ASSESSING CASES FOR APPEAL

June 2010

By David Zuckerman
(with thanks to Catherine Smith and Howard Goodfriend)

Law Office of David B. Zuckerman
1300 Hoge Building
705 2nd Avenue
Seattle, WA 98104
(206) 623-1595
david@davidzuckermanlaw.com

DAVID ZUCKERMAN has a B.A. from Brown University (1981) and a J.D. from Northeastern University School of Law (1988). He served as a law clerk to the Honorable William L. Dwyer, United States District Court, Western District of Washington (1991-92). He is currently in private practice with a focus on appeals. David is a member of the Washington Appellate Lawyers Association, and an editor and contributing author for the Washington Appellate Practice Deskbook.

TABLE OF CONTENTS

I.
INTRODUCTION

When I began my legal career as a staff attorney for the Seattle public defenders, my supervisor explained that any good lawyer must fill two roles: an advisor and an advocate. When deciding whether to go to trial or settle a case, for example, the lawyer must be a neutral advisor, objectively setting out the costs and benefits of each option. Once the client has decided to go to trial, however, the lawyer must become an advocate, internalizing the client's goals as her own.

After an unsuccessful trial, the lawyer must switch hats again in order to advise the client regarding an appeal. This is not an easy task. In the heat of battle, the opposing party's positions may have seemed frivolous, the judge biased, and the ultimate ruling a travesty of justice. Certainly the client is likely to view things that way, perhaps more so in a family law case than in a criminal case. It is your job, however, to provide neutral and realistic advice about the likelihood of success on appeal, and the various costs and risks involved.

The purpose of this outline is to discuss some of the factors that affect the decision to appeal. The outline discusses unpublished appellate decisions as well as published ones because both are important in evaluating the chances of success on appeal. After all, if you do appeal, it is more likely than not that you'll get an unpublished ruling.

II.
WHEN IS THE TIME RIPE?

A. GENERALLY, ONLY FINAL JUDGMENTS CAN BE APPEALED

In general, a litigant must wait for a final judgment before she can appeal as of right. See RAP 2.2(a)(1). One exception relevant to family law is an order terminating all parental rights. RAP 2.2(a)(6).

Unless revision is timely sought, a judgment by a superior court commissioner becomes the judgment of the court and the only review is by appeal. Robertson v. Robertson, 113 Wn. App. 711, 54 P.3d 708 (2002); RCW 2.24.050.

B. INTERLOCUTORY REVIEW IS LIMITED

1. Standards

It is possible to move for discretionary review of interlocutory decisions, but such review is granted only under special circumstances. The standard is set out in RAP 2.3(b):

Except as provided in section (d), discretionary review may be accepted only in the following circumstances:

(1) The superior court has committed an obvious error which would render further proceedings useless;

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

2. Examples

Parentage of M.F, --Wn.2d --, 228 P.3d 1270, 2010 WL 1240989 (April 01, 2010). In this case, the stepmother petitioned for de facto parent status. The parent moved to dismiss under CR 12(b)(6) on the ground that a stepparent can never acquire de facto parent status. The trial court denied the motion to dismiss and the parent sensibly sought discretionary review. I was surprised to learn recently that the trial court did *not* certify the legal issue under RAP 2.3(b)(4). Nevertheless, the parent had a reasonable argument under RAP 2.3(b)(2) that the superior court committed probable error on this pure issue of law. Further, there was a very strong argument that the superior court "substantially altered the status quo" because it placed the child with the stepparent pending trial.

Goldberg v. Willey, No. 35231-1-II (Wn. Ct. App., Nov. 16, 2006). Here, the trial court struck the husband's pleadings regarding finances after finding that he had repeatedly lied about his assets. The husband then sought discretionary review. I argued on behalf of the wife that the trial court had broad discretion in fashioning remedies for discovery violations and that the husband would still have a fair trial. The Court of Appeals Commissioner denied review and granted costs and attorney fees to the wife.

