

New Jersey Law Journal

VOL. CLXXXII – NO. 7 – INDEX 640

NOVEMBER 14, 2005

ESTABLISHED 1878

Spell Out the Facts Embedded in Your Generalizations

To do the right thing, the court needs to know the facts

By Kenneth F. Oettle

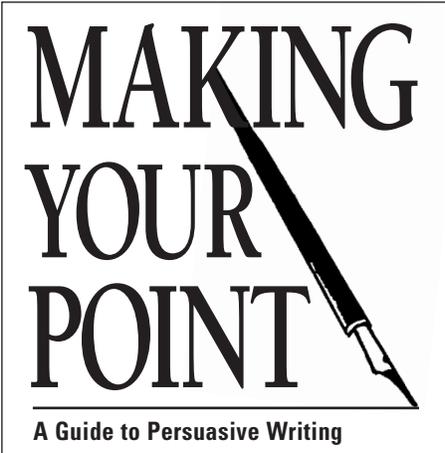
Facts are key to the persuasive process because they give the court a basis on which to do the right thing. They are the clay from which the court molds a result. To maximize the value of facts, set them before the court whenever possible.

Suppose you represent the wife in a long divorce litigation. Since the beginning of the litigation six years ago, the family home has doubled in value. It is about to be sold, and you want the wife to share its current value even though the presumptive date for valuing the home in a divorce is the date the complaint was filed. You have to persuade the court that the wife is entitled to half the appreciation in the home despite the presumptive valuation date.

The husband and wife both lived in the family home during the litigation, albeit in separate bedrooms, and the wife continued to clean the house, tend the garden and cook for both her husband and herself. The children had grown and moved out. You contend that the wife should share the home's appreciation during the six years of litigation because, among other things, she continued to contribute to the common venture of the marriage.

The author is a partner and co-chair of the writing and mentor programs at Sills Cummis Epstein & Gross. He invites questions and suggestions for future columns to koettle@sillscummis.com. "Making Your Point" appears every other week.

Your assigning attorney writes the Statement of Facts for the trial brief. Describing the wife's contribution to the household during the litigation, the attorney states that the wife "continued to clean the house, tend the garden, and prepare the family meals." The attorney chose the word "family" to connote a common enterprise and the phrase "continued to contribute" to create a parallel with the home's continuing increase in



MAKING
YOUR
POINT

A Guide to Persuasive Writing

value.

You are assigned the Argument section of the brief. You write the following in Point I:

During the six-year litigation, Mrs. X continued to contribute to the common enterprise of the marriage as she had before filing her complaint. Therefore, she is entitled to an equal share of the appreciation of the family home during the litigation.

You feel pretty good about having picked up on the assigning attor-

ney's use of "continued to contribute" and "family," but you don't repeat the ways in which the wife continued to contribute to the common enterprise of the marriage. You figure the facts are already set forth in the Statement of Facts — you don't want to be redundant — and you don't want to appear overzealous, either. Pounding the law, the facts or the table is not your style.

Overcome your reluctance. Where good facts are concerned, be unabashedly overt in your advocacy. If the facts are good, the principle of frequency overrides the principle of brevity. Write the sentence like this:

During the six-year litigation, the wife continued to clean the house, tend the garden and prepare the family meals, contributing to the joint enterprise of the marriage as she had before she filed her complaint.

Articulating the embedded facts is like clicking on the little plus sign in the folders column of your e-mail program, causing a menu of folders to drop down and become accessible to you. When you "argue the facts," you drop down a set of facts from your generalization. Here, the word "contributed" is the generalization, the set, and each of the ways in which the wife contributed is a subset.

Suppose you are lucky enough to have found a precedent, *Smith v. Smith*, where the wife successfully sought a share of the increase in value of the family home during divorce litigation. During the litigation in *Smith*, the wife lived in the family home, cared for the children,

did the household shopping and paid the bills.

After citing your precedent, lock in your analogy like this:

Just as the wife in *Smith v. Smith* was credited with the appreciation of the family home during a long divorce litigation because she continued to contribute to the marital enterprise, so should Mrs. X share in the increased value of the family home during her divorce litigation because she, too, continued to contribute to the marital enterprise, cleaning the home, preparing the family meals and tending the garden.

You may be tempted to extrapolate Mrs. X's role from "tending the garden" to something more impressive, like "supervising the upkeep of the property." Don't exaggerate. Don't try to turn a subset (tending the garden) into a set (seeing to the upkeep of the property). The court will see through it, and you will lose credibility.

Should you concede that Mrs. X contributed to the family enterprise in different ways from the wife in *Smith v. Smith*, who took care of the children, did the shopping and paid the bills, whereas Mrs. X merely cooked, cleaned and tended the garden — duties that arguably are less strenuous than caring for children?

This is a judgment call. Because

Mrs. X did less, the difference doesn't help you. The scope of her marital enterprise contracted when her children moved out. Your bottom line is that both women continued to contribute to the marital enterprise, so the result in your case should be like the result in *Smith v. Smith*.

But it's your choice, and maybe you can turn chicken scratch into chicken cacciatore. The other side will almost certainly address *Smith v. Smith* because it is on point. They will look to minimize your client's role, comparing her unfavorably with the wife in *Smith v. Smith*.

Acknowledging the factual difference between the women's roles carries some risk because your client didn't care for children during the divorce litigation; thus, her contribution to the marital enterprise was, arguably, less. But discussing the differences gives you the opportunity to reiterate and thus solidify the analogy between your case and *Smith v. Smith*, as follows:

True, Mrs. Smith and Mrs. X contributed to the family enterprise in different ways, Mrs. Smith by taking care of the children, doing the shopping and paying the bills, and Mrs. X by cooking, cleaning, and tending the garden — her children having grown up and moved out. Both continued to contribute to the household they shared with their husband.

I would confront the distinction head-on. The *Smith* case is sure to be central in the legal debate and thus to be parsed and picked at by the other side, the judge's law clerk and the judge. Show confidence by taking the aggressor's role. Posit the test as "contribution to the marital enterprise" and dare the other side to say that cooking, cleaning and tending the garden aren't a contribution. Bobbing and weaving has its place, but probably not here.

Puzzler

How would you tighten and sharpen the following sentence?

The Legislature adopted the Gaming Act in April which includes a complete ban on gifts to Gaming Commission employees.

Drop the reference to the Legislature as implicit. Because the ban is included in the Act, not in April, drop "which" (eliminating the question whether to place a comma in front of "which"). Reduce the phrase "includes a complete ban on" to "bans all." It's not only shorter but sharper.

The new version:
The Gaming Act adopted in April bans all gifts to Gaming Commission employees. ■