APPELLATE TIPS: JUDGES PANEL

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APPENDICES

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APPELLATE TIPS: JUDGES PANEL

I. SCOPE OF ARTICLE

This article is intended to address the appeal of a family law case. Since most appeals of a family law case arise from a non-jury trial, this article will emphasize findings of fact and conclusions of law. It will also attempt to steer practitioners around many of the traps and pitfalls in a family law appeal. In 1997, the Texas Rules of Appellate Procedure were extensively amended. The impact of the rule changes on non-jury appeals will be emphasized in this article although appeals from jury trials will be discussed when pertinent. Throughout this Article, the Texas Rules of Civil Procedure are referred to as "TRCP," and the Texas Rules of Appellate Procedure are referred to as "TRAP."

II. APPELLATE REVIEW

A. Preservation of Error in the Trial Court

In family law appeals, as in all other cases, you will not prevail unless the error complained of in the appellate court is first sufficiently preserved in the trial court. The appellate record must reflect that a timely request, objection or motion was presented to the trial court, and that it was ruled upon. TRAP 33.1(a). If the trial judge refused to rule, an objection to that failure preserves the complaint. TRAP 33.1(a)(2)(B). *See Frazier v. Yu*, 987 S.W.2d 607, 609-10 (Tex. App. -- Fort Worth 1999, pet. denied) (Error is preserved as long as the record indicates in some way that the trial court ruled on the objection either expressly or implicitly). *But see In re Colony Insurance*, 978 S.W.2d 746 , 747 (Tex. App. -- Dallas 1998, orig. proceeding) (trial court did not rule on motion but only indicated an intent to rule in the future); *Guyot v. Guyot*, 3 S.W.3d 243 (Tex. App. – Fort Worth 1999, no pet.) (a trial court docket sheet notation cannot be relied upon to preserve error on appeal). *See also Scurlock Permian Corp. v. Brazos County*, 869 S.W.2d 478, 483-84 (Tex. App. – Houston [1st Dist.] 1993, writ denied) (the unconstitutionality of a statute is an affirmative defense that must be pled).

Under TRAP 33.1(b), this requirement of a ruling does not apply to the overruling by operation of law of a motion for new trial or motion to modify judgment, unless the taking of evidence was necessary to properly present the complaint in the trial court. *See Stovall v. Avalon Hair, Inc.*, 1998 WL 849398 (Tex. App. -- Austin, 1998, no. pet.).

TRAP 33.1(c) provides that a signed, separate order is not required to preserve a complaint for appeal, as long as the trial court's ruling is reflected in the record. Thus, TRAP 33.1(c) invalidates cases which previously held that a ruling on a motion for directed verdict must be in writing to be recognized on appeal. *See Thedford v. Missouri Pacific R. Co.*, 929 S.W.2d 39, 50 (Tex. App. -- Corpus Christi 1996, writ denied); *Soto v. Southern Life & Health Ins. Co*., 776 S.W.2d 752, 754 (Tex. App.--Corpus Christi 1989, no writ).

B. The "Harmless Error Rule"

Even if error occurred in the trial court, it is not necessarily "reversible error." In order to obtain relief from the appellate court, the appellant must show that the trial court's error was harmful. TRAP 44.1 provides:

> (a) *Standard for Reversible Error.* No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of:
>
> > (1) probably caused the rendition of an improper judgment; or
> >
> > (2) probably prevented the appellant from properly presenting the case to the court of appeals.
>
> (b) *Error Affecting Only Part of Case.* If the error affects part of, but not all, the matter in controversy and that part is separable without unfairness to the parties, the judgment must be reversed and a new trial ordered only as to the part affected by the error. The court may not order a separate trial solely on unliquidated damages if liability is contested.

In substance, TRAP 44.1 is unchanged from former TRAP 81(b)(1). "The harmless error rule, as expressed in former Rule 81, applies to all errors, even those involving the violation of

procedural rules couched in mandatory language." *Lone Star Steel Co. v. Scott*, 759 S.W.2d 144, 147 (Tex. App..--Texarkana 1988, writ denied). The test of whether error is reversible or harmless is not a "but for" test; it is instead a matter of probability of harm. The appellate court must determine whether it is more likely than not that the error led to an improper judgment. *King v. Skelly*, 452 S.W.2d 691, 696 (Tex. 1970). If so, the judgment is reversed; if not, the judgment is affirmed.

C. Procedure and Evidence

When a trial is conducted in violation of a rule of civil procedure or rule of evidence, an appellate court will reverse the trial court's judgment, but only if the violation probably resulted in an improper judgment. TRAP 44.1.

1. Procedural Errors

Some procedural errors are sufficiently significant to warrant reversal, and some are not. For example, few cases are reversed on the adequacy of the pleadings to support the judgment. Few cases (if any) have been reversed for denying special exceptions. Few cases have been reversed for denying a motion for continuance. Improper joinder or severance is rarely a successful claim on appeal. On the other hand, appellate courts are more sensitive to a claim that a litigant was wrongfully deprived of a jury trial. *See Halsell v. Dehoyos*, 810 S.W.2d 371, 371 (Tex. 1991).

2. Evidence Errors

Challenges to the erroneous admission or exclusion of evidence requires a two-prong approach. First, the trial court's evidentiary ruling must be erroneous. Second, assuming error occurred, was it harmful? When considering whether the erroneous admission or exclusion of evidence constitutes error, the appropriate standard of review is whether the trial court abused its discretion. *See City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995).

As appellate courts are quick to point out, not all error constitutes reversible error. One of the most difficult steps in handling evidentiary issues on appeal is convincing the appellate court that the trial court's error in admitting or excluding error was harmful. Harmful error is shown under this test when the evidence is controlling on a material issue and not cumulative. *Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994). Furthermore, the Supreme Court in *McCraw v. Maris,* 828 S.W.2d 828 (Tex. 1992) specifically rejected the requirement of a "but for" relationship between the error and an improper judgment. *See also, City of Brownsville v. Alvarado,* 897 S.W.2d 750 (Tex. 1995); *Durbin v. Dal-Briar Corp.,* 871 S.W.2d 263, 267 (Tex.App.--El Paso 1994, writ denied).

There is some authority in the courts of appeals that a case is reversible on wrongful admission or exclusion of evidence only if the entire case turns on the particular evidence. *Litton v. Hanley*, 823 S.W.2d 428, 429-30 (Tex.App.--Houston [1st Dist.] 1992, no writ); *LaCoure v. LaCoure,* 820 S.W.2d 228, 235 (Tex.App.--El Paso 1991, writ denied); *Dudley v. Humana Hosp.,* 817 S.W.2d 124, 126 (Tex.App.-Houston [14th Dist.] 1991, no writ); *Rawhide Oil Co. v. Maxus Exploration Co.,* 766 S.W.2d 264, 279 (Tex.App.--Amarillo 1988, writ denied). Other courts of appeals combine the "entire case turns" language with former Rule 81(b)(1) language. *E.g., Service Lloyds Ins. Co. v. Martin,* 855 S.W.2d 816 (Tex.App.--Dallas 1993, no writ); *Riggs v. Sentry Ins. Co.,* 821 S.W.2d 701, 708-709 (Tex.App.--Houston [14th Dist.] 1991, writ denied). The "entire case turns" language has been questioned in recent opinions. *Durbin v. Dal-Briar Corp.,* 871 S.W.2d 263, 267 (Tex.App.--El Paso 1994, writ denied); *Castro v. Sebesta,* 808 S. W. 2d 189, 192 n. 1 (Tex. App. --Houston [1st Dist.] 1991, no writ). The state of the law with regard to this language is unclear; if it is viewed as a separate standard, the Supreme Court has not developed it in a harmful error analysis in more recent cases, *see, e.g., City of Brownsville v. Alvarado, 897* S.W.2d 750 (Tex. 1995); if it is viewed as a permutation of the "but for" standard, then it should be viewed as disapproved by *McCraw*; if it is a higher standard than "but for," it is most certainly disapproved by *McCraw.* Perhaps the language is only a variation of the other language often present in this area of the law, that the evidence must be controlling on a material issue in the case. *See Gee v. Liberty Mutual Fire Ins. Co.,* 765 S.W.2d 394, 396 (Tex. 1989).

Other factors also play in the harmless error arena. If the evidence complained of is only

cumulative of other evidence admitted, then error with regard to admission or exclusion is harmless. *Id.; Hyundai Motor Co. v. Chandler,* 882 S.W.2d 606, 620 (Tex.App.--Corpus Christi 1994, writ denied); *see State v. McKinney,* 886 S.W.2d 302, 305 (Tex.App.--Houston [1st Dist.] 1994, writ denied). Furthermore, the evidence must concern an issue material to the case. *Durbin v. DalBriar Corp.,* 871 S.W.2d 263, 271 (Tex.App.--El Paso 1994, writ denied).

The Supreme Court rejected a variation in this area in *Williams Distributing Co. v. Franklin,* 898 S.W.2d 816 (Tex. 1995). *Williams* involved expert testimony excluded due to a party's failure to supplement its discovery designation of expert witnesses. Another expert had been properly designated by the party to testify on the same issue. Without determining if the exclusion were erroneous, the Dallas Court of Appeals held that harmful error was not shown because there was no showing the party "was unavailable to testify or *would not give controlling evidence* himself."[emphasis added] *Williams Dist. Co. v. Franklin,* 884 S.W.2d 503, 510 (Tex.App.--Dallas 1994), *rev'd,* 898 S.W.2d 816, (Tex. 1995). The Supreme Court attacked the emphasized language, holding that it put a party to an unpleasant election between offering "weaker" testimony and abandoning the exclusion complaint, or disparaging the "weaker" testimony as not controlling. The Court also held that it amounted to an impermissible intrusion into a party's trial strategy regarding whether or not to call a witness and determining what evidence is best to put to the jury.