III.
WHAT'S THE STANDARD OF REVIEW?

A. IS EVERYTHING REVIEWED FOR ABUSE OF DISCRETION?

Some of the case law seems to suggest that nearly all rulings in family law cases are reviewed for "abuse of discretion." See, e.g., Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (parenting ruling reviewed for abuse of discretion); State ex rel. J.V.G. v. Van Guilder, 137 Wn. App. 417, 154 P.3d 243 (2007) (child support ruling reviewed for abuse of discretion). In my view, the phrase "abuse of discretion" does little to clarify the standard because the level of review truly depends on the type of error made.

Abuse of discretion is generally defined as discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971).

> A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) (citing Washington State Bar Ass'n, Washington Appellate Practice Deskbook § 18.5 (2d ed.1993)), review denied, 129 Wn.2d 1003, 914 P.2d 66 (1996).

Marriage of Littlefield, 133 Wn.2d at 47.

In other words, one standard is applied to the judge's factual findings and another to errors of law. Each of those types of errors are discussed below. Only when the trial court has not erred in finding the facts, or in applying the correct legal standard, is the ruling truly "discretionary" in any meaningful sense. In that situation, the ruling can be reversed only "if it is outside the range of acceptable choices."

Such reversals are quite rare. One example is Marriage of D.K.R., 116 Wn. App. 1026, 2003 WL 1738917 (2003), in which the Court of Appeals found an award of permanent maintenance to be excessive. More commonly, the appellate court will affirm whenever the trial court considered the appropriate factors and reached a conclusion that was not legally forbidden. See, e.g., Marriage of Pfeiffer and Cueva, 151 Wn. App. 1033, 2009 WL 2331858 (2009) (where trial court considered all of the statutorily required factors regarding relocation and made factual findings on each, appellate court would not reverse its discretionary ruling).

Practice tip: If you are the respondent in an appeal, keep the focus on how the trial court did not abuse its discretion. If you are the appellant, focus on the specific factual and (preferably) legal errors made by the trial court.

B. FACTUAL FINDINGS

1. Standards

In general, appellate review of factual findings is very limited. The trial court will be upheld as long as there is "substantial evidence" in the record to support its decision. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 183 (1959). An appellate court will not ordinarily substitute its judgment for that of the trial court even though it might have resolved the factual dispute differently. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 73 P.3d 369 (2003). The trial court is generally free to believe or disbelieve a witness in reaching factual determinations. State v. Chapman, 78 Wn.2d 160, 469 P.2d 883 (1970).

This deference to the trial court's factual findings applies to an exaggerated degree in family law cases. For example, in most civil cases, the appellate court will not defer to the trial court's findings when both courts are merely reviewing documents rather than live testimony. Brouillet v. Cowles Publishing Co., 114 Wn.2d 788, 791 P.2d 526 (1990); State v. Rowe, 93 Wn.2d 277, 609 P.2d 1348 (1980). But in family law cases, the deferential standard of review applies even when the trial court relied solely on documentary evidence. Marriage of Rideout, 150 Wn.2d 337, 351-52, 77 P.3d 1174 (2003). The trial court's evaluation of credibility is almost impossible to overturn. See, e.g., Marriage of Winn, 131 Wn. App. 1025 (2006).

2. Examples of Successful Appeals

Marriage of Stern, 57 Wn. App. 707, 789 P.2d 807 (1990), review denied, 115 Wn.2d 1013, 797 P.2d 513 (1990)): This is a rare family law cases in which the appellate court reversed because a factual finding was not supported by substantial evidence. The trial court based its ruling in part on the premise that there was little difference between the cost of sending the children to private school or public school because the public school option would require additional daycare expense. Id. at 716-17. That may have been true at the time of the court's ruling because the eldest child was then in kindergarten and the public school provided for only a half-day program. The trial court failed to consider, however, how the cost differential would change once any child reached first grade and could receive a full day of education in public school. Id. at 719-20.

More often, when a court purportedly overturns a factual finding, there is really some error of law involved, or some unusual procedural irregularity, as in the two cases cited below.

