



Finding the Facts in a Domestic Bench Trial

By Judge Steven L. Hansen

My current assignment is in the civil/domestic division of the Fourth District Court where I regularly preside over domestic trials. Prior to trial, I frequently ask myself whether or not the attorneys will present facts enabling me to make my findings and conclusions. I have observed many attorneys with various skill levels present their cases with different styles and techniques, some having more success than others. Some of the more proficient lawyers use trial techniques that have impressed me, and I thought those skills should be shared with other members of the bar to assist them in presenting their cases to the court in a domestic relations bench trial.

First of all, you should set aside any preconceived myths of the simple divorce trial. At least in the trial setting, most cases are not simple to try or to decide. A domestic trial is a complex matter that should be approached with the same level of respect you would have for any trial. There are financial issues in the breakup of a marriage that are similar to those seen in commercial or business litigation and partnership dissolutions. Furthermore, unlike many trials with one claim, stagnant facts, and a remedy of a simple money award, domestic trials have multiple claims, and

JUDGE STEVEN L. HANSEN was appointed to the Fourth District Court in August 1993 by Gov. Michael O. Leavitt. He received his law degree from the Cumberland School of Law at Samford University in 1976. He was a law clerk at the Utah Supreme Court in 1976, after which he went into private law practice. He was Wasatch County Attorney from 1986 until his appointment to the bench.

the facts and remedies are dynamic. And, of course, the issues surrounding child custody and support can be extremely emotional for all involved. Some lawyers are aware of those and approach these trials accordingly, while others do not.

FINAL PRE-TRIAL/ MANAGEMENT CONFERENCE

The trial management conference, or final pretrial, can be a very important hearing for both counsel and the court. I use this hearing in most domestic trials to focus on the issues and to discuss ways of facilitating the orderly presentation of the case. I encourage counsel to prepare a joint pretrial order, which enables everyone to know in advance what is expected at trial. Lists of witnesses and exhibits are exchanged and stipulations are recommended on the admissibility of documents. At this hearing the

able advocate knows the issues, what evidence is anticipated, and how the trial is going to proceed. Less time will then be spent in trial on procedural matters and evidentiary objections, and the trial can proceed much smoother than it would otherwise. The final pretrial conference is an excellent tool to educate the judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As a trial judge, I am acutely aware that the appellate courts of this state expect specific and detailed findings of fact as the basis for my decision. Attorneys run the risk of a new trial if the judge cannot find the facts. It is the lawyer's job to present evidence to clearly support his or her position, not the judge's role to cut and paste together a decision from a trial where essential facts were confused or left out completely. If the attorney and the judge both know where they are headed at the beginning and throughout the trial, the attorney will be better able to provide the evidence the judge needs to rule in his or her favor and withstand appellate review.

Some successful attorneys have proposed findings of fact and conclusions of law prepared and filed with the court prior to trial. This technique proves helpful in a

complex case, where it serves as a road map providing direction both to you, as advocate, and the court. Naturally, the evidence does not always fit the proposed findings, and amended findings will be necessary. Since the trial is no time for discovery, there is no reason not to aid the court with proposed findings setting forth your theories and the facts you expect will come out in trial. If an attorney knows in advance that the judge will require submission of findings at the conclusion of the trial, it is to the lawyer's advantage to prepare proposed findings. By doing so, the attorney is better prepared, and assists the court in finding the facts in his or her favor.

OPENING STATEMENTS

In most domestic bench trials an opening statement should not be waived. This opportunity should be used to state more than the issues and legal conclusions. For example, an opening statement should not be limited to stating that a client is entitled to child custody, child support, alimony, and a division of the equity in the home. A judge wants to be told why a client is entitled to that relief. State what you expect the witnesses will show from the particular witnesses you expect to call and the exhibits you intend to introduce. Then relate those facts to the elements of the law. All of this can be done in a statement without argument, and will provide the judge with the necessary clues to find the facts you are trying to prove. Importantly, do not forget to tell me exactly what remedy you want. In this way, the opening statement becomes a critical component of a successful bench trial.