D. Factual Disputes

The Texas Supreme Court and courts of appeals can reverse and render a case when there is no evidence to support a fact finding or when the party with the burden of proof in the trial court has conclusively established a contention but the fact finder nonetheless finds to the contrary. The courts of appeals (but not the Supreme Court) can reverse and remand the case for a new trial when an affirmative fact finding is not supported by factually sufficient evidence, or if a negative fact finding is against the great weight and preponderance of the evidence.

When the trial judge sits as finder of fact, appellate courts "give to the trial court's fact findings the same deference that [they] would give to the same findings by a jury." *MJR Corp. v. B & B Vending Co.*, 760 S.W.2d 4, 10 (Tex. App..--Dallas 1988, writ denied). *See Reynolds v. Kessler*, 669 S.W.2d 801, 807 (Tex. App..--El Paso 1984, no writ) ("The Court of Appeals may not pass on credibility nor substitute its findings for those of the trier of fact."); *Blanco v. Garcia*, 767 S.W.2d 896, 897 (Tex. App..--Corpus Christi 1989, no writ). The likelihood of prevailing on factual points may increase if a reversal would not require a new trial, i.e., if the judgment can be reformed or a remittitur ordered.

E. Applying Substantive Law

An appeal attacking the legal (rather than factual) basis for the judgment is better received in the appellate court. As described by the Dallas Court of Appeals:

> The appellate court, as the final arbiter of the law, not only has the power, but the duty to independently evaluate trial court findings upon the law.

MJR Corp. v. B & B Vending Co., 760 S.W.2d 4, 10 (Tex. App..--Dallas 1988, writ denied).

F. Abuse of Discretion

An appeal directed toward showing an abuse of discretion is one of the tougher appellate propositions. It is largely a subjective question and difficult to predict in advance. Unfortunately, in family law cases, most of the appealable issues are evaluated against an abuse of discretion standard, be it the issue of property division, visitation or child support. Furthermore, appellate courts are more inclined to reverse family law decisions for significant technical errors than just plain old abuse of discretion.

1. Definition

The term "abuse of discretion" is not susceptible to rigid definition. As pointed out in Wendell Hall's article, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 360-61 (1998), the term "abuse of discretion" is not easily defined. "[J]udicial attempts to define the concept almost

routinely take the form of merely substituting other terms that are equally unrefined, variable, subjective and conclusory." *Id.* at 360-61, citing *Landon v. Jean-Paul Budinger, Inc.*, 724 S.W.2d 931, 934 (Tex. App..--Austin 1987, no writ). Combining the terms and phraseology used in various appellate opinions, Wendell suggests that "[t]he test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. Rather, a trial court abuses its discretion if its decision is arbitrary, unreasonable, and without reference to any guiding rules and principles." *Id.* at 362 [footnotes omitted]. However, "[t]here are at least two instances in which a perceived error does not constitute an abuse of discretion. First, a mere error of judgment is not an abuse of discretion. Second, a trial court does not abuse its discretion if it reaches the right result for the wrong reason." *Id.* at 363 [footnotes omitted].

The Supreme Court gave the following widely-cited test for determining an abuse of discretion by the trial court:

> The test for an abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. Rather, it is a question of whether the court acted without reference to any guiding rules and principles. *Craddock v. Sunshine Buslines*, 133 S.W.2d 124, 126 (Tex.Com.App.--1939, opinion adopted). Another way of stating the test is whether the act was arbitrary or unreasonable. *Smithson v. Cessna Aircraft Company*, 665 S.W.2d 439, 443 (Tex. 1982); *Landry v. Travelers Insurance Co.*, 458 S.W.2d 649, 651 (Tex. 1970). The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred.

Downer v. Aquamarine Operators, Inc., 701 S.W.2d at 238 (emphasis added).

2. When Does Abuse of Discretion Standard Apply?

The abuse of discretion standard applies to the following trial court decisions: plea in abatement, special exceptions, temporary and permanent injunctions, severance and joinder, striking intervention, amendment of responses to requested admissions, and deeming them admitted, good cause for late supplementation of discovery, motion for continuance, dismissal for want of prosecution, denial of request for jury, whether to certify a class, recusal, sealing court records, limiting opening statements, trial amendment of pleadings, wording and submission of jury instructions and definitions. *See* W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 355, 372-430, 437, 446-48 (1998). Abuse of discretion is also the standard when the court sets child support and divides property on divorce. *MacCallum v. MacCallum*, 801 S.W.2d 579, 582 (Tex. App..--Corpus Christi 1990, writ denied) (child support); *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981) (property division).

3. Applying an Erroneous Rule of Law

While trial courts have broad discretion in making rulings, the courts are not free to make decisions based upon an erroneous conception of the law. There are several mandamus cases which indicate that applying the wrong law is itself an abuse of discretion. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Ninth Court of Appeals*, 864 S.W.2d 58, 59 n.3 (Tex. 1993); *NCNB Texas Nat. Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989). The remedy, however, is to remand the case back to the trial court to exercise discretion using proper legal principles. It is not the prerogative of the appellate court to dictate to the trial court how that discretion should be exercised.

4. Is There a Different Standard of Evidentiary Review?

Recently some courts have said that when the trial court's ruling on the merits is reviewed under an abuse of discretion standard, the normal "sufficiency of the evidence" review is part of the "abuse of discretion" review and not an independent ground for reversal. *Crawford v. Hope*, 898 S.W.2d 937, 940-41 (Tex. App..--Amarillo 1995, writ denied) (when standard of review is abuse of discretion, factual and legal sufficiency are not independent grounds of error); *accord*, *Thomas v. Thomas*, 895 S.W.2d 895, 898

(Tex. App..--Waco 1995, writ denied); *In re Marriage of Driver*, 895 S.W.2d 875, 877 (Tex. App..--Texarkana 1995, no writ); *Wood v. O'Donnell*, 895 S.W.2d 555, 556 (Tex. App..--Fort Worth 1995, no writ); *In re Pecht*, 874 S.W.2d 797, 800 (Tex. App..--Texarkana 1994, no writ); *but see Matthiessen v. Schaefer*, 897 S.W.2d 825, 828 (Tex. App..--San Antonio 1994) (Duncan, J., dissenting), *rev'd on other grounds*, 915 S.W.2d 479 (Tex. 1995) (appellate court should review award of attorney's fees by normal sufficiency of evidence standard, and not subsume sufficiency of evidence into abuse of discretion standard).

The El Paso Court of Appeals has agreed with Justice Duncan's dissenting opinion in *Matthiessen.* In *Lindsey v. Lindsey,* 965 S.W.2d 589 (Tex. App..--El Paso 1998, no pet.), the court addressed the conflict between the traditional sufficiency review and the abuse of discretion standard in the context of a child support modification:

> An order regarding child support will not be disturbed on appeal unless the complaining party can demonstrate a clear abuse of discretion. We are aware of recent opinions holding that when the trial court's ruling on the merits is reviewed under an abuse of discretion standard, the normal sufficiency of the evidence review is part of the abuse of discretion review and not an independent ground for reversal.
>
> One commentator has suggested that the abuse of discretion standard of review should be standardized. R. Townsend, *State Standards of Review: Cornerstone of the Appeal*, The University of Texas School of Law 6th Annual Conference on State and Federal Appeals (1996). He recommends that once it has been determined that the abuse of discretion standard applies, an appellate court should engage in a two pronged inquiry: (1) Did the trial court have sufficient information upon which to exercise its discretion; and (2) Did the trial court err in its application of discretion? We agree with this approach. The traditional sufficiency review comes into play with regard to the first question; however, our inquiry cannot stop there. We must proceed to determine whether, based on the elicited evidence, the trial court made a reasonable decision. Stated inversely, we must conclude that the trial court's decision was neither arbitrary nor unreasonable.

Overlapping Standards in the Family Law Context

> An appeal directed toward demonstrating an abuse of discretion is one of the tougher appellate propositions. Most of the appealable issues in a family law case are evaluated against an abuse of discretion standard, be it the issue of property division incident to divorce or partition, conservatorship, visitation, or child support. While the appellant may challenge the sufficiency of the evidence to support findings of fact, in most circumstances, that is not enough. If, for example, an appellant is challenging the sufficiency of the evidence to support the court's valuation of a particular asset, (s)he must also contend that the erroneous valuation caused the court to abuse its discretion in the overall division of the community estate. In the child support context, an appellant may challenge the sufficiency of the evidence to support a finding of net resources, a finding of the proven needs of the child, a finding of voluntary unemployment or under-employment, or a finding of a material and substantial change in circumstances. Once we have determined whether sufficient evidence exists, we must then decide whether the trial court appropriately exercised its discretion in applying the child support guidelines to the facts established. Mr. Lindsey has appropriately raised both prongs of this inquiry by designated points of error.

Lindsey, 965 S.W.2d at 592-93 (footnote and citations omitted).

Consider the following hypothetical from *Lindsey*. Suppose the parties dispute the value of Husband's business which is operated as a sole proprietorship. Wife contends it has a value of $30,000 while Husband values it at $10,000. For

purposes of this example, we will assume that Wife's valuation expert improperly includes personal goodwill. We will also assume that the trial court erroneously overrules Husband's objection and makes a specific fact finding that the business has a value of $30,000. On appeal, Husband contends that the trial court erred in admitting Wife's expert's testimony, and had it been properly excluded, there was no evidence to support a valuation finding of $30,000. While an appellate court would likely agree, that is merely the first hurdle. Husband must still demonstrate that the trial court abused its discretion in dividing the community estate. Even if the evidence is insufficient to support the court's value of $30,000, that valuation error may not constitute an abuse of discretion in the ultimate distribution of a $300,000 estate [the error representing ten percent of the total community estate], but it may well constitute an abuse of discretion in the division of a $100,000 estate [the error representing nearly a third of the community estate], depending upon the equities justifying a disproportionate division. *Lindsey*, 965 S.W.2d at 592 n. 3.