In re the Marriage of Obaidi and Qayoum, 154 Wn. App. 609, 226 P.3d 787 (2010): The Court of Appeals overturned a trial court ruling upholding a Mahr (an Islamic prenuptial agreement), purportedly because the finding that it was a valid contract was "not supported by substantial evidence." Id. at 791. But to a large extent the result was actually

based on a legal error: the trial court improperly applied Islamic law rather than "neutral principles" of Washington contract law. Id. at 790.

Miles v. Miles, 128 Wn. App. 64, 114 P.3d 671 (2005): The Court of Appeals overturned a factual finding that the wife agreed to convey her interest in certain real estate to the husband after he paid off the mortgage. This case is unusual, however, because the judge who entered the written findings was not the same one who issued the oral ruling, and the two were inconsistent with each other. Normally, the written findings would supersede the oral ruling. Id. at 70 n. 5. The court also overturned a second "finding of fact" after first noting that it was actually a conclusion of law. Id. at 71.

C. QUESTIONS OF LAW

Questions of law are reviewed de novo. See King v. Snohomish County, 146 Wn.2d 420, 423-24, 47 P.3d 563 (2002). As noted above, appellate courts in effect apply this de novo standard in family law cases, although they may couch the ruling in terms of "abuse of discretion" due to the trial court's reliance on "untenable grounds." See, e.g., Marriage of Littlefield, supra. (trial court abused its discretion in crafting parenting plan because it had no authority under Parenting Act to order primary residential parent to live in a particular area); Lawrence v. Lawrence, 105 Wn. App. 683, 20 P.3d 972 (2001) (because Washington does not follow the "friendly parent" doctrine, a trial court abuses its discretion if it relies on that doctrine in crafting a parenting plan). For this reason, the best cases to appeal are generally those that present a pure question of law.

In my view, the new Registered Domestic Partnership Act will probably provide fertile ground for appeal of new legal issues. Consider the following language in RCW 26.09.915:

> For the purposes of this chapter, the terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to state registered domestic partnerships or individuals in state registered domestic partnerships . . .

It is hardly self-evident how that language will be applied in various settings. For example, suppose two women are registered partners and one of them has an affair with a man and becomes pregnant. Is the other woman a presumed parent? If so, how could the presumption be rebutted? By genetic testing? (Which would mean that the presumption would *invariably* be rebutted in a lesbian relationship.) Would the intent of the parties to have a baby together matter? (A principle that would not seem to "apply equally" to married couples and RDPs.) Or would the child simply have three parents?

D. THE IMPORTANCE OF WRITTEN FINDINGS

Under CR 52(a)(2)(B), findings of fact and conclusions of law are required in "connection with all final decisions in adoption, custody, and divorce proceedings." See also Marriage of Stern, 68 Wn. App. 922, 926, 846 P.2d 1387 (1993).

The trial court's written findings control over any apparently inconsistent statements in an earlier oral ruling. Shellenbarger v. Brigman, 101 Wn. App. 339, 346, 3 P.3d 211 (2000), citing State v. Eppens, 30 Wn. App. 119, 126, 633 P.2d 92 (1981). On the other hand, the court's oral statements can be used to clarify consistent written findings. State v. Parada, 75 Wn. App. 224, 234, 877 P.2d 231 (1994) (citing In re Marriage of Yates, 17 Wn. App. 772, 773, 565 P.2d 825 (1977).

The wording of the written findings may be critical to the chances of success on appeal. I suggest that you graciously offer to prepare the first draft. It's amazing how often the opposing party is happy to agree to that, due to the press of other commitments. Preparing the first draft will often mean that you establish the overall structure of the findings, even if you have to agree to some specific changes. If the other side prepares the first draft, review it carefully and, if necessary, prepare a complete re-write rather than trying to edit their draft. Don't hesitate to set a court hearing if you can't work out agreed findings to your satisfaction.