PRESENTING EVIDENCE

Trial attorneys should avoid the dump truck method of presenting evidence. By this, I mean unloading all the evidence on the court in an unorganized fashion with the expectation that the judge will unearth and find its meaning. Rather, attorneys should consider the case from the judge's perspective. No one relishes searching through a huge mass of evidence emptied into the courtroom. Nor is anyone thrilled to receive hundreds of pages of financial records without explanation. A domestic trial, like any other trial, should not require the judge to search in vain for lost facts in a jumbled maze of confusion. The trial should be crisp and to the point.

Start with the end result in mind. This means thinking about the final findings of fact and conclusions of law before calling your first witness. The importance of the facts cannot be emphasized enough — facts are the building blocks of a judicial decision. I have searched in vain for a fact to support one of the elements in the claim on many times. Although I might have been inclined to do so, I felt I could not order the relief requested because essential facts were missing from the record. Granted, facts cannot be produced if you have a weak case, but sometimes careful preparation, and following a well-prepared trial plan will help organize your evidence and direct attention to the important facts. In this way you may find crucial facts you initially thought were lost.

"Be creative in a bench trial just as you would in front of a jury. Judges are people too, and we appreciate a well-organized and artfully presented case."

It is important that family lawyers appreciate the impact each type of evidence may have on the judge. Testimonial evidence in a domestic bench trial covers a multitude of issues ranging from child custody, child support, visitation and alimony, to division of property and debts. This testimony, under the circumstances, is difficult to present in a chronological fashion, and requires organization into various subjects. The court needs to understand when the questions are shifting from one subject to another. A simple question to the witness in a preliminary form focusing on the claim clarifies for the court and the witness where you are headed.

In addition, real evidence is not used enough by most attorneys. Generally, real evidence is dramatic and can have a lasting impact, such as a tooth broken off in a fight, or a returned check resulting from a wrongfully closed bank account. Real evidence is often available but rarely produced by the client unless the lawyer asks for it.

Demonstrative evidence can be just as effective as real evidence. A photograph of a child's empty bedroom or pictures of the kids with the neighborhood children can

often be compelling and tell the judge why the family home should not be listed for immediate sale. A photograph of the bruised husband or wife is far more effective in demonstrating marital violence than words. An attorney should not skimp on preparing these exhibits. Be meticulous in preparing completed financial declarations and current lists of property and debts. Photos, exhibits, and graphs which are illustrative of the testimony also help to uncover the facts.

Documentary evidence, such as canceled checks, tax returns, and bank statements, is often the best way to present financial issues. However, documentary evidence is not without its pitfalls. Many times this type of evidence seems to lull attorneys into a false sense of security. There appears to be a perception that a document is enough when further clarification is actually needed. An example best illustrates this principle: A Plaintiff's attorney presented pay stubs to demonstrate the Defendant's gross income. In an attempt to rebut the Plaintiff's evidence, the Defendant's attorney submitted a general list of the Defendant's business expenses which he wanted the court to deduct from the gross income listed on the pay stubs. The evidence supported a finding that the Defendant had both reasonable and unreasonable business expenses. Normally, I would have deducted the reasonable business expenses, but because the Defendant's documentary evidence was not carefully itemized, and no further testimonial evidence was received, I could not determine a sum representing his reasonable business expenses. I knew he had legitimate business expenses, but I did not know how much. The net effect was that there was insufficient evidence to support the deduction of a sum certain representing his reasonable business expenses from his gross income to support specific and detailed findings of fact by the court.

BE CREATIVE IN YOUR PRESENTATION

Be creative in a bench trial just as you would in front of a jury. Judges are people too, and we appreciate a well-organized and artfully presented case. Perhaps lawyers are concerned the judge has heard these issues many times before and fear the judge will be bored by such matters. Creative trial advocacy is not boring, and is as

interesting for a judge as it is for a jury. Furthermore, it serves a very important purpose; that is, it illustrates and makes clear to the judge what it is you are trying to prove, which is the very purpose of a trial. Never fall into the trap of thinking the domestic bench trial is so routine that the creative use of trial advocacy is not a valuable tool for the court to use in finding the facts.