III. THE APPELLATE TIMETABLE

A. Court Can Suspend Deadlines

Under TRAP 2, for good cause on motion of a party or on its own initiative, the appellate court can suspend the operation of any rule in a particular case, except the deadline for perfecting appeal. Old TRAP 2 previously gave this power to the appellate courts only in criminal cases; new TRAP 2 gives this power in both civil appeals and criminal appeals. TRAP 2 thus would permit the extension of deadlines and late-filing of documents in civil appeals, except for perfecting appeal. *See generally* John Hill Cayce, Jr., Anne Gardner, & Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 BAYLOR L.REV. 867, 876-77 (1997). The court cannot, however, suspend any provision in the Code of Criminal Procedure. In *Jauregui Partners, Ltd. v. Grubb & Ellis Commercial Real Estate Service*, 960 S.W.2d 334, 336 (Tex. App..--Corpus Christi 1997, pet. denied), the court of appeals was asked to use new TRAP 2 to extend the deadline for the trial court to have signed an order granting a new trial. Analogizing to the use of old TRAP 2(b) in criminal cases, the court of appeals held that it could not use new TRAP 2, in a civil case, to retroactively suspend rules governing events that previously occurred at the trial level before the record was forwarded to the appellate court.

B. Computation of Time

Under old TRAP 5, and under TRAP 4.1(a), if the last day of a period for filing a document ends on a Saturday, Sunday or legal holiday, the filing deadline is extended to the next business day which is not a legal holiday. TRAP 4.1(b) also extends the deadline when the court clerk's office in which the document is to be filed is closed or inaccessible during regular hours on the last day for filing. TRAP 4.1(b). Inaccessibility can be proved by certificate of the clerk or counsel, by a party's affidavit, or other satisfactory proof, and can be contested in like manner. TRAP 4.1(b).

C. Filing by Mail

As before, under TRAP 9.2(b), a document can be timely filed with an appellate court through the U.S. Postal Service if the document is received within 10 days after the filing deadline and the document was mailed on or before the last day for filing. TRAP 9.2(b). Under TRAP 9.2(b)(2), conclusive proof of the date of mailing consists of (i) a legible postmark, (ii) a USPS receipt for registered or certified mail, or (iii) a USPS certificate of mailing. Other proof may be considered.

However, don't try this method of filing with Federal Express or UPS -- your document absolutely, positively will not be timely. *See, e.g., Carpenter v. Town and Country Bank*, 806 S.W.2d 959, 960 (Tex. App. -- Eastland 1991, writ denied) (UPS); *Fountain Parkway, Ltd. v. Tarrant Appraisal Dist.*, 920 S.W.2d 799, 802-03 (Tex. App. -- Fort Worth 1996, writ denied) (Federal Express). A court of appeals by local rules

may also permit documents to be filed, signed or verified by electronic means. TRAP 9.2(c).

D. Deadline for Perfecting Appeal

The new TRAPs continue the same deadlines for perfecting appeal.

1. Final Judgments

Under the shorter timetable (no post-judgment motion, no request for findings), the deadline for perfecting the appeal continues to be 30 days after the judgment is signed. TRAP 26.1. The deadline for perfecting appeal is 90 days after the judgment is signed if any party timely files a (i) motion for new trial; (ii) motion to modify the judgment; (iii) motion to reinstate after a dismissal for want of prosecution; or (iv) a request for findings and conclusions when they are required or can be properly considered by the appellate court. TRAP 26.1(a). TRAP 4.3(a) specifically provides that modifying the judgment during the trial court's period of plenary power restarts the appellate timetable.

2. Accelerated Appeals

In an accelerated appeal, the appeal must be perfected within 20 days after the judgment or appealable interlocutory order is signed. TRAP 26.1(b).

3. Restricted Appeals

In a "restricted appeal" (replacement for the appeal by writ of error after a default judgment), the appeal must be perfected within 6 months after the judgment or order is signed. TRAP 26.1(c).

4. Other Parties

If any party timely perfects an appeal, any other party may perfect an appeal within the applicable deadlines, or within 14 days after the first party perfects an appeal, whichever is later. TRAP 26.1(d).

5. Extending the Deadline

The appellate court can extend the time for perfecting appeal if the appeal is perfected within 15 days after the deadline, and within that same period, a motion is filed in the appellate court reasonably explaining the need for the extension, as required by TRAP 10.5(b). Under TRAP 26.3, the deadline for perfecting may be extended in all appeals, including accelerated appeals. However, the Supreme Court recently "liberalized" the deadlines in *Verburgt v. Dorner*, 959 S.W.2d 615 (Tex. 1997). *Verburgt* held that a motion for extension of time to file a cost bond (now notice of appeal) is implied when a party, acting in good faith, files a cost bond within the 15 day period in which former TRAP 41(a)(2)(now TRAP 26.3) permits parties to file a motion to extend the time for filing the cost bond. 959 S.W.2d at 617. But there still must be a reasonable explanation to support the late filing. *Boyd v. American Indem. Co.*, 958 S.W.2d 379, 380 (Tex. 1997); *Harlan v. Howe State Bank*, 958 S.W.2d 380, 381 (Tex. 1997). An "implied motion for extension of time" may be overruled if no reasonable explanation or good cause exists or is shown. *Weik v. Second Baptist Church of Houston*, 988 S.W.2d 437, 439 (Tex. App. -- Houston [1st Dist.] 1999, pet. denied). *See Jones v. City of Houston*, 976 S.W.2d 676 (Tex. 1998) (applying *Verburgt* to untimely filed affidavit of indigency in lieu of cost bond). "A reasonable explanation means 'any plausible statement of circumstances indicating that failure to file within the [required] period was not deliberate or intentional, but was the result of inadvertence, mistake or mischance.'" *Weik v. Second Baptist Church of Houston*, 988 S.W.2d 437, 439 (Tex. App. -- Houston [1st Dist.] 1999, pet. denied) (quoting *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 669 (Tex. 1989)). *See Kidd v. Paxton*, 1 S.W.3d 309 (Tex. App. – Amarillo 1999, pet. denied) (counsel's miscalculation of deadline for filing notice of appeal allegedly due to his misunderstanding of law was not a plausible excuse for delay in filing of notice of appeal; counsel's preoccupation with other cases was not a valid reason for delay in filing notice of appeal because a causative nexus between the work on other cases and the delay in filing the notice of appeal was not established through fact).

6. No Notice of Trial Court's Judgment

TRAP 4.2 carries forward the procedure for a delayed appellate timetable which applies when a party did not receive notice from the trial court clerk of the signing of a judgment, and did not receive actual notice of signing, within 20 days of the date the judgment was signed.

E. Deadline for Requesting the Record

1. The Clerk's Record

It is not necessary for the appellant to request the preparation of the clerk's record (previously known as the "transcript"). Under TRAP 35.3(a), the trial court clerk has the duty to prepare and file the clerk's record if: (i) a notice of appeal has been filed, and (ii) the party responsible for paying for the clerk's record has paid the clerk's fee, or made satisfactory arrangements to pay the fee, or is entitled to appeal without paying the fee.

2. The Reporter's Record

The reporter does not have to prepare the reporter's record (previously known as the "statement of facts") unless it has been requested. TRAP 35.3(b)(2). The appellant must request in writing that the official reporter prepare the reporter's record. This request is due at or before the time for perfecting appeal. TRAP 34.6(b)(1). The reporter must prepare and file the reporter's record if: (i) a notice of appeal has been filed; (ii) the appellant requests preparation of the reporter's record; and (iii) the party responsible for paying for the reporter's record has paid the reporter's fee, or has made satisfactory payment arrangements, or is entitled to appeal without paying the fee. TRAP 35.3(b).

However, if the party responsible for paying for the preparation of the reporter's record (and presumably the clerk's record) does not pay, or make satisfactory arrangements to pay, the fee for preparation of the reporter's record, the reporter's duty to prepare and timely file the reporter's record does not arise. *See Utley v. Marathon Oil Co.*, 958 S.W.2d 960, 961 (Tex. App. -- Waco 1998, orig. proceeding) (motion to extend time to file reporter's record denied). In *Utley*, the court of appeals denied the Utleys' motion for extension of time and the reporter's record was not filed.

F. Deadline for Filing Record

In civil cases, the record must be filed in the appellate court within 30 days after appeal is first perfected. TRAP 35.1. In accelerated appeals, the record is due within 10 days after appeal is perfected. TRAP 35.1. Because the duty to file the clerk's record (formerly the transcript) and the reporter's record (formerly the statement of facts) in the appellate court belongs to the trial court clerk and the court reporter, respectively, there is no longer a provision for filing a motion to extend the time for filing the record. TRAP 35.3, *Notes and Comments*. The appellate court must allow the late filing of the record if the delay is not the appellant's fault, and *may* do so when the delay is the fault of appellant. TRAP 35.3(c). In fact, beginning September 1, 1997, no case can be disposed of or issue decided on the grounds that the record was not timely filed, before or after that date, except under the "new" TRAPS. *See* Final Approval of Revisions to the Texas Rules of Appellate Procedure, Misc. Docket No. 97-9134 (August 15, 1997).

