The statement of decision in a bench trial

In a bench trial, the statement of decision may be crucial to preserving issues for appeal

By Jerry Clausen

Prior to 1981, in a case tried to a judge sitting without a jury, the court was required, upon request by a party, to issue "findings of fact" and "conclusions of law." (Code Civ. Proc., § 632.) In 1981, section 632 was amended to do away with findings of facts and conclusions of law in favor of a "statement of decision explaining the factual and legal basis for [the court's] decision as to each of the principal controverted issues at trial." (§ 632.)

In my experience, many trial lawyers fail to understand the true purpose of a statement of decision and, as a consequence, they tend to devote the bulk of their pleadings during the statement of decision process to rearguing the evidence in an attempt to persuade the court that its tentative decision is erroneous. In truth, the true purpose of a statement of decision is "to make the case easily reviewable on appeal by exhibiting the exact grounds upon which the judgment rests." (*In re Marriage of Davis* (1983) 141 Cal.App.3d 71, 74-75, cit. omitted.) In other words, its purpose is to lay bare the underlying findings and reasoning for the trial court's ruling so that the propriety of that ruling may be assessed on review. Thus, the attorney's focus should be not on rearguing his or her case but on ensuring that the statement of decision addresses all of the factual issues necessary to a determination of the case and expresses all of the legal principles necessary to the trial court's ruling.

For attorneys unfamiliar with statements of decision, it can be helpful to think of them this way: a statement of decision is to a bench trial what the special verdict and jury instructions are to a jury trial. The latter serve the same function as a statement of decision: they disclose the "factual and legal basis" for the jury's decision.

The statement of decision procedure

The statement of decision procedure involves a two-step process: In order to avoid the appellate court inferring findings against the appellant under the doctrine of implied findings, he or she must (1) request a statement of decision under section 632 and (2) object to defects in it (i.e., ambiguities in the statement or material omissions from it) under section 634. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1134.)

A party desiring a statement of decision must request one, specifying the controverted issues as to which the party seeks a statement of decision. If the trial takes less than a total of eight

hours or one calendar day, the request must be made before submission for decision. (§ 632.) However, the trial court may (and commonly does) state in its tentative decision that it will become the statement of decision unless within 10 days either party specifies controverted issues or makes proposals not covered in the tentative decision (Cal. Rules of Court, rule 3.1590); this obviates the need for a formal request by a party. Thereafter, any party may make proposals as to the content of the statement of decision. (*Id.*, subd. (d); § 632.)

If a statement of decision does not resolve a controverted issue, or if it is ambiguous, the aggrieved party must object on the record to the omission or ambiguity, either before the entry of judgment or thereafter by means of a motion for new trial (§ 657) or a motion to vacate the judgment (§ 663). If it does, then "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." (*Ibid.*)

Applicable appellate principles

In order to understand the true purpose and function of a statement of decision, it is necessary to understand certain basic

principles of appellate review. Each of these principles implicates the appellant's burden to provide an adequate record on appeal. This in turn requires that the appellant (1) make an adequate record in the trial court and (2) bring up to the appellate court such parts of the record as are necessary to demonstrate prejudicial error.

The presumption of correctness

Under this principle, the judgment is presumed correct; all intendments and presumptions are indulged to support the judgment on matters as to which the record is silent, and error must be *affirmatively* shown. (E.g., *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) The appellant has the burden of making this affirmative showing. Thus, to avoid a waiver under the presumption of correctness, the appellant must provide a record that affirmatively shows the error. (*Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039.)

The harmless error doctrine

A ruling will not be reversed "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; *F.P. v. Monier* (2017) 5 Cal.5th 1099, 1107-1108.) To avoid a finding of harmless error, the appellant must provide a record that demonstrates the alleged error prejudiced the appellant. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

The doctrine of implied findings

Under this doctrine, an appellate court will, in the absence of express findings, infer all findings necessary to support the judgment. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.) The doctrine is "a natural and logical corollary" to the fundamental principles mentioned above – i.e., (1) that a judgment is presumed correct, (2) that all intendments and presumptions are indulged in favor of correctness, and (3) that the appellant bears the burden of providing an adequate record affirmatively proving error. (*Fladeboe, supra*; *In Re Marriage of Arceneaux, supra*, 51 Cal.3d 1130, 1133.) Thus, a failure to request a statement of decision on a principle controverted issue, or to object to a defective statement, will likely result in the appellate court implying a finding on that issue that supports the judgment.