The preparation of findings can be a good time to consult with an appellate lawyer, who may be quicker to spot language that could come back to haunt you.

The trial court's failure to make adequate written findings can, in itself, be grounds for reversal. However, the typical remedy is a remand for more specific findings. See, e.g., Lawrence v. Lawrence, supra. (findings of fact were too incomplete for the Court of Appeals to determine on what theory the trial court made its decision to award custody of children to husband at divorce; court therefore remands for more specific findings); Marriage of Fortner, 138 Wn. App. 1029, 2007 WL 1252768 (2007) (Court of Appeals chastises trial court for complete lack of findings regarding central issue in the case: the mother's allegations that the father was abusive; because Court has no way to review the trial court's award of primary custody to the father, it remands for further findings).

For this reason, it is not productive to appeal on the ground of inadequate findings if the trial court would simply fix that problem on remand. On the other hand, if it appears that the facts *could not* support a finding to justify the trial court's conclusions, a remand might be useful. Similarly, more specific findings could be useful if they would show that the trial court relied on an improper legal basis. See Lawrence, supra, (suggesting that trial court might have improperly relied on the "friendly parent" doctrine).

The Katare case is perhaps an extreme example of the difficulties that can be encountered when appealing the trial court's failure to make a finding. In Marriage of Katare, 125 Wn. App. 813, 105 P.3d 44 (2004), rev. denied, 155 Wn.2d 1005 (2005), the Court of Appeals reversed because the trial court imposed limitations in the parenting plan without making adequate findings regarding the alleged risk that the father would abduct the children to a foreign country. On remand, the trial court essentially restated its original findings, and the Court of Appeals once again reversed for more specific findings. Katare v. Katare, 140 Wn. App. 1041, 2007 WL 2823311 (2007), review denied, 163 Wn.2d 1051, 187 P.3d 750 (2008). The case is now on its third appeal.[1]

E. THE ISSUE MUST BE PRESERVED

Preserving facts and legal issues for appeal is a complex topic in itself. In brief, the appellate court will generally decline to consider an argument for reversal if it was not properly raised in the trial court. RAP 2.5(a). See also, Allen v. Asbestos Corp., Ltd., 138 Wn. App. 564, 578, 157 P.3d 406 (2007), review denied, 162 Wn.2d 1022, 178 P.3d 1033 (2008) ("Error in the exclusion of testimony by a trial court generally cannot be urged under a theory presented for the first time on appeal."). On the other hand, the appellate court will consider any argument for affirmance of the trial court, even if it has not been raised below, as long as "the record has been sufficiently developed to fairly consider the ground." Id. An appeal is generally limited to the existing factual record. RAP 9.11 authorizes submission of additional evidence on appeal only under very limited circumstances.

In some cases, a motion under CR 59 for a new trial or for reconsideration may be used to preserve a legal issue not previously raised. See Olson v. City of Seattle, 54 Wn.2d 387, 387-88, 341 P.2d 153 (1959) (suggesting in dictum that an objection might have been preserved through a motion for new trial); Newcomer v. Masini, 45 Wn. App. 284, 287, 724 P.2d 1122 (1986) (finding that a new legal theory was properly preserved through a motion for reconsideration where the theory required no new facts and was closely related to theories pursued at trial).

It can also be a good idea to file a motion for reconsideration, of course, when you have reason to believe the trial court may actually change its mind about the result. On the other hand, if you believe the trial court is determined to rule against you, it can be counter-productive to file a motion for reconsideration pointing out flaws in the court's reasoning. The court may simply fix those errors, reach the same result, and remove your best issues for appeal.

F. HARMLESS ERROR

[1] Thanks to Greg Miller at Carney Badley for filling me in on the history of this case.