G. Effect of Motion to Modify, Motion to Reinstate, and Request for Findings

Under the old rules, there was some doubt as to whether *all* appellate deadlines were extended by a timely motion to modify judgment, motion to reinstate, or request for findings of fact. Under the TRAPs, the only surviving variable deadline is the time for perfecting appeal. Under new TRAP 26.1(a), a motion for new trial, a motion to modify judgment, a motion to reinstate, and a request for findings of fact (when appropriate), all extend the deadline for perfecting appeal. In addition, a timely filed post-judgment motion that seeks a substantive change in an existing judgment qualifies as a motion to modify under Rule 329b(g), and extends the appellate timetable. *Lane Bank Equipment Co. v. Smith Southern Equipment, Inc.* , 43 Tex. Sup. Ct. J. 267 (January 6, 2000) (timely filed post-judgment motion seeking to add an award of sanctions to an existing judgment extends the appellate timetable).

In determining what constitutes "a motion for new trial," the courts look to the substance of the motion rather than its form. *Mercer v. Band*, 454 S.W.2d 833, 835 (Tex. Civ. App. -- Houston [14th Dist.] 1970, no writ). The substance is not determined solely from a caption or introduction; rather it is gleaned from the body of the instrument and prayer for relief. *Woodruff v. Cook*, 721 S.W.2d 865, 869 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.). A motion for new trial must, by its very nature, seek to set aside an existing judgment and request relitigation of the issues. *Mercer v. Band*, 454 S.W.2d at 836.

Consequently, a motion which seeks to seek to set aside an existing judgment and request relitigation of the issues may be a motion for new trial regardless of its caption or title. *See Finley v. J.C. Pace Ltd.*, 4 S.W.3d 319 (Tex. App. -- Houston [1st Dist.] 1999, motion to dismiss appeal) (motion for rehearing of a summary judgment, which sought to set aside an existing judgment for the purpose of litigating the issues, was considered a motion for new trial and extended the appellate timetable).

H. Bankruptcy

TRAP 8 addresses the effect of bankruptcy on Texas appellate deadlines and codifies much of the existing "common law" bankruptcy procedure.

1. Notice of Bankruptcy

TRAP 8 specifically describes the following requirements of a notice of bankruptcy: (1) the bankrupt party's name; (2) the court in which the bankruptcy proceeding is pending; (3) the bankruptcy proceeding's style and case number; (4) the date when the bankruptcy petition was filed; and (5) an authenticated copy of the page or pages of the bankruptcy petition that show when the petition was filed. In addition, any party may file a notice of bankruptcy. TRAP 8.1.

2. Automatic Stay

In a general civil case, if the bankrupt party was the defendant in the trial court, the automatic stay applies and any further action against the bankrupt party is stayed. *See Freeman v. Commissioner*, 799 F.2d 1091, 1092-93 (5th Cir. 1986). In other words, if the debtor was the plaintiff in the trial court, the automatic stay does not apply; but if the debtor was the defendant in the trial court, any further action is stayed. When the automatic stay applies, the bankruptcy suspends the appeal and all periods from the date when the bankruptcy petition is filed.

It is not particularly clear how the debtor, to whom the automatic stay applies, is determined in family law cases. In *Thiel v. Thiel*, 780 S.W.2d 930 (Tex. App. -- San Antonio 1989, no writ), the appellate court applied the traditional rule to a family law case, holding that since the debtor/husband was the petitioner who filed for divorce in the trial court (i.e., the equivalent of a plaintiff in a general civil case), the automatic stay did not apply to the appeal. However, in *Burns v. Burns*, 974 S.W.2d 820 (Tex. App. -- San Antonio 1998, no pet.), the appellate court interpreted TRAP 8.2 in a probate-related case. The court held that TRAP 8.2 required the imposition of the automatic stay if any party files a bankruptcy petition. The appellate court declined to follow its former opinion in *Thiel v. Thiel* because TRAP 8.2 was promulgated afterwards.

A document which is filed during the time when the appeal is suspended by bankruptcy is not void, but is deemed filed on the same day, but after, the court reinstates or severs the appeal and is not considered void or ineffective because it was filed while the appeal was suspended by bankruptcy. TRAP 8.2. TRAP 8.2 clarifies an area of conflicting court opinions concerning whether filings or actions taken in violation of the automatic bankruptcy stay is void or voidable. *See Paine v. Sealey*, 956 S.W.2d 803, 805-07 (Tex. App. -- Houston [14th Dist.] 1997, no pet.).

3 Calculation of Time Periods

TRAP 8 also clarifies the calculation of time periods. A time period that began to run but had not expired when the appeal was suspended by bankruptcy begins over when the appellate court reinstates or severs the appeal. For example, during the ninety day period for filing the notice of appeal after the judgment and the filing of a motion for new trial, the defendant files a bankruptcy petition which suspends the appeal. The ninety day period for filing the notice of appeal "starts over" or "begins anew" when the court reinstates the appeal (when, for example, the bankruptcy court lifts the bankruptcy stay) or severs the bankrupt party. TRAP 8.2. *See Costilla Energy, Inc. v. GNK, Inc.*, 2000 WL 235128 (Tex. App. – Waco 2000, no pet.).

4. Motions to Sever and Reinstate

The suspended Texas appeal does not automatically become reinstated simply because of a lifting of the stay by the bankruptcy court, or dismissal or resolution of the bankruptcy. The Texas appeal is reinstated only when the Texas appellate court issues an express order reinstating the appeal. *See* TRAP 8.3. An order reinstating the appeal would be proper under federal law only if the bankruptcy court has lifted the automatic stay, or the bankruptcy proceeding has been resolved. An order of severance would reinstate the appeal only as to non-debtor parties if their claims are severed from the claims of the debtor.

If the motion to reinstate is based upon expiration or lifting of the stay by court order, a certified copy of the bankruptcy order must be attached. TRAP 8.3(a). Any party may move to sever the appeal with respect to the debtor and to reinstate the appeal as to all other parties. However, the motion must show that the case is severable and must comply with applicable federal law regarding severance of a bankrupt party. TRAP 8.3(b); s*ee, e.g., Greenberg v. Fincher & Son Real Estate, Inc.*, 753 S.W.2d 506, 507 (Tex. App. -- Houston [1st Dist.] 1988, no writ).

IV. PERFECTING THE APPEAL

One of the greatest changes under the new TRAPs involves who must perfect an appeal in a civil case, and how an appeal is perfected in a civil case.

A. Notice of Appeal

There is no longer a requirement that an appellant post an appeal bond or a cash deposit in lieu of bond. Under TRAP 25, an appeal is perfected by filing the original of a notice of appeal with the clerk of the trial court. The appellant must file a copy of the notice of appeal with the appellate court clerk. If the original notice is mistakenly filed in the appellate court, the notice is deemed to have been filed that same day with the trial court clerk, and the appellate court clerk must send a copy of the notice to the trial court clerk. TRAP 25.1(e).

The notice must: (i) give the number and style of the case and trial court in which it is pending; (ii) give the date of the judgment or order appealed from; (iii) state the party's desire to appeal; (iv) state the court to which the appeal is taken (or in the case of the 1st and 14th Courts of Appeals, to either of them); (v) state the name of each party filing the notice; and (vi) in an accelerated appeal, state the fact that the appeal is accelerated. TRAP 25.1(d). The notice must be served on all parties to the trial court's judgment, or in an interlocutory appeal, upon all parties in the trial court. TRAP 25.1(e). The notice can be amended freely up until the time appellant's brief is filed, by merely filing an amended notice, subject to having the notice stricken for cause. After the appellant's brief is filed, the notice of appeal can be amended only upon leave of court, and on terms prescribed by the court. TRAP 25.1(f).

B. Who Must Perfect?

This question is at once simpler and more difficult than one would think and is probably the biggest malpractice trap in the TRAPs. “A party who seeks to alter the trial court’s judgment or other appealable order must file a notice of appeal... The appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause.” TRAP 25.1(c). The appellee can no longer "piggy-back" on the appellant's perfection of an appeal. If an appellee wishes to make changes to the judgment that only affect cross-appellees, the appellee must perfect its own appeal. If several parties perfect an appeal, each such party is an appellant, and will be filing an appellant's brief and an appellee's brief. However, if the appellee has perfected his own appeal, placing cross-points in his appellee’s brief may be an acceptable way of presenting those issues to the appellate court. *Scott v. Sebree*, 986 S.W.2d 364, 367 n.3 (Tex. App. -- Austin 1999, pet. denied) (citing

John Hill Cayce, Jr., Anne Gardner, & Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 BAYLOR L.REV. 867, 962-65 (1997)). This is a significant change in the law.

If one party timely perfects an appeal, any other party may perfect an appeal within 14 days of the date the appeal is perfected, or 14 days of the last day to perfect the first appeal, whichever is later. TRAP 26.1(d)

C. Errors in the Notice of Appeal

If the clerk of the appellate court determines that the notice of appeal is defective, the clerk must notify the parties and the trial court clerk so that the defect can be remedied if possible. TRAP 37.1. If no curative action is taken within 30 days of the clerk's notice, the matter is referred to the appellate court for disposition. See TRAP 37.1.

D. Effect on Judgment

Under TRAP 25.1(g), the filing of a notice of appeal does not suspend enforcement of the judgment. This provision does not affect the automatic suspension of enforcement when the State appeals an adverse judgment. TRAP 25.1(g)(2).

E. Time for Perfecting Appeal

TRAP 26.1 still requires that an appeal from a final judgment be perfected within 30 days of signing the judgment, or in the event of a timely motion for new trial, motion to modify, motion to reinstate, or request for findings of fact (when appropriate), then appeal must be perfected within 90 days after the judgment is signed by the court. A prematurely-filed notice of appeal is effective. TRAP 27.1(a). In an accelerated appeal, appeal must be perfected by the 20th day after the appealable order or judgment is signed. TRAP 26.1(b). In a restricted appeal (formerly writ of error appeal), perfection must be accomplished within 6 months after judgment. TRAP 26.1(c).

