ONE GENERAL CLE CREDIT HOUR

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Big Picture Approach to Family Law Appeals

BY JUDGE CHARLES J. HOSKIN

As a district court judge in the Family Division, I have an opportunity to see trends in the law and in the practice of law. As we strive to follow the law and serve those who appear before us, there is sometimes a tendency to focus on the result, rather than the process that achieved that result. When that occurs, we have the appellate courts to push us back to where they think we should focus. This article is an attempt to assist practitioners in recognizing that push and save their clients time and resources by solving a problem before it starts.

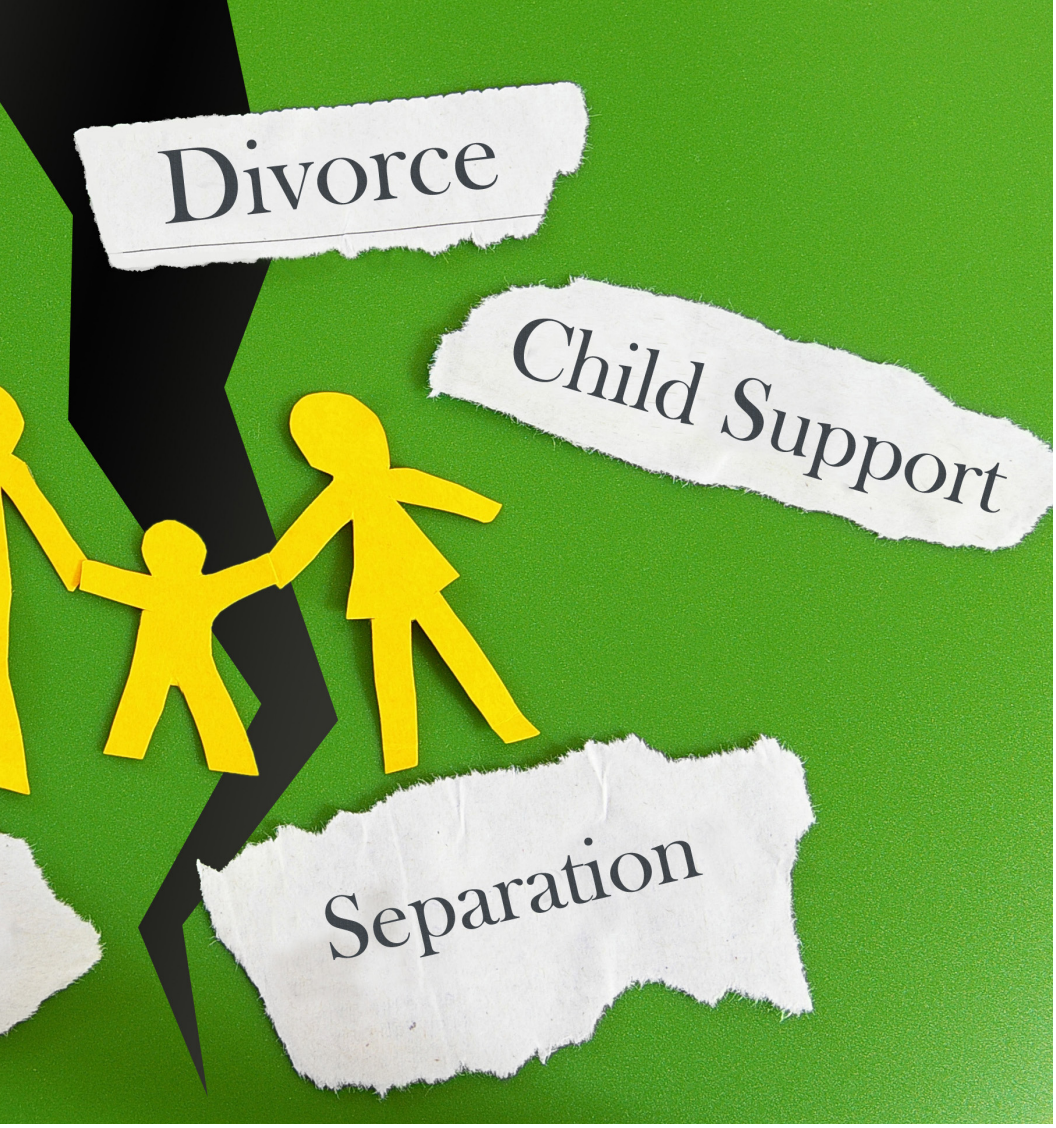
I Have a Family Case; Now What?

So, you have a civil domestic (family law) case and you would like to "win it" for your client? Perhaps start by setting realistic expectations given what is being argued; no side really "wins" in Family Court. There are typically only different degrees of losing. However, if you understand how to most effectively present your case in representing your client, you have the best opportunity to obtain the results you are seeking.

Whenever I am given an opportunity to present information to attorneys, I remind them that judges need evidence to support relevant factors in order to grant the desired relief. First step: figure out what legal factors you need to meet and list them. Second step: provide evidence to the court that supports those factors. While those two steps may previously have been sufficient, if there is a potential your case will be appealed, another step is required. The Nevada Supreme Court's decision in *Davis v. Ewalefo*, 131 Nev. Adv. Op. 45, 352 P.3d 1139 (2015), and the way the appellate courts are interpreting that decision, creates another step. We will call it the third step: reference the court's findings clearly within your order to withstand appellate scrutiny.