The requirement of substantial evidence

Even an implied finding must be supported by substantial evidence. (*Fladeboe, supra*, 150 Cal.App.4th at p. 60; *Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1148, fn. 11; see *Yield Dynamics, Inc. v. Tea Systems Corp.* (2007) 154 Cal.App.4th 547, 557 [findings must be sustained if supported by substantial evidence, even though evidence could also justify contrary findings].) However, in order to attack on appeal the sufficiency of the evidence to support a finding an appellant *must* include the reporter's transcript in the appellate record. (*Williams v. Inglewood Board of Realtors* (1963) 219 Cal.App.2d 479, 481; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, pp. 402 & 598, §§ 354 & 561.)

In short, as can be seen, the purpose of the statement of decision process concerns preserving issues for review by *avoiding* the application of the foregoing appellate principles. In order to fulfill this purpose, the aggrieved party must ensure that it (1) has requested the trial court make findings on all facts necessary to support the judgment and (2) bring to the trial court's attention any such findings that are omitted from or ambiguously expressed in the statement of decision.

Perhaps the most common impact of a failure to request or object to a statement of decision is upon the harmless error analysis. This is because appellate courts "uphold judgments if they are correct for any reason, 'regardless of the correctness of the grounds upon which the court reached its conclusion.' [Citation.]" (*United Pacific Ins. Co. v. Hanover Ins. Co.* (1990) 217 Cal.App.3d 925, 933.) For example, in *McBride v. California Bd. of Accountancy* (2005) 130 Cal.App.4th 518, accountants charged with gross negligence based on a number of alleged acts of misconduct attacked on appeal what they claimed was the only act mentioned in the statement of decision as the basis for the judgment of gross negligence. The appellate court, however, held that because the accountants failed to bring to the trial court's attention the omission of the other acts, it would imply findings on those acts in support of the judgment. (At p. 527.) Thus, any error regarding the single act mentioned by appellants was harmless.

The differences between a statement of decision and a tentative decision

A tentative decision (sometimes called a memorandum of intended decision) differs in several significant ways from a statement of decision. A tentative decision is not considered part of the "record on appeal," which is to say that, even though it may be part of the physical record before the appellate court, its uses on appeal are restricted. (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 646.) The trial court is not bound by its tentative decision and may enter a wholly different judgment than that announced in it. (*Id.* at pp. 646-647; Cal. Rules of Court, rule 3.1590(b).) Rather, the trial court's findings and conclusions – i.e., its statement of decision – constitute its final decision, and a tentative decision cannot be used for the purpose of *impeaching* or gainsaying the findings and judgment. (*Id.* at p. 647.)

Illustration: *In re Marriage of Ditto*

The foregoing principles – and the consequences of failing to request a statement of decision and designate an adequate record on appeal – are aptly illustrated in the case of *In re Marriage of Ditto* (1988) 206 Cal.App.3d 643.

Prior to 1984, property purchased with the separate property of one spouse

but taken in the name of both spouses as husband and wife was presumed to be *community* property unless one of the spouses proved there was an agreement that it remain separate property. (*In re Marriage of Lucas* (1980) 27 Cal.3d 808, 816.) In 1984, Civil Code section 4800.2 reversed this presumption. It provided that, in such a case, the property is presumed to remain *separate* property unless there was an agreement that it be community property.

In *Ditto*, section 4800.2 had not yet been enacted when husband Joseph and wife Gladys purchased a home as husband and wife using Joseph's separate property to pay for the home. But section 4800.2 was in effect when Gladys filed for dissolution of the marriage. At trial Joseph argued that section 4800.2 applied retroactively and required that he be reimbursed for the separate property used to acquire the home. Gladys argued that section 4800.2 did not apply retroactively, that therefore under the former law Joseph's contribution to the acquisition of the home was presumed to be a gift to the community unless the parties had agreed otherwise, and that Joseph had presented no evidence of such an agreement.