V. CLERK'S RECORD

Under the TRAPs, what was formerly called the "transcript" is now called the "clerk's record." TRAP 34.1.1

A. What's Automatically Included

Unless the parties designate the filings in the appellate record by agreement under TRAP 34.2 (an agreed record), the clerk is to include copies of the following items in the clerk's record:

(1) all pleadings on which the trial was held;

(2) the court's docket sheet;

(3) the court's charge and the jury's verdict, or the court's findings of fact and conclusions of law;

(4) the court's judgment or other order that is being appealed;

(5) any request for findings of fact and conclusions of law, any post-judgment motion, and the court's order on the motion;

(6) the notice of appeal;

(7) any formal bill of exception;

(8) any request for a reporter's record, including any statement of points or issues under TRAP 34.6(c);

(9) any request for preparation of the clerk's record;

(10) a certified bill of costs, including the cost of preparing the clerk's record, showing credits for payments made; and

(11) any filing that a party designates to have included in the record.

TRAP 34.5(a)

The clerk must include these items in the clerk's record even if the appellant does not request the inclusion of the items — the filing of the notice of appeal triggers the duty to include them. But the appellant must pay (or make arrangements with the clerk to pay) for the record before the clerk has an obligation to prepare it. TRAP 35.3(a)(2). Formerly, the clerk could not refuse to prepare the record until payment was made because the cost bond secured the cost of preparing the record. *See Click v. Tyra*, 867 S.W.2d 406, 407-08 (Tex. App. -- Houston [14th Dist.] 1993, orig. proceeding). Since the requirement of a cost bond is abolished, the rules allow the clerk to refuse to prepare the record until paid.

Any party may request that other items be included in the clerk's record. TRAP 34.5(b). The request may be made "at any time before the clerk's record is prepared." Formerly, the request had to be filed on or before the time for perfecting the appeal. *See* former Rule 51(b). Since the clerk might prepare the record at any time, the cautious attorney will check with the clerk to determine when the record will be prepared and will timely file a request for inclusion of additional items. However, the consequences of the failure to timely request inclusion of additional items is not clear. The rule provides that "An appellate court must not refuse to file the clerk's record or a supplemental clerk's record because of a failure to timely request items to be included in the clerk's record." TRAP 34.5(b)(4). But it does not say that the appellate court has to consider the late filed items.

The request to the trial court clerk must be in writing and must be specific (the party must "specifically describe the item so the clerk can readily identify it"). The clerk will disregard a general request. TRAP 34.5(b)(2). The clerk is specifically authorized to consult with the parties concerning items to be included in the clerk's record. TRAP 34.5(h). If a party requests more items than necessary be included in the clerk's record or any supplement, the appellate court may -- regardless of the appeal's outcome -- require that party to pay the costs for the preparation of the unnecessary portion. TRAP 34.5(b)(3).

B. Additional Items to Include in Family Law Appeals

There are other items you may want to take up in an appeal of a non-jury trial, that are not on the list in TRAP 34.5.

1. Requested Admissions

Requested admissions will be in the clerk's record, *see* TRCP 191.4(c) (discovery materials may be filed for use in a court proceeding), but possibly not in the reporter's record, if not read into the record during trial.

2. Divorce Inventories and Custody Social Studies

Ordinarily, all evidentiary material will appear in the reporter's record. However, sworn inventories in a divorce and social studies in a suit affecting the parent-child relationship are sometimes considered by courts without being formally admitted into evidence. If the trial court considered a sworn inventory or a social study that was not marked as an exhibit, the appellant needs to include it in the clerk's record.

3. Written Stipulations

Written stipulations may have been filed with the clerk of the court and not mentioned in the presence of the court reporter.

4. Child's Written Election of Managing Conservator

A child's written election of managing conservator under TEX. FAM. CODE § 153.008, would not ordinarily be included in the clerk's record unless it is specifically requested.

C. Timely Request

TRAP 34.5 omits the provision in former TRAP 51(b), saying that failure to make a timely designation of items to include in the transcript waives the right to complain of omissions.

D. Duty to File

It is no longer the duty of the appellant to see that the clerk's record is timely filed in the court of appeals. TRAP 35.3 provides that the trial

court clerk has this responsibility. Thus, appellate counsel will no longer need to seek extensions from the appellate court to permit additional time for the clerk's record to be filed. TRAP 35, *Notes and Comments*.

E. Time for Filing

Under TRAP 35.1, in a civil case the clerk's record must be filed within 60 days after the judgment is signed, unless one of the following exceptions applies:

- if a timely motion for new trial, motion to modify judgment, motion to reinstate, or valid request for findings and conclusions is filed, then the clerk's record is due 120 days after the judgment is signed;

- in an accelerated appeal, the clerk's record is due 10 days after the notice of appeal is filed;

- in a restricted appeal, the clerk's record is due 30 days after the notice of appeal is filed.

If the clerk's record is not filed by the deadline, the appellate court clerk must notify the trial court clerk, with a copy to the parties and the trial judge, advising of the missed deadline and requesting that the record be filed within 30 days. If that deadline is not met, then the appellate court clerk must refer the matter to the appellate court, to make whatever order is appropriate to avoid further delay and protect the parties' rights. TRAP 37.3. If the delay in filing the record is not appellant's fault, the appellate court *must* permit late-filing of the record; if it is appellant' fault, it *may* allow late-filing. TRAP 35.3(c). If the reason for the missed deadline is appellant's failure to pay for the clerk's record, the appeal can be dismissed, after reasonable opportunity to cure. TRAP 37.3(b).

F. Cost of Excessive Portions

TRAP 34.5(b)(3) provides that a party who requests more items than necessary can be required by the appellate court to pay for unnecessary portions, regardless of the outcome of the case.

G. Paying the Cost

TRAP 35.3(a)(2) provides that the trial court clerk will prepare the clerk's record upon perfection of the appeal, *and upon payment or arrangement with the clerk to pay the fee*. Thus, it will now be necessary to pay for the clerk's record, rather than just ordering it and leaving it as a cost to be collected at a later time.

H. Defects/Inaccuracies

Under TRAP 34.5(d), the appellate court clerk should automatically check the clerk's record to see that all items required by TRAP 34.5(a) are included. If not, the clerk of the appellate court must contact the trial court clerk to get the omitted material supplemented. If needed items are missing from the trial court's records, the parties can by written stipulation substitute copies. Failing that, the trial judge, after notice and hearing, can settle the dispute. TRAP 34.5(e).

I. Supplementation

If something is omitted from the clerk's record, the parties, the trial court, or the appellate court, may request a supplemental clerk's record *by letter*. A motion for leave to supplement is no longer necessary. TRAP 34.5(c).

VI. REPORTER'S RECORD

Under the TRAPs, what was formerly called the "statement of facts" is now called the "reporter's record." TRAP 34.1. The reporter's record includes the court reporter's transcription of those portions of the proceedings, and exhibits as the parties to the appeal designate. TRAP 34.6(a)(1).

A. Duty to File

It is now the duty of the court reporter or recorder to see that the reporter's record is timely filed in the appellate court. TRAP 35.3(b). Thus, appellate counsel will no longer need to seek extensions from the appellate court to permit additional time for the reporter's record to be filed. TRAP 35, *Notes and Comments*.

However, if the party responsible for paying for the preparation of the reporter's record (and presumably the clerk's record) does not pay for, or make satisfactory arrangements to pay the fee for, preparation of the reporter's record, the reporter's duty to prepare and timely file the reporter's record

does not arise. *See Utley v. Marathon Oil Co.*, 958 S.W.2d 960, 961 (Tex. App. -- Waco 1998, orig. proceeding) (motion to extend time to file reporter's record denied). In *Spiegel v. Spiegel*, 6 S.W.3d 643 (Tex. App. – Amarillo 1999, no pet.), the husband appealed from the trial court's denial of his request for a temporary injunction. The orders denying the application for temporary injunction contained the following language: "[t]he specific reason for the Court's decision is: on record." *Id.* at 645. However, the husband expressly did not request a reporter's record. On appeal, the appellate court stated that the reporter's responsibility to prepare and file the reporter's record is expressly conditioned upon the appellant filing a notice of appeal, requesting that the reporter's record be prepared, and paying for or making arrangements to pay for the reporter's record. *Id.* at 646. The appellate court went on to decide that if the reporter's record is absent because the appellant did not satisfy the above requirements, the court would not only continue to presume that the missing record supports the trial court's determination but also would forego reviewing the dispute as authorized under Rule 37.3(c) of the Rules of Appellate Procedure (which directs the court to address those issues that do not need the reporter's record for decision). *Id.*

B. Time for Filing

Under TRAP 35.1, in a civil case the reporter's record must be filed within 60 days after the judgment is signed, unless one of the following exceptions applies:

- if a timely motion for new trial, motion to modify judgment, motion to reinstate, or valid request for findings and conclusions is filed, then the reporter's record is due 120 days after the judgment is signed;

- in an accelerated appeal, the reporter's record is due 10 days after the notice of appeal is filed;

- in a restricted appeal, the reporter's record is due 30 days after the notice of appeal is filed.

If the reporter's record is not filed by the deadline, the appellate court clerk must notify the court reporter, with a copy to the parties and the trial judge, advising of the missed deadline and requesting that the reporter's record be filed within 30 days. If that deadline is not met, then the appellate court clerk must refer the matter to the appellate court, to make whatever order is appropriate to avoid further delay and protect the parties' rights. TRAP 37.3. If the delay in filing the record is not the appellant's fault, the appellate court *must* permit late-filing of the record; if it is the appellant's fault, it *may* allow late-filing. TRAP 35.3(c). If the reason for the missed deadline is the appellant's failure to pay for the reporter's record, the appellate court can, after notice and an opportunity to cure, decide the issues or points that do not require a reporter's record for a decision. TRAP 37.3(c).