Skipping step one makes you look poorly in court, which damages one of your most valuable assets – your reputation. Skipping step two makes it very difficult for the court to give you what you are requesting, potentially affecting the outcome and, maybe, damaging your reputation. Skipping step three essentially guarantees the case will be remanded on appeal for further findings (even if the judge made those findings on the record). At that point, you will need to explain to your client why their case was delayed so long.

Contrary to what you may believe, judges are willing to give you the relief you are requesting. Judges are, however, limited by the law and the facts. Give us both the law and facts, and your odds of



prevailing increase substantially. Give us just one, or neither (which happens more often than you may think), and you have effectively doomed you chances for success.

Findings, Findings, Findings

Since I first took the bench in 2009, I was told that, if I make all the requisite findings, my decisions are more likely to withstand appellate scrutiny. I took that advice to heart and tried to make findings on every relevant factor within my oral decisions. Sometime later, reality set in; the appellate courts do not receive the official record of the court (the Justice Audio Visual Solutions (JAVS) video in most cases) when determining whether my decisions withstand appellate scrutiny. They focus on the written order. My answer to that reality check was to try to write my own orders. With an ever-increasing caseload, however, such is not always possible. I prefer to draft my own orders so I can clearly state my applicable findings. *Davis*, as interpreted by the Court of Appeals, takes that a step further and necessitates findings even on the inapplicable factors.

I also learned that even irrelevant factors, as well as factors that were not demonstrated within the evidence presented, if part of the law pertaining to the issue presented, still need to be discussed. The *Davis* Court, inferring that the district judge may have made appropriate findings, ultimately determined that since, "The decree [did] not explicitly address the best interest of the child, … nor … include findings to support its implicit conclusion[s] … [those] deficiencies violate Nevada law, which requires express findings as to the best interest of the child in custody and visitation matters, … and they leave us in doubt whether 'the district court's determination was made for appropriate reasons.' *Rico,* 121 Nev. at 701, 120 P.3d at 816." *Id*. at 1143.

Following that decision, the Court of Appeals consistently reversed and remanded scores of cases that would otherwise likely have been affirmed. They continue to do so because those orders/decrees do not explicitly address all the best interest factors in rendering their custody determination. I have received reversals and remands on numerous cases with direction to hold proceedings consistent with the appellate court decisions. I translate those orders as instructing me to "make the findings on all factors and make sure it is in the written order."

That direction is not limited to custody cases. In *Manuela H. v. Eighth Jud. Dist. Ct.*, 132 Nev. Adv. Op. 1, 365 P.3d 497 (2016), the Nevada Supreme Court expanded the requirement to include dependency cases, leaving the door open for other types of issues. Referencing *Davis*, the court states that "[w]ithout findings that provide a 'factual basis' for the district court's order, 'this court cannot say with assurance' whether the action steps were ordered 'for appropriate legal reasons.'" *Id.* at 502.

In discussions with colleagues, I learned that my experience is not unique. Oft times, significant findings are rendered by the court orally from the bench, covering every applicable (and inapplicable) factor necessary for the court to render its decision. However, when counsel, or the self-represented litigant, prepares the order resulting from that oral pronouncement, it does not include all those findings. That case is doomed on appeal. The case will be remanded for further findings, even if findings were orally made at the time of the decision, because they were not included in the final order. That mistake results in delayed finalization of the case for many months, or sometimes years.

Be the Best Attorney You Can Be

At this point, I could get on my soapbox and lobby that a copy of the video, the official record of the court (at least in most courts in the state) be provided and

continued on page 10

continued from page 9

Big Picture Approach to Family Law Appeals

reviewed in every appeal so that the complete record is reviewed on appeal. But, such is not likely to be successful, given the appellate courts' crushing caseloads.

As such, I'll propose another solution — that every attorney take extra care to include all factual findings on each and every required factor, whether applicable to the specific facts of the case or not, in every order and decree they prepare. Such would result in the appellate courts making their determinations based upon the entire record including all findings made, rather than simply reversing and remanding because a factor was not referenced within the final order.

Also, please do not be the attorney who waits for the court clerk to complete their minutes before preparing your order. While our court clerks are great at what they do, they are not attorneys and are only preparing their minutes to help the court. Minutes are not the official record, and clerks may not understand what is necessary in every order. You are the attorney; it is your job to take notes when the judge is rendering their decision. Review the official record (the JAVS video) if necessary. Prepare your orders shortly after the hearing or trial, so you remember to include everything that was ordered. You will be a better attorney and create better orders when you do not rely on the minutes to prepare them.

Logically, following this three-step process should be easy. Prepare for your trial or evidentiary hearing so you understand what law applies and what evidence needs to be presented to support your position. That way, your outline for the necessary findings you need is already done. At that point, use the notes you took while the judge was rendering their decision (you were taking notes, right?), apply them to the factors as findings and draft your order or decree.

Ultimately, the court will be happy because you did your job. Your reputation will be intact (which is always a good thing), and your odds of success on appeal are increased. Let's call that a "win." **NL**

JUDGE CHARLES J. HOSKIN is a Nevada native who was born and raised in Las Vegas. He was appointed to the district court bench, family division in 2009, was re-elected twice and continues to serve in Department E. He served for four years as the presiding judge of the family division and receives numerous remands from the Nevada Supreme Court and Court of Appeals.