The trial court issued a tentative decision stating that section 4800.2 applied retroactively. Neither party requested a statement of decision. The judgment reimbursed Joseph for his separate property contribution to the purchase of the home but did not state the court's reasoning in arriving at that judgment.

Gladys appealed. In support of her appeal she did not submit a reporter's transcript, but she did submit a clerk's transcript, which included the court's tentative decision stating section 4800.2 applied retroactively. While her appeal was pending, another appellate court held that section 4800.2 did *not* apply retroactively.

The *Ditto* court affirmed the judgment in favor of Joseph, reasoning:

Gladys could not rely on the tentative decision to show error; a tentative decision is not part of the record on appeal and hence could not be used for the purpose of impeaching the findings or judgment. (*Ditto*, 206 Cal.App.3d 643, 646-647.)

Findings could be implied that would sustain the judgment, such as, for example, a finding there was an agreement that Joseph's contribution was to remain separate property. (See *id.* at p. 648, fn. 3.) Because the failure to request a statement of decision resulted in a waiver of findings, the court was required to presume the judgment was correct (i.e., that it applied the correct law and made all findings necessary to support it). (*Id.* at p. 647.)

The only remaining issue was whether substantial evidence supported the implied findings. However, because the record on appeal did not include the reporter's transcript, the court was required to presume that oral evidence received at trial sustained the findings. (*Id.* at p. 648.)

A failure to object to an erroneous statement of law appearing on the face of a *statement of decision* does not waive a party's right to challenge the error on appeal. (*Id.* at p. 60; *United Services Auto. Assn. v. Dalrymple* (1991) 232 Cal.App.3d 182, 186; *Van Klompenburg v. Berghold* (2005) 126 Cal.App.4th 345, 348, fn. 3.) Thus, had the trial court in *Ditto* issued a statement of decision disclosing its conclusion that the disputed statute applied retroactively, no further action would have required Gladys to preserve this issue on appeal. But if the statement did *not* disclose this conclusion, it would have been necessary for Gladys to object to this omission in order to preserve the issue, since in that case the legal error would not appear on the face of the statement of decision.

The nature of the "findings" required in a statement of decision

Perhaps one of the most difficult problems in understanding the statement of decision process is grasping the type of "finding" required to be made. The problem is due in large part to the confusing and ambiguous terminology that has historically been used to characterize the different types of findings, such as "general" versus "specific" (or "special") findings and "ultimate" versus "evidentiary" (or "probative") facts. As one court has observed, "ultimate 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." (*Yield Dynamics, Inc., supra*, 154 Cal.App.4th at p. 559.) It is also termed an "elemental fact" or "principal fact." (*Ibid.*) It is distinguished conceptually from "evidentiary facts" and "conclusions of law." (*Ibid.*) "General findings" and "special findings" are likewise slippery terms.

The imprecision in the meaning of these terms has led to holdings that appear, at least at first blush, utterly at odds with one another. For example, some courts have held that, in rendering a statement of decision under section 632, a trial court is "required to state only *ultimate* rather than evidentiary facts because findings of ultimate facts necessarily include findings on all intermediate evidentiary facts necessary to sustain them." (*In re Cheryl E.* (1984) 161 Cal.App.3d 587, 599, italics added; *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.4th 509, 524.) In contrast, others have held that section 634 in effect requires *special* findings (i.e., findings of evidentiary or probative facts) because "its purpose was to discourage the mere finding of so-called ultimate facts [i.e., 'general findings'] when such method left counsel and the appellate court unable to determine the trial court's resolution of the conflicting facts needed for a factual determination of the case." (*South Bay Irr. Dist. v. California-American Water Co.* (1976) 61 Cal.App.3d 944, 993, citing *Morris v. Thogmartin* (1973) 29 Cal.App.3d 922, 928-929.)

