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THE *IVIE* TRAP: MIXED QUESTIONS OF FACT AND LAW

The Missouri Supreme Court recognizes that a claim on appeal may present a mixed question of fact and law. *Pearson v. Koster*, 367 S.W.3d 36, 44 (Mo. banc 2012). Yet the Court criticized an appellant for combining into the same point relied on a substantial-evidence challenge, a misapplication-of-law challenge, and an against-the-weight-of- the-evidence challenge. *Ivie v. Smith*, 439 S.W.3d 189, 199, n. 11 (Mo. banc 2014). The Court ruled that these three challenges must appear in separate points to be preserved for appellate review. *Id*. How does the appellant's lawyer comply with this *Ivie* rule when the claim on appeal presents a mixed question of fact and law? I view this kind of dilemma as the *Ivie* trap.

For most purposes, the *Ivie* rule makes perfect sense. The elements of a substantial-evidence challenge are distinctly different from a weight-of-the-evidence challenge. See, *Hopkins v. Hopkins*, 449 S.W.3d 793, 802 (Mo.App. W.D. 2014). So, it makes sense to require the appellant to raise these two kinds of factual challenges to a judgment in separate points. See, *J.A.R. v. D.G.R.*, 426 S.W.3d 624, 629 (Mo. banc 2014). The Court in *Ivie*, however, went further and ruled that the misapplication-of-law challenge also must be presented as a separate point. *Ivie v. Smith*, 439 S.W.3d at 199, n. 11. For a pure question of law, this again makes sense. So, for example, if a trial court awards one parent sole physical custody without addressing the statutory factors for the best interest of the child, the trial court can be charged with misapplying the law. Or, if the appellant is appealing from an order dismissing the appellant's petition, this again is a pure question of law that the appellate court reviews *de novo*.

My concern is with the grey area when a single claim on appeal presents a mixed question of fact and law. I offer a few illustrative examples from recent cases to demonstrate my concern. The Missouri Supreme Court found a mixed

question of fact and law was presented by the determination of whether a particular map complied with the constitutional compactness requirement for congressional districts. *Pearson v. Koster*, 367 S.W.3d 36, 47 (Mo. banc 2012). Later, the Western District found a mixed question of fact and law over whether there was substantial evidence under the law applicable to fixtures or abandonment to support a judgment. *Herron v. Barnard,* 390 S.W.3d 901, 911 (Mo.App. W.D. 2013). The Western District also found a mixed question over whether a firefighter was entitled to official immunity under the facts of the particular case. *Rhea v. Sapp,* 463 S.W.3d 370, 375 (Mo.App. W.D. 2015). And just a few months ago, the Eastern District found the same kind a mixed question in deciding if there was sufficient evidence to support a finding that a father was unfit as matter of law to serve as a guardian. *In re L.M.*, 488 S.W.3d 210, 217 (Mo.App. E.D. 2016).

When faced with these kinds of mixed questions, the reviewing courts traditionally will segregate the parts of the issue that were dependent upon factual determinations from those dependent on legal determinations. The reviewing court will defer to the factual findings so long as they are supported by substantial evidence, but will review *de novo* the application of the law to those facts. *Pearson v. Koster*, 367 S.W.3d at 44; *Herron v. Barnard,* 390 S.W.3d at 910; *Rhea v. Sapp,* 463 S.W.3d at 375; *In re L.M.*, 488 S.W.3d at 214. How does this approach square with the *Ivie* rule? A strict reading of *Ivie* now compels the appellant to draw the distinction between the legal and factual issues and raise separate points – not only for substantial-evidence and weight- of-the-evidence challenges – but also for any alleged misapplication of law.

From a practical standpoint, what does the *Ivie* rule mean when a proposed point relied on presents a mixed question of fact and law? Does the appellant's lawyer have to redraft the legal and factual challenges as separate points and thus dilute the strength of the total argument? Say, for example, the trial court committed an error of law that only reveals itself as reversible error when the ruling was applied to the facts of the case. If the appellant's lawyer is forced to create two separate points in that situation, I worry that the separation dilutes the strength of each argument.

The *Ivie* rule, strictly applied, also may impose limitations on what the appellant is allowed to say as part of a factual challenge to the judgment. The first element of both a substantial-evidence challenge and a weight-of-the- evidence challenge is to "state the challenged factual proposition necessary to sustain the

judgment." *Hopkins v. Hopkins*, 449 S.W.3d at 802. Defining what factual proposition must be proved often is a question of law.[1] Surely the *Ivie* rule does not bar the appellant from citing statutes or cases to show that a particular factual proposition is necessary to sustain the judgment. In my view, this approach is perfectly justified. The appellant is supplying the authority necessary to satisfy the first element of the factual challenge. But how far can the appellant go in defining the factual proposition without being accused of combining legal and factual issues? And why should it matter if the point presents a true mixed question of fact and law?

I cannot answer these troubling questions with this article. The answers must await future clarification from the Missouri appellate courts. Hopefully, the Missouri Supreme Court at some point will provide the needed clarification by reconciling the conflicting approaches in *Pearson* and *Ivie*. Until that happens, however, the appellant's lawyer must navigate the minefield of drafting points and arguments in a way that will not cause his or her appeal to be dismissed.

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[1] See, e.g., *In re L.M.*, 488 S.W.3d 210, 217 (Mo.App. E.D. 2016). The Eastern District in *L.M.* held there was no substantial evidence to support a finding that a father was unfit to be guardian. But before reaching this factual conclusion, the court reviewed the relevant factors for finding a parent unfit. *Id.* at 217. As part of its reasoning, the Eastern District concluded that the reasons given by the trial court for finding the father unfit in that particular case were insufficient as a matter of law. *Id.*