C. Cost

Under TRAP 35.3(b), the appellant must pay or arrange to pay the court reporter before the court reporter is required to file the reporter's record. Under TEX. GOV'T CODE § 52.047, payment is required before delivery of the reporter's record.

D. Partial Reporter's Record

Former TRAP 53(d) permits a party to request a partial statement of facts, provided at the same time the party gives a statement of the points to be relied upon in the appeal. TRAP 34.6(c)(1) carries forward the idea of requesting a partial reporter's record, while simultaneously including the points or issues to be presented on appeal.

1. *Englander Co. V. Kennedy* Overruled

In *Englander Co. v. Kennedy*, 428 S.W.2d 806, 806 (Tex. 1968) (per curiam), the Supreme Court ruled that a complaint about the legal or factual sufficiency of the evidence cannot be successfully raised without a complete statement of facts. *See Schafer v. Conner*, 813 S.W.2d 154, 155 (Tex. 1991). TRAP 34.6(c)(4) provides that when a partial reporter's record is properly designated, "[t]he appellate court must presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues. This presumption applies even if the statement includes a point or issue complaining of the legal or factual sufficiency of the evidence to support a specific factual finding identified in that point or issue." This new language overrules *Englander* in those

situations when a partial reporter's record is properly requested.

However, when the reporter's record is not properly requested by filing and serving a request for a partial reporter's record which states the points of error or issues to be presented on appeal, the presumption that the partial reporter's record constitutes the entire record for purposes of reviewing the stated points or issues does not apply. *See Jaramillo v. Atchison, Topeka & Santa Fe Railway Co.*, 986 S.W.2d 701, 702 (Tex. App. -- Eastland 1998, no pet.); *CMM Grain Co., Inc. v. Ozgunduz*, 991 S.W.2d 437 (Tex. App. -- Fort Worth 1999, no pet.). *See Gardner v. Baker & Botts, L.L.P.*, 6 S.W.3d 295 (Tex. App. – Houston [1st Dist.] 1999, pet. denied) (appellant's statement of the complaints to be pursued on appeal were too general).

2. Who Pays for Additional Portions?

Under TRAP 34.6(c)(3), when the appellant requests a partial reporter's record, other parties can designate additional portions to be included in the reporter's record, *at appellant's cost*. The appellate court can tax unnecessary portions of the reporter's record against the party requesting them, regardless of how costs are otherwise assessed on appeal. TRAP 34.6(c)(3).

E. Electronic Recording

Under the TRAPs, the Supreme Court will still continue to authorize electronic reporting on a court-by-court basis, through Supreme Court order. However, numerous rule changes were made in 1997 to protect the integrity of the process of electronic reporting. These are set out in TRAP 13.2.

TRAP 34.6(a)(2) defines the reporter's record which was recorded electronically to include:

- certified copies of all tapes or other audio-storage devices on which the proceedings were recorded;

- any exhibits that the parties designate; and

- certified copies of the original logs prepared by the court recorder pursuant to TRAP 13.2.

In an appeal using an electronically-recorded recorder's record, each party must file one copy of an appendix containing a transcription of all portions of the recording that the party considers relevant. A copy of relevant exhibits must be included. TRAP 38.5.

F. Inaccuracies

Under TRAP 37.2, the appellate court clerk should automatically check the reporter's record to see that it complies with the Supreme Court's and Court of Criminal Appeals' order on preparation of the record. If not, the clerk of the appellate court is to contact the court reporter to bring the reporter's record into compliance with the rule. TRAP 37.2. TRAP 34.6(e) provides that inaccuracies in the reporter's record can be corrected by agreement of the parties without recertification by the court reporter. If a dispute arises as to the accuracy of the reporter's record, the trial judge, after notice and hearing, can settle the dispute. TRAP 34.6(e)(2). If the dispute arises after the record is filed in the appellate court, that court can submit the matter to the trial court. TRAP 34.6(e)(3).

G. Lost or Destroyed Records

Under TRAP 34.6(f), if part of the reporter's record is missing, without the appellant's fault, then a new trial will be ordered but only if a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed. The same is true if the trial was electronically recorded and a significant portion of the recording has been lost or destroyed.

VII. BILLS OF EXCEPTION

A. Informal Bills of Exception and Offers of Proof

Former TRAP 52(b) specifically discussed making an offer of proof when evidence is excluded at trial. That provision has been deleted from the current TRAPs. The requirement to make an offer of proof when evidence has been excluded is now set out only in TEX. R. EVID. 103(b).

B. Deadline for Formal Bills of Exception

Under former TRAP 52(c)(11), formal bills of exception were due 60 days after the judgment is signed, or 90 days if a motion for new trial were timely filed. Under TRAP 33.2(c)(1), the time for filing formal bills of exception in civil cases is always 30 days after the filing party perfects the

appeal. The deadline does *not* vary depending on timely filing of a motion for new trial, etc. The deadline can be extended upon a proper motion to extend the deadline, filed within 15 days after the deadline. TRAP 33.2(e)(3).

VIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact and conclusions of law reflect the factual and legal basis for the trial court's judgment after a non-jury trial. If there is only one theory of liability or defense, the basis of the trial court's judgment can be inferred from the judgment itself, even without findings and conclusions. However, if more than one legal theory, or more than one set of factual determinations, could serve as the basis for the trial court's judgment, then it can be very difficult to brief the appellate attack on the judgment, since you must handle several different approaches to the case in 50 pages. Because the party wishing to appeal the trial court's judgment must request findings of fact and conclusions of law within 20 days of the date the judgment is signed, the trial attorney must be conscientious about requesting findings and conclusions in a timely way. It sometimes happens that a trial lawyer does not bring an appellate lawyer into the case until just before the motion for new trial is due, or until after the motion for new trial has been overruled. In such a situation, if the trial lawyer has not timely requested findings of fact and conclusions of law, and if the trial court does not permit a late request, or elects not to give findings and conclusions because there is no obligation to do so, then the ability to successfully pursue an appeal could already be severely impaired before the appeal has even commenced.

In addition to findings of fact and conclusions of law under TRCP 296, courts have also started giving findings of fact in the area of discovery sanctions. Also, the Family Code contains a procedure for obtaining specific findings in child support orders [§154.130 of the Code] and findings in visitation orders [§153.258 of the Code].

A. TRCP 296 Findings and Conclusions

Requesting findings of fact and conclusions of law is one of the most frequently overlooked steps in preparing the non-jury case for appeal. It is the first step you should take after an adverse judgment is signed by the trial court.

1. Entitlement

Findings of fact and conclusions of law as a general rule are not available after a jury trial. TRCP 296 provides that findings of fact and conclusions of law are available in any case tried in the district or county court without a jury. *See Roberts v. Roberts*, 999 S.W.2d 424, 433 (Tex. App. – El Paso 1999, no pet.). In *Baley v. W/W Interests, Inc.*, 754 S.W.2d 313, (Tex. App..--Dallas 1988, no writ), the appellate court concluded that it is not reversible error for the trial court to refuse a request for findings of fact and conclusions of law after a jury trial when the complaining party suffers no injury. *See also Cravens v. Transport Indem. Co.*, 738 S.W.2d 364 (Tex. App..--Fort Worth 1987, writ denied).

In a jury trial, the answers to the jury questions contain the findings on disputed factual issues. When a case is tried to the court, however, there is no ready instrument by which one can determine how the trial court resolved the disputed fact issues. Nor can the appellate court determine upon which of the alternate theories of recovery or defense the trial court rested the judgment.

This is particularly true in family law cases in which many different factual and legal issues are resolved by the trial court. In the division of property, for example, the court may consider a number of factors in making a disproportionate division, such as age, health, income disparity, future business opportunity, levels of education, fault in breaking up the marriage, waste of community assets, and needs of children. When the decree reflects the property division, but not the reasons for the property division, it is difficult to determine which facts were considered, and whether the evidence supports the disproportionate division. In these situations it is important to require the trial court to make specific findings of fact and conclusions of law. Keep in mind that when findings and conclusions are not filed, the appellate court will attempt to find any legal theory raised in the pleadings which would support the judgment. If there is one, then the higher court will presume that the trial court found all facts which would be necessary to support that judgment. The advantage, then, is in

requiring the court to specify upon what findings and conclusions its decision was grounded. Note, however, that the courts of appeal take divergent paths as to what findings an appellant may be entitled in a divorce case.

Given the assumption that findings and conclusions are appropriate in a bench trial but not in a jury trial, what happens when the two are combined? Perhaps the suit involves domestic torts and the jury will determine the personal injury or fraud issues while the judge will decide the ultimate division of property. Also, it is not unusual for the court to permit separate trials on the issues of property and custody, with a jury deciding issues of conservatorship and the judge deciding issues of possession and access, child support, conservator rights, as well as the characterization, valuation and division of property. If one party chooses to appeal from the property division, is (s)he entitled to findings and conclusions? If the jury and non-jury portions of the case are conducted via separate trials, findings and conclusions are available in the non-jury trial. *Roberts v. Roberts*, 999 S.W.2d at 433; *Shenandoah Associates v. J & K Properties, Inc.*, 741 S.W.2d 470, 484 (Tex. App..--Dallas 1987, writ denied). *See Heafner & Associates v. Koecher*, 851 S.W.2d 309, 312-13 (Tex. App..--Houston [1st Dist.] 1992, no writ).

