the standard of living during the marriage..." and upon the request of either party, "factual determinations with respect to other circumstances." Family Code section 3022.3 requires the court to issue a statement of decision when requested by a party following "the trial of a question of fact in a proceeding to determine the custody of a minor child....".

Baltins also identifies a judicially-created exception for child custody rulings noted in *In re Marriage of S.,* 171 Cal.App.3d 738 (1985). In *S.*, Mother requested a statement of decision following a motion to modify custody orders contained in an interlocutory judgment. A statement of decision was required but not prepared. On appeal, the trial court's ruling was reversed based on the failure to comply with California Code of Civil Procedure section 632. In addressing the issue of whether section 632 applied to a post-judgment modification request, the Second District, citing earlier precedent, found that "where the issues are sufficiently important, as in a child custody case, formal findings of fact and conclusions of law are required upon the request of a party, regardless of the nature of the proceedings."

A statement of decision is also mandatory when a matter is heard by a referee.[2]

Rules of Court Re: Statement of Decision

Several rules of court address the implementation of section 632. California Rules of Court, Rule 3.1590 governs the announcement of the statement of decision and subsequent judgment. Importantly, subsection (a) provides that:

> (o)n the trial of a question of fact by the court, the court must announce its tentative decision by an oral statement, entered in the minutes, or by a written statement filed with the clerk. Unless the announcement is made in open court in the presence of all parties that appeared at the trial, the clerk must immediately serve on all parties that appeared at the trial a copy of the minute entry or written tentative decision.

Rule 3.1590 then addresses several procedural aspects concerning statements of decisions, including the use and preparation of tentative statements, objections to the tentative statement and the applicable deadlines. In summary:

- Within ten days of the court's announcement or service of a tentative decision (whichever is later), a party may request a statement of decision. The request must specify the principal controverted issues which the requesting party contends must be addressed. Rule 3.1590(d).
- The other party (or parties) can make proposals regarding the content of the statement of decision within ten days of the request. Rule 3.159(e).
- When a statement of decision has been requested, "the court must, within 30 days of announcement or service of the tentative decision" serve the proposed statement of decision unless a party was directed to do so. Rule 3.159(f).
- Within fifteen days of service of the proposed statement of decision, all parties may file written objections. Rule 3.159(g).
- Upon a showing of good cause and with a written order, the court may extend the time for or excuse noncompliance with any of the deadlines. Rule 3.159(m).

An important exception to Rule 3.159(d) is set forth in Rule 3.159(n), and repeats the language of section 632: If your trial takes less than eight hours over consecutive days or is concluded within one court day, the request for

statement of decision must be made before the matter is submitted for decision. In those instances, the statement of decision may be made orally on the record in the presence of the parties.

The Court is Required to Issue a Statement of Decision if Requested

Although the court may direct a party to prepare the tentative statement of decision (Rule of Court 3.1590(c)(3)), its obligation to prepare a statement cannot be ignored or avoided. The failure to comply with a valid section 632 request is in fact reversible error. *In re Marriage of Shimkus,* 244 Cal.App.4th 1262 (2016), received attention last year for its discussion of the need to move declarations into evidence because they were not automatically part of the court record. However, *Shimkus* also addressed the trial court's duty to prepare a statement of decision when properly requested. The court's failure to issue a statement of decision when properly requested to do so is a reversible error per se, usually requiring remand for the court to issue the requested statement.[3]

Be Specific in Your Request for Statement of Decision

Simply requesting a statement of decision is not enough. Collectively, section 632 and Rule 3.1590(d) require the party requesting a statement of decision to specify the principal issues in controversy for which the court is being asked to provide a statement of decision. Given the requirement that the statement of decision must be requested prior to the submission of a matter lasting less than eight hours or one court day, identifying the principal and controverted issues should be part of your trial or hearing preparation.