An error will normally be disregarded if it had no material, prejudicial effect upon the party asserting the error. See, e.g., Griffin v. West RS, Inc., 143 Wn.2d 81, 18 P.3d 558 (2001) (appellant not entitled to relief where erroneous jury instruction did not prejudice case); Ashley v. Hall, 138 Wn.2d 151, 978 P.2d 1055 (1999) (improper admission of testimony harmless where jury heard similar testimony without objection). For this reason, there is no point in appealing even a clear, legal error by the trial court unless you can show that it likely affected the result. For example, an error in characterizing property as separate or community may be harmless if it appears that the trial court would have made the same division of property regardless. Marriage of Olivares, 69 Wn. App. 324, 848 P.2d 1281, review denied, 122 Wn.2d 1009, 863 P.2d 72 (1993), overruled on other grounds by, Estate of Borghi, 167 Wn.2d 480, 219 P.3d 932 (2009).

IV.
OTHER FACTORS TO CONSIDER

A. STAYING THE JUDGMENT

The trial court has authority to stay a judgment pending appeal. RAP 7.2(h); CR 62. In most civil cases, there is an absolute right to stay a monetary judgment, or a decision affecting property, by posting a "supersedeas" amount in the form of bond, cash or alternate security. RAP 8.1(b).

The trial court has discretion to deny supersedeas, however, when the "judgment or decision "provides for periodic payments." RAP 8.1(c)(3). This exception was created out of concern that parties should not necessarily be allowed to stay maintenance and support payments in dissolution cases.

Although a party can stay a division of property by posting a bond, the trial court may mitigate the effect of the stay by modifying its ruling concerning maintenance. The leading case on this issue is Stringfellow v. Stringfellow, 53 Wn.2d 359, 333 P.2d 936 (1959). In that case, the trial court awarded substantial community property to the wife, including some profitable corporations, but because of that it granted no "alimony." Because the husband's supersedeas bond deprived the wife of the business income, the Supreme Court directed the trial court to award appropriate "support and maintenance" pending appeal, as well as funds to cover the fees and costs of responding to the husband's appeal. The Court left open whether, and to what extent, these payments should ultimately be charged to the wife's share of the community property.

The appellate court has discretion to stay equitable relief, such as the provisions of a parenting plan, under RAP 8.1(b)(3). The court must consider whether the moving party has

raised "debatable issues" and must compare the relative harm to each party if the stay is or is not granted. Id.

B. THE GENERAL RATE OF REVERSAL

According to the Washington Appellate Deskbook (2005 ed.), the overall rate of reversal in civil cases is roughly 30% with the rate somewhat lower in family law cases. Updated statistics will be available soon in the 2010 supplement.

C. DELAY

Appeals take time. A rough estimate is approximately 18 months from the filing of a notice of appeal to a ruling. But some appeals take much longer. For example, the Court of Appeals might stay the case pending a ruling from the Washington Supreme Court on a similar issue.

You should consider the benefit or detriment of a remand down the road. For example, suppose the trial court's ruling regarding a parenting plan is reversed. Will the increased age of the children help or hurt your case on remand?

D. THE EXPENSE OF AN APPEAL AND THE POSSIBILITY OF SHIFTING FEES AND COSTS

Appeals are expensive. First, there is the cost of preparing transcripts, which is roughly $1,000 per trial day. A supersedeas bond, if desired, can be quite expensive. Other costs include the filing fee and the preparation of clerk's papers.

The most significant cost will typically be the legal fees. In that regard, an appeal raising a discrete legal issue that does not require an extensive discussion of the evidence will likely take less time to prepare than one that is heavily dependent on detailed facts and procedural history.

In any appeal, the prevailing party may recover statutory costs from the other side, including the cost of preparing the transcript and clerk's papers, the cost of the supersedeas bond, and a specified amount per page of briefing. RAP 14.3. Because most of these costs are generally borne initially by the appellant, the possibility of recovering them may cut in favor of appeal.

In family law cases on appeal, as at trial, the court also has discretion to order one side to pay the other's attorney fees and costs See RCW 26.09.140; RAP 18.1. In addition, RAP 18.9 authorizes an award of compensatory damages against a party who files a frivolous appeal.