In *Roberts v. Roberts*, the trial court submitted questions to the jury concerning the grounds for divorce, the validity of a deed executed by the wife to the husband and a percentage distribution of the community estate. 999 S.W.2d at 428-29. After the trial court entered the divorce decree, the husband filed his initial request for findings of fact and conclusions of law pursuant to Tex.R.Civ.P. 296. In response, the trial court advised the parties that it would be inappropriate for him to enter findings at all since the matter had been tried to a jury. *Id.* at 430. The El Paso Court of Appeals disagreed, stating:

> In this case, the jury findings on the grounds for divorce and the validity of deed were binding on the court while the percentage distribution of the community estate was merely advisory. We conclude that Husband was entitled to findings of fact relating to the property division.

Id. at 434. In addition, when the judgment of the court differs substantially or exceeds the scope of the jury verdict, findings are also available. *See Rothwell v. Rothwell*, 775 S.W.2d 888 (Tex. App..--El Paso 1989, no writ).

In the event the trial court does give findings of fact in a jury case, those findings will be considered by the court of appeals only for the purpose of determining whether facts recited are conclusively established and support the decree as a matter of law. *Holloway v. Holloway*, 671 S.W.2d 51 (Tex. App..--Dallas 1984, writ dism'd). Thus, if the evidence does not support the jury verdict, the judgment cannot be supported merely by the findings of fact and conclusions of law submitted by the trial court.

Findings and conclusions are not authorized in some non-jury cases. Courts have held that findings are <u>not</u> authorized in the following circumstances:

- When the cause is dismissed without a trial. *Eichelberger v. Balette*, 841 S.W.2d 508, 510 (Tex. App..--Houston [14th Dist.] 1992, writ denied); *Timmons v. Luce*, 840 S.W.2d 582, 586 (Tex. App..--Tyler 1992, no writ).

- When the cause is withdrawn from the jury by directed verdict due to the general rule that the trial court can grant an instructed verdict only when there are no fact issues to be resolved by the jury. *Spiller v. Spiller*, 535 S.W.2d 683 (Tex. Civ. App.--Tyler 1976, writ dism'd); *Yarbrough v. Phillips Petroleum Co.*, 670 S.W.2d 270 (Tex. App..--Houston [1st Dist.] 1983, writ ref'd n.r.e.).

- When a judgment notwithstanding the jury verdict is entered. *Fancher v. Cadwell*, 159 Tex. 8, 314 S.W.2d 820 (1958).

- When a summary judgment is granted. *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994); *Chavez v. El Paso Housing Authority,* 897 S.W.2d 523 (Tex. App..--El Paso 1995, writ denied).

- In an appeal to district court from an administrative agency. *Valentino v. City of Houston*, 674 S.W.2d 813 (Tex. App..-Houston [1st Dist.] 1983, writ ref'd n.r.e.).

● When a default judgment is granted. *Harmon v. Harmon*, 879 S.W.2d 213 (Tex. App..--Houston [14th Dist] 1994, writ denied).

● When a case is dismissed for want of subject matter jurisdiction without an evidentiary hearing. *Zimmerman v. Robison*, 862 S.W.2d 162 (Tex. App..--Amarillo 1993, no writ).

TRAP 28.1 provides for an option on the part of the trial judge in appeals from interlocutory orders. The court is not required to file findings and conclusions, but it may do so within 30 days after the judgment is signed. *Smith Barney Shearson, Inc. v. Finstad*, 888 S.W.2d 111 (Tex. App..--Houston [1st Dist.] 1994, no writ) (involving interlocutory appeal of denial of motion for arbitration). One court of appeals has admonished trial courts to give findings and conclusions to aid the appellate court in reviewing class certification decisions. *Franklin v. Donoho*, 774 S.W.2d 308, 311 (Tex. App..--Austin 1989, no writ).

2. Importance of Obtaining

Many practitioners fail to obtain findings of fact and conclusions of law. In the absence of findings and conclusions, the judgment of the trial court must be affirmed if it can be upheld on any available legal theory that finds support in the evidence. *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277 (Tex. 1987); *In re W.E.R.*, 669 S.W.2d 716 (Tex. 1984); *Lassiter v. Bliss*, 559 S.W.2d 353 (Tex. 1977). Absent findings of fact, it doesn't make any difference whether the trial court selected the right approach or theory. If the appellate court determines the evidence supports a theory raised by the pleadings or tried by consent, then it is presumed that the trial court made the necessary findings and conclusions to support a recovery on that theory. *Lemons v. EMW Mfg. Co.*, 747 S.W.2d 372 (Tex. 1988). These presumptions are tantamount to implied findings. These implied findings can be challenged by legal and factual insufficiency points, provided a reporter's record is brought forward. Further, presumptions will not be imposed if findings are properly requested but are not given.

It is far better to tie the judge to a specific theory and to challenge the evidentiary support for that theory, than it is to engage in guesswork about implied findings.

3. Impact of Filing Request on Appellate Deadlines

The timely filing of a request for findings of fact and conclusions of law extends the time for perfecting appeal from 30 days to 90 days after the judgment is signed by the court. TRAP 26.1(a)(4). The timely filing of a request for findings and conclusions also extends the deadline for filing the record from the 60th to the 120th day after judgment was signed. TRAP 35.1(a). A timely request for findings and conclusions does not extend the trial court's period of plenary power. *See* TRCP 329b (no provision is made for an extension of plenary power due to the filing of such a request).

The foregoing rules regarding the extension of *some* appellate deadlines by filing a timely request for findings and conclusions do not apply when findings and conclusions cannot properly be requested. For example, findings of fact are not available on appeal from a summary judgment. When a party appeals from the granting of a summary judgment, files a request for findings of fact and conclusions of law, but files no motion for new trial, the filing of the request for findings will not extend the appellate timetable. *Linwood v. NCNB of Texas*, 885 S.W.2d 102, 103 (Tex. 1994) ("the language 'tried without a jury' in rule 41(a)(1) does not include a summary judgment proceeding"). *See also Chavez v. El Paso Housing Authority,* 897 S.W.2d 523 (Tex. App..--El Paso 1995, writ denied). Another case holds that a suit which is dismissed for lack of subject matter jurisdiction, or in which there has been no evidentiary hearing, has not been "tried without a jury" as used in the rule, so that a request for findings does not extend the 30-day deadline for perfecting appeal. *Zimmerman v. Robinson*, 862 S.W.2d 162 (Tex. App..--Amarillo 1993, no writ). *Accord*, *O'Donnell v. McDaniel*, 914 S.W.2d 209 (Tex. App..--Fort Worth 1995, writ denied) (when appeal is from dismissal rendered without evidentiary hearing, a request for findings of fact and conclusions of law does not extend any applicable deadlines); *Smith v. Smith*, 835 S.W.2d 187, 190 (Tex. App..--Tyler 1992, no writ) (in divorce case tried to jury, request for findings of fact and conclusions of law did not extend appellate timetable even though the

trial judge was not bound by some of the jury's answers).

4. Sequence for Obtaining Findings

a. Initial Request

Rule 296 requires that the request for findings and conclusions be filed within 20 days after the judgment is signed. ***FILING A MOTION FOR NEW TRIAL DOES NOT EXTEND THE TIME PERIOD FOR FILING A REQUEST FOR FINDINGS AND CONCLUSIONS.*** Often, the decision to appeal is made after the motion for new trial is filed and often after it is presented to the court or overruled by operation of law. Frequently, appellate counsel is employed to handle the appeal after the overruling of the motion for new trial. At that point, it is too late for appellate counsel to file the initial request for findings of fact and conclusions of law. **A basic but very important rule is that if the client is the slightest bit unhappy with a portion of the judgment, submit the request for findings within the required time period.** If an appeal is later perfected, you have preserved the right to findings. If no appeal is taken, the request can always be withdrawn or ignored.

Note that under TRCP 296, the request must be specifically entitled "Request for Findings of Fact and Conclusions of Law". The request should be a separate instrument, and not coupled with a motion for new trial or a motion to correct or reform the judgment.

If you miss the deadline, you will have waived your right to complain of the trial court's failure to prepare the findings. Having said that, keep in mind that you can still make the request, even if it is untimely. The trial court can give you findings and conclusions even though it is not obligated to do so. The timetables set out by TRCP 296 and 297 are flexible if there is no gross violation of the filing dates and no party is prejudiced by the late filing. *Wagner v. GMAC Mortg. Corp. of Iowa*, 775 S.W.2d 71 (Tex. App..--Houston [1st Dist.] 1989, no writ). In addition, TRCP 5, "Enlargement of Time," appears to permit the trial court to enlarge the time for requesting findings and conclusions.

b. Presentment Not Necessary

Older case law required that the request for findings of fact and conclusions of law be actually presented to the judge. However, the Supreme Court, in *Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768 (Tex. 1989), abandoned the requirement of presentment to the trial judge.