Specificity in the request can affect a subsequent appellate review. In *Ananeh-Firempong*, cited above, one of the disputed issues was the valuation of the husband's medical practice. The parties introduced conflicting expert testimony regarding that value. Prior to submission, Husband's attorney orally requested the trial court issue a statement of decision "showing calculations so the record is clear as to what factors were used in arriving at whatever calculation."[4] Husband subsequently made an untimely written request. The Second District first concluded that "an oral request for a statement of decision is permissible under section 632."[5] It then reversed the trial court's judgment as to the valuation of husband's medical practice, in large part due to the limited and specific request for statement of decision made by husband's counsel.

> The trial court here refused to issue a statement of decision and awarded the medical practice to Husband and valued it at $ 282,830. Under [*In re Marriage of Hargrave* (1985) 163 Cal.App.3d 346] and [*In re Marriage of Ramer* (1986) 187 Cal.App.3d 263] such a statement is inadequate explanation of the factual and legal basis for the court's decision regarding the valuation of Husband's medical practice.
>
> Since Husband's accountant testified to a different valuation for the medical practice, a finding in Husband's favor is possible. Therefore, we conclude that it was reversible error for the trial court to refuse to issue a statement of decision on the issue of the calculations used to determine the valuation of the medical practice.

The importance of this specific request regarding a single controverted issue in *Ananeh-Firempong* is made clear by the contrary result in *In re Marriage of Bergman,* 168 Cal.App.3d 742 (1985). In *Bergman*, Husband took issue with the manner in which the court divided the community interest in the parties' respective pension plans. Husband requested a statement of decision on the issue of "distribution of respondent's retirement rather than reservation of benefits until received by respondent." Husband's request, however, did not specify the manner by which the court calculated the value of the pensions or to provide the trial court's calculations. The record did not contain the trial court's calculations. Had such a request been made, under the authority cited above the failure to provide a statement of findings and facts would have been reversible error. Instead, the First District determined that "[u]nder these circumstances all inferences are indulged in support of the finding of the trial court and we simply examine the record to determine if there is substantial evidence support it." Husband's appeal was rejected after the appellate panel identified that substantial evidence, even though it did not contain or reflect the court's calculations.

> [Husband's] request for a statement of decision on the issue of the value of his pension was, at best, a request for the specific dollar amount of value found by the court, not a request for the calculation by which the court determined that

value. If Elmer wanted the court to set forth its calculation, that request should have been made in his request for a statement of decision.

*In re Marriage of Bergman*168 Cal.App.3d at 754 (1985).

The Court's Statement of Decision Must Be in Writing – Unless it Need Not Be

In a short cause matter, the court can issue its statement of decision orally from the bench. Creating a record of such an oral ruling is critical. Given the lack of reporters in family court in most jurisdictions at the present time, it would be highly advisable to provide your own reporter in a short cause trial to ensure that the court's oral statement of decision is available to the appellate court.

In a long cause matter, the court must issue its statement of decision in written form unless that requirement has been waived by all parties. However, as discussed next, waiving this writing requirement would be highly inadvisable.

Consequences of Failing to Request a Statement of Decision

The consequences of not obtaining a statement of decision are significant. When a party, expressly or impliedly, waives a statement of decision, the doctrine of implied findings is invoked. An appellate court will assume that a trial court has made all of the factual findings necessary to support the decisions for which substantial evidence exists in the absence of a statement of decision.

> Under the doctrine of 'implied findings,' when parties waive a statement of decision expressly or by not requesting one in a timely manner, appellate courts reviewing the appealed judgment must presume the trial court made all factual findings necessary to support the judgment for which there is substantial evidence.[6]

The doctrine of implied findings discussed in *McHugh* applies to those instances where a party could have requested a statement of decision but did not do so. "A party who does not request a statement of decision may not argue [on appeal] the trial court failed to make any finding required to support its decision."[7]

Thus, the failure to request or obtain a statement of decision is the equivalent of giving a judicial officer a hall pass. As long as there is substantial evidence in the record to support the judgments and rulings made by the trial court, on review the findings to support that judgment will be presumed if a statement of decision has not been issued. "The failure to request a statement of decision on the valuation of the community property interest in [an asset] is fatal to [a party's] appellate attack on the trial court's valuation."[8]

The absence of a statement of decision can also impact future requests to modify a judgment. As noted in Kirkland, et al., *California Family Law Practice and Procedure*, 2d Edition, §121.02:

> In addition, with respect to judgments that include modifiable provisions (i.e., provisions regarding child custody or child or spousal support), the statement of decision provides a record of the circumstances that existed at the time of the judgment, from which the court, in a later proceeding to modify those provisions, can determine whether circumstances have changed so as to warrant a modification.