The conflict, however, is merely apparent and not real. It disappears when the terms "general findings" and "special findings" are understood in the context of the types of findings necessary to uphold a judgment. (See *In re Marriage of Arceneaux, supra*, 51 Cal.3d 1130, 1135, italics added ["A 'special finding' *in the present context* is a finding on an issue necessary to support the judgment"].) General findings – understood in this context to mean the *elements* of a claim or defense (i.e., "ultimate facts") – are probably always necessary to support a judgment, and thus findings on those facts should probably always be included in a statement of decision. Special findings, on the other hand, are not *always* necessary to support a judgment, but may be so on occasion. For example, a general finding of negligence may be insufficient in the face of a request for special findings as to the specific circumstances upon which the finding of negligence was predicated. (*Shell Oil v. Allied Constr. & Eng. Co.* (1971) 22 Cal.App.3d 1, 5; compare *McBride v. California Bd. of Accountancy, supra*, 130 Cal.App.4th 518, 527 [general finding of gross negligence sufficient where appellant failed to request special findings as to particular acts upon which general finding was based].)

In short, the findings required to be made, whether they be called "general' or "special," are merely those findings necessary to support the judgment. Two cases serve to illustrate the point. In *Ortiz v. Avila* (1963) 222 Cal.App.2d 786, the plaintiff, a person of subnormal intelligence, came to live with the defendants, a married couple, on their ranch. The plaintiff alleged that, over a five-year period, he delivered his paychecks to the defendants, who represented they would deposit them in a bank account in the plaintiff's name. The plaintiff alleged he relied on this representation and that it was false and fraudulent; he further alleged that he reposed special trust and confidence in the defendants.

The trial judge issued findings that there were no false or fraudulent representations and that the parties had orally agreed plaintiff would live with defendants as a member of their family and would devote his earnings for the common use of the plaintiff and defendants. The plaintiff requested special findings on the issues of whether the plaintiff was of subnormal intelligence and whether the defendants were in a confidential relationship with him, which the trial judge refused.

The Court of Appeal reversed. It upheld the judge's finding that the defendants' representations to plaintiff were not fraudulent, but held the judge erred in refusing to make the requested findings. (*Ortiz, supra*, 222 Cal.App.2d 786, 790-791.) The court explained that, while the general rule was that a fraud is not presumed, a special statutory rule applied in the case of a trustee and a beneficiary in a confidential relationship. (*Id.* at p. 791.) Under the latter rule, when a trustee entered into a transaction with a beneficiary whereby the trustee gained an advantage from the beneficiary, the beneficiary was *presumed* to have entered into the transaction under undue influence. (*Ibid.*) Thus, under the statute, no evidence of fraud was required; instead, the burden was upon the defendants to prove no unfair advantage had been taken of the plaintiff. (*Ibid.*) The requested findings were necessary to the latter determination and thus the refusal to make them was prejudicial error. (*Ibid.*)

In *Gordon v. Wolfe* (1986) 179 Cal.App.3d 162, the plaintiff was injured by an automobile driven by the defendant. The parties stipulated to liability and tried the issue of damages to the court without a jury. The plaintiff sought general damages for pain and suffering and special damages for medical expenses, lost earnings, and lost earning capacity. (*Id.* at 167-168.) The court issued a tentative decision finding the plaintiff's total damages to be $72,000. It denied the plaintiff's request for a statement of decision on the ground it was not required to set out its computation of damages. (*Id.* at p. 165.) The plaintiff appealed, contending (1) the damage award was inadequate as a matter of law and (2) the trial court erred in refusing to issue a statement of decision. (*Ibid.*)

The Court of Appeal reversed on the latter ground. It held that the trial court was obligated to find separately the general damages and several categories of special damages. (*Gordon, supra*, 179 Cal.App.3d at p. 167.) Without those findings, the court explained, "we have no basis to determine whether the award was insufficient as a matter of law." (*Id.* at pp. 165, 167-168.)

The types and categories of damages suffered by a plaintiff are not elements of the cause of action of negligence and thus are special findings, not general findings. In *Gordon*, such findings were necessary in order to evaluate the plaintiff's primary contention on appeal, and hence were necessary to the judgment.

Summary

A helpful way of understanding the role and function of a statement of decision is to think of it as a rough analog to jury instructions and a special verdict. Thus, the failure to specify a necessary finding in a request for a statement of decision would correspond to the failure to include such a finding on a requested special verdict form. Similarly, the failure to object to a statement of decision on the ground it omits a requested finding would be similar to the failure to object to a special verdict form on the same ground. And, the failure to object to a statement of decision that omitted a ruling on an important issue of law would be roughly (though not perfectly) analogous to the failure to request a crucial jury instruction.


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