TRCP 296 now provides that the request shall be filed with the clerk of the court "who shall immediately call such request to the attention of the judge who tried the case". Notice to the opposing party of the filing of the request is still required under the rule. Presentment to the trial judge is no longer required.

c. Response by Court

TRCP 297 provides that, upon timely demand, the court shall prepare its findings of fact and conclusions of law and file them within 20 days after a timely request is filed. The court is required to cause a copy of its findings and conclusions to be mailed to each party to the suit. Deadlines for requesting additional or amended findings run from the date the original findings and conclusions are filed, as noted below.

d. Untimely Filing by Court

In *Morrison v. Morrison*, 713 S.W.2d 377 (Tex. App..--Dallas 1986, no writ), the husband appealed the property division in a divorce and requested findings and conclusions. In the original findings, the court stated that the marriage had become insupportable. The wife requested additional findings on the issues of cruelty, adultery and desertion. The judge made the additional findings noting that the husband was at fault in the breakup of the lengthy marriage due to his drinking, adultery and spending community assets on other women. The husband attempted to have the additional findings disregarded because they were filed untimely. The appellate court determined that the only issue raised by the late filing was that of injury to the appellant, not the trial court's jurisdiction to make the findings. The court also noted that the husband had not demonstrated any harm which he suffered because of the late filing. *See also Narisi v. Legend Diversified Investments*, 715 S.W.2d 49, 50 n. 2 (Tex. App..--Dallas 1986, writ ref'd n.r.e.) (court of appeals considered allegedly late filed supplemental find-

ings and conclusions because appellant neither filed a motion to strike, *City of Roma v. Gonzales*, 397 S.W.2d 943, 944 (Tex. Civ. App.--San Antonio 1965, writ ref'd n.r.e.), nor has she shown that she was harmed by the delay in the filing. *Fonseca v. County of Hidalgo*, 527 S.W.2d 474, 480 (Tex. Civ. App.--Corpus Christi 1975, writ ref'd n.r.e.)). *See also*, *Summit Bank v. The Creative Cook*, 730 S.W.2d 343 (Tex. App..--San Antonio 1987, no writ), in which the court specifically stated that a reviewing court will consider late filed findings of facts and conclusions of law when there has been no motion to strike. If the appellant has been prejudiced in his/her appeal because of the late filing, (s)he should consider filing a motion to strike, but (s)he must also be prepared to demonstrate injury. Note also that if the findings and conclusions are filed too far past the deadline, the appellate court may disregard them. *Stefek v. Helvey,* 601 S.W.2d 168 (Tex. Civ. App.--Corpus Christi 1980, writ ref'd n.r.e.). In *Labar v. Cox*, 635 S.W.2d 801 (Tex. App..--Corpus Christi 1982, writ ref'd n.r.e.), the court determined a late filing to be reversible error because it prevented the appellant from requesting additional findings. The court declined to permit the trial court to correct its procedural errors as permitted by old TRCP 434 because other errors existed which required a reversal.

e. Reminder Notice

TRCP 297 provides that if the trial court fails to submit the findings and conclusions within the 20 day period, the requesting party must call the omission to the attention of the judge **within 30 days after filing the original request.** Failure to submit a timely reminder waives the right to complain of the court's failure to make findings. *Avery v. Grande, Inc.*, 717 S.W.2d 891 (Tex. 1986); *Saldana v. Saldana*, 791 S.W.2d (Tex. App..--Corpus Christi 1990, no writ).

The rules require that the reminder be specifically entitled "Notice of Past Due Findings of Fact and Conclusions of Law". The current version of TRCP 297 specifically provides that the filing of the reminder notice "shall be immediately called to the attention of the court by the clerk". Thus, it appears that presentment is no longer required for the reminder either.

When the reminder is filed, the time for the filing of the court's response is extended to 40 days from the date the original request was filed.

f. Additional or Amended Findings

If the court files findings and conclusions, either party has a period of ten days in which to request specified additional or amended findings or conclusions. The court shall file any additional or amended findings and conclusions within ten days after the request, and again, cause a copy to be mailed to each party. No findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings or conclusions. TRCP 298.

(1) Failure to Request

When a party fails to timely request additional findings of fact and conclusions of law, (s)he is deemed to have waived his/her right to complain on appeal of the court's failure to enter additional findings. *Briargrove Park Property Owners, Inc. v. Riner*, 867 S.W.2d 58, 62 (Tex. App..--Texarkana 1993, writ denied); *Cities Services Co. v. Ellison*, 698 S.W.2d 387, 390 (Tex. App..--Houston [14th Dist.] 1985, writ ref'd n.r.e.). Further, when the original findings omit a finding of a specific ground of recovery which is crucial to the appeal, failure to request an additional finding will constitute a waiver of the issue. *Poulter v. Poulter*, 565 S.W.2d 107 (Tex. Civ. App.--Tyler 1978, no writ), (the failure to request a specific finding on reimbursement waived any reimbursement complaints on appeal). In *Keith v. Keith*, 763 S.W.2d 950 (Tex. App..--Fort Worth 1989, no writ), the trial court refused to set aside the husband's personal good will in a community partnership business as the husband's separate property. The findings of fact and conclusions of law found the value of the businesses to be $262,400. The husband made no request for additional findings as to whether the partnership had any good will or whether any such good will was professional good will attributable to him personally as distinguished from commercial good will. He challenged the trial court's failure to make those findings on appeal. The court of appeals affirmed, noting that the failure to request additional findings constitutes a waiver on appeal.

(2) Court's Failure to Respond

A trial court's failure to make additional findings upon request is not reversible error if the requested finding is covered by and directly contrary to the original findings filed. *San Antonio Villa Del Sol Homeowners Association v. Miller*, 761 S.W.2d 460 (Tex. App..--San Antonio 1988, no writ).

(3) Bill of Exceptions

Under the current version of TRCP 297 and after *Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768 (Tex. 1989), a file-stamped copy of the original request should be sufficient to show that it was timely filed in the clerk's office. Under the current rule, a file-stamped copy of the past due notice should be sufficient to preserve any error if the trial court fails to file findings and conclusions. See Price, *Just the Facts, Judge: Findings of Fact and Conclusions of Law*, THE APPELLATE ADVOCATE Vol. III, No. IV (Summer, 1990).

g. Effect of Premature Request

TRCP 306(c) provides that no motion for new trial or request for findings of fact and conclusions of law will be held ineffective because of premature filing. Instead, every such request shall be deemed to have been filed on the date of but subsequent to the signing of the judgment. *Fleming v. Taylor*, 814 S.W.2d 89 (Tex. App..--Corpus Christi 1991, no writ).

5. What Form Is Required?

Findings of fact and conclusions of law need not be in any particular form as long as they are in writing and are filed of record. *Hamlet v. Silliman*, 605 S.W.2d 663 (Tex. App..--Houston [1st Dist.] 1980, no writ). It is permissible for the trial court to list its findings in a letter to the respective attorneys, as long as the letter is filed of record. *Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120 (Tex. App..--Corpus Christi 1986, no writ). Remember, however, that oral statements by the trial court on the record as to its findings will not be accepted as findings of fact and conclusions of law. *In re W.E.R.*, 669 S.W.2d 716 (Tex. 1984); *Stevens v. Snyder*, 874 S.W.2d 241 (Tex. App..--Dallas 1994, writ denied). Nor may the court have those statements prepared as a reporter's record and filed of record as findings of fact and conclusions of law. *Nagy v. First National Gun Banque Corporation*, 684 S.W.2d 114 (Tex. App..--Dallas 1984, writ ref'd n.r.e.). The Texas Supreme Court ruled in one case, however, that appellate courts must give effect to **intended** findings of the trial court, even when the specific findings made do not quite get the job done, provided they are supported by the evidence, the record and the judgment. See *Black v. Dallas County Child Welfare*, 835 S.W.2d 626 (Tex. 1992).

a. Predecessor Rules

Formerly it was common practice to insert various "findings" into the court's order. The Texas Family Code requires visitation and child support orders to contain certain findings of fact. *See* TEX. FAMILY CODE §§ 153.258, 154.130. Contempt orders must contain specific findings as to the exact violations which have occurred and what actions, if any, will permit the contemnor to purge himself. Orders granting injunctions are required to set forth the reasons for issuance. Decrees make specific findings in matters of military retirement benefits to comply with the Soldiers and Sailors Relief Act and still other findings in order to qualify as a Qualified Domestic Relations Order. There was a divergence of opinions as to whether specific findings of fact and conclusions of law which were contained within a decree, such as specific factors considered with regard to a disproportionate division of the estate or specific findings as to values, qualified as formal findings of fact and conclusions of law. *See Cottle v. Knapper*, 571 S.W.2d 59 (Tex. Civ. App.--Tyler 1978, no writ), holding that findings contained within the decree are valid, despite the fact that they are not contained in a separate document. The inclusion of the findings in the order did not preclude a request for separate findings and conclusions. *See also*, *A-- v. Dallas County Child Welfare*, 726 S.W.2d 241 (Tex. App..--Dallas 1986, no writ), holding that when findings and conclusions are incorporated into a judgment, even when no request has been made, they are treated as findings of fact and conclusions of law filed in accordance with Rule 296. *But see Jones v. Jones*, 641 S.W.2d 342 (Tex. App..--Corpus Christi 1982, no writ); *City of Houston v. Houston Chronicle*, 673 S.W.2d 316 (Tex. App..--Houston [1st Dist.] 1984, no writ); and *Gonzales v. Cavazos*, 601 S.W.2d 202 (Tex. Civ. App.--Corpus Christi 1980, no writ); all holding that recitations in the judgment cannot be considered as a substitute for

separately filed findings and conclusions. Thus, they provide no basis for attack by a losing party on appeal.

b. TRCP 299a

In 1990, the Supreme Court enacted TRCP 299a which provides:

> **RULE 299a. FINDINGS OF FACT TO BE SEPARATELY FILED AND NOT RECITED IN A JUDGMENT**
>
> Findings of fact shall not be recited in a judgment. If there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes.
>
> Findings of fact shall be filed with the clerk of the court as a document or documents separate and apart from the judgment.

In *Frommer v. Frommer*, 981 S.W.2d 811, 814 (Tex. App. -- Houston [1st Dist.] 1998, no pet.), the court of appeals discussed TRCP 299a:

> [W]e believe the purpose of Rule 299a is clear. Findings of fact and conclusions of law shall not be recited in a judgment. If they are, they cannot form the basis of a claim on appeal. ... As far back as 1952, the preferred practice was to express findings of fact and conclusions of law in a separate document. While the propriety of findings of fact and conclusions of law in judgments was once a matter of debate, in 1990 the Texas Supreme Court ended the debate once and for all. "Findings of fact and conclusions of law shall not be recited in a judgment." TEX. R. CIV. P. 299a.

See Sutherland v. Cobern, 843 S.W.2d 127, 131 n. 7 (Tex. App. -