THE ELEMENTS

To help the judge find facts for each element in each claim, an attorney must know the law and the required elements he or she must prove. I recommend that you keep a list of each element of every claim you need to prove at counsel's table. Frequently, I bring my own list on the bench. A quick review of the elements can often jog your memory about a fact that you may have left out.

CROSS-EXAMINATION

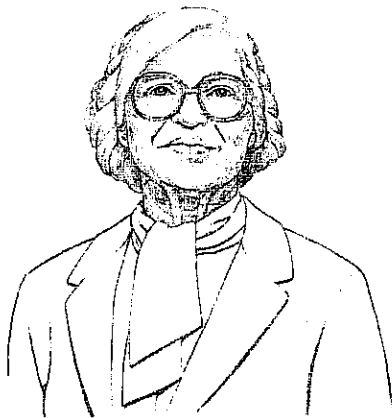
I have noticed many attorneys rushing to present their own evidence, not adequately preparing to cross-examine the opponent's witnesses. Effective cross-examination is always premised on a thorough knowledge of the facts of the case and the rules for impeachment. In cross-examining a witness it is rarely effective to attack his ultimate conclusion. A more effective method attacks the factual foundation of the opinion or the credibility of the witness. An attorney has at his or her disposal a better factual picture of the entire case than does the witness, and should be able to use this to his or her advantage in cross-examination. Clearly, casting doubt on the credibility of the witness and the facts relied upon by your opponent can have a powerful impact on the court.

CONCLUSION

Remember, the purpose of the domestic trial, where multiple claims with complex and emotional facts come standard, is to produce a favorable result for your client by presenting a clear picture for the court. I appreciate the trial lawyer who understands the principles of clarity and simplicity in this type of a case. Taking a mass of confusion and emotion and breaking it down to present a clear picture of equity and justice for your client is an art form. The judge is asked to do this at the conclusion of the case, and it is your job, as advocate, to assist the court in performing its task in administering justice. In the end, justice and favorable rulings require findable facts.

Attorneys Needed to Assist the Elderly

Needs of the Elderly Committee Senior Center Legal Clinics



Attorneys are needed to contribute two hours during the next 12 months to assist elderly persons in a legal clinic setting. The clinics provide elderly persons with the opportunity to ask questions about their legal and quasi-legal problems in the familiar and easily accessible surroundings of a Senior Center. Attorneys direct the person to appropriate legal or other services.

The Needs of the Elderly Committee supports the participating attorneys, by among other things, providing information on the various legal and other services

available to the elderly. Since the attorney serves primarily a referral function, the attorney need not have a background in elder law. Participating attorneys are not expected to provide continuing legal representation to the elderly persons with whom they meet and are being asked to provide only two hours of time during the next 12 months.

The Needs of the Elderly committee instituted the Senior Center Legal Clinics program to address the elderly's acute need for attorney help in locating available resources for resolving their legal or quasi-legal problems. Without this assistance, the elderly often unnecessarily endure confusion and anxiety over problems which an attorney could quickly address by simply directing the elderly person to the proper governmental agency or pro bono/low cost provider of legal services. Attorneys participating in the clinics are able to provide substantial comfort to the elderly, with only a two hour time commitment.

The Committee has conducted a number of these legal clinics during the last several months. Through these clinics, the Committee has obtained the experience to support participating attorneys in helping the elderly. Attorneys participating in these clinics

have not needed specialized knowledge in elder law to provide real assistance.

To make these clinics a permanent service of the Bar, participation from individual Bar members is essential. Any attorneys interested in participating in this rewarding, yet truly worthwhile, program are encouraged to contact: Tom Christensen or Mary Ann Fowler @ 531-8900, Fabian and Clendenin, 215 South State, #1200, Salt Lake City, Utah 84111.