"An appeal is frivolous if there are no debatable issues upon which reasonable minds could differ, and it is so totally devoid of merit that there was reasonable possibility for reversal. Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd., 107 Wn.2d 427, 443, 730 P.2d 653 (1986) (quoting Boyles v. Wn. Dep't of Retirement Sys., 105 Wn.2d 499, 509, 716 P.2d 869 (1986) (Utter, J. concurring in part, dissenting in part))." In re Marriage of Obaidi and Qayoum, 154 Wn. App. 609, 792 (2010).

A recent example of an appeal found to be frivolous is Marriage of Read, No. 37964-III (February 9, 2010). The appellant argued that the trial court erred in denying his motion for a trial continuance. However, "in both criminal and civil cases, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). Here, the trial court considered the relevant factors, even though the pro se litigant had not raised them properly and its decision was within its discretion. Similarly, the trial court's division of property was within its discretion when it awarded the parties their respective separate property and made a reasonable distribution of the community property. The majority found that there was no debatable point of law and therefore found the appeal frivolous and awarded the respondent her attorney fees and costs.

When the only appealable issue involves money, it may be relatively easy to evaluate the costs and benefits of appeal. For example, even if the trial court were dead wrong in finding a certain $10,000 asset to be community property, it probably would not be worth the expense of appeal to challenge that. On the other hand, the value of rulings regarding parenting plans are subjective and can be assessed only by the client. For example, the benefit of being the primary residential parent may be "priceless."

E. IS THE OPPOSING PARTY LIKELY TO FILE A CROSS-APPEAL?

Even if the trial court made some rulings against you which seem ripe for appeal, you should also consider the rulings that went in your favor. If you don't file an appeal, the opposing party may let the latter rulings stand. But if you put them in the position of responding to your appeal, they may decide it takes relatively little additional effort to raise some claims of their own. By the same token, if the other side appeals, take a good look at whether you have grounds for a cross-appeal. Whenever competing claims have been raised in the appellate court, consider the possibility of an agreement for voluntary dismissal of the appeal and cross-appeal, with each side bearing its own costs.

Marriage of Rockwell, 141 Wn. App. 235, 170 P.3d 572 (2007), rev. denied, 163 Wn.2d 1055, 187 P.3d 752 (2008), illustrates the dangers of a cross-appeal. The husband appealed the trial court's division of property on two grounds: (1) that the trial court improperly considered his future earning capacity as a factor in the overall fairness of the division of property and (2) that the court erred in making an adjustment for social security benefits that the wife's federal

pension precluded her from receiving. The decision to appeal would seem reasonable at first glance because a victory would have saved the husband considerable money, and the second claim, at least, was essentially an issue of law.

On the other hand, the trial court also made an important ruling in the husband's favor: using the "subtraction method", rather than the "time rule method", to categorize the portion of the wife's pension that was community property. It appears the law tended to favor the wife on this second claim, and she properly filed a cross-appeal. The wife won, the husband lost, and the wife was awarded attorney fees and costs under RCW 26.09.140 and RAP 18.1. In retrospect, it appears that the husband should have left well enough alone. Even if he had won on his claims, he might not have come out ahead in view of the wife's cross-claim.

F. WILL THE CLIENT BE STUCK WITH ADVERSE FINDINGS FOREVER?

Dissolution cases can drag on for many years, with periodic requests for modification of support, maintenance, and parenting plans. Some findings may "stick" to the client throughout the process if they are not appealed promptly. For example, the issuance of a domestic violence protection order may severely limit any attempts to modify parenting down the road. Similarly, a trial court's ruling imputing income to a party may make it difficult to modify support and maintenance years later. In such cases, the cost/benefit analysis must take into account the long-term effects of the trial court's ruling.

G. WILL AMICI BE AVAILABLE?

If your case presents an issue of importance to some group or organization, it may be willing to assist with an amicus brief, or even to take on the appellate litigation at no expense to the client. Organizations that have been involved in family law cases include the American Civil Liberties Union of Washington, The Northwest Women's Law Center, and the Fred T. Korematsu Center for Law and Equality.