The failure to obtain a statement of decision could adversely impact your client's ability to demonstrate a subsequent change of circumstances. That was the conclusion reached in *In re Marriage of Reilley,* 196 Cal.App.3d 1119, 1126 (1987):

> Without the statement of decision in the instant case, we are unable to determine what the trial court found husband would earn in 1985, the degree of wife's income potential, and the family's needs. A statement of decision is also useful to guide future decisions because support orders are modifiable.

In *In re Marriage of Laube,* 204 Cal.App.3d 1222 (1988), the absence of prior findings memorialized in a statement of decision resulted in the First District stating that a party's "failure to request findings [by way of a statement of decision] was fatal" to the party's subsequent attempts to modify a spousal support order, because "there is no evidentiary yardstick with which to measure [Wife's] claim that the sole reason for eliminating spousal support was [Husband's] temporary unemployment and that her needs never diminished during any material time."[9]

Conclusion

Notwithstanding the prudent practitioner standard set forth above, as litigators we all face the reality (perceived

or actual) that judicial officers can be put off by making a request for a statement of decision. I would consistently have that inner monologue raising the question: "Am I going to upset the court by making this request?" In those instances when your hearing or trial will be less than eight hours, squelch that self-dialogue. You must make the request.

In cases in which the proceedings took more than eight hours, you can still prepare and draft the request for statement of decision and hold it in reserve until after the trial has concluded. Regardless, however, the request for statement of decisions should be part of your pre-trial preparation and not an afterthought following an adverse ruling. Respected family law attorney and author Kathryn Kirkland has offered the following commentary on the necessity of requesting a statement of decision, which aptly and distinctly identifies the risk to counsel who fail to do so:

> "Failure to request a statement of decision is the single most common failure by trial counsel in family law proceedings. Appellate decisions are replete with statements indicating an inability to review an issue on appeal because trial counsel failed to request a statement of decision. Counsel should always request a statement of decision in order to preserve the opportunity for appellate relief."

California Family Law Practice and Procedure, supra, section 121.02, Commentary.

Endnotes

1 *Fong*, 193 Cal.App.4th at 294.

2 *See* Cal. Code Civ. Proc. § 638; *In re Marriage of Demblewski,* 26 Cal.App.4th 232 (1994).

3 *Shimkus*, 244 Cal.App.4th at 1278, citing *In re Marriage of Sellers*, 110 Cal.App.4th 1007, 1010 (2003), and *Miramar Hotel Corp. v. Frank B. Hall & Co.*, 163 Cal.App.3d 1126, 1130 (1985); *see also In re Marriage of Ananeh-Firempong,* 219 Cal. App.3d 272 (1990) (supporting the proposition that when a party makes a timely request for a statement of decision regarding the valuation of a particular asset (in that case, a medical practice), the trial court's failure to prepare such a statement is reversible error.)

4 *Ananeh-Firempong*, 219 Cal.App.3d at 282.

5 219 Cal.App.3d at 284.

6 *In re Marriage of McHugh,* 231 Cal.App.4th 1238, 1248 (2014) (quoting *In re Marriage of Condon,* 62 Cal.App.4th 533, 549–550, n. 11 (1998)).

7 *McHugh*, 62 Cal.App.4th at 1248.

8 *In re Marriage of Hebbring*, 207 Cal.App.3d 1260, 1274 (1989).

9 *Laube*, 204 Cal.App.3d at 1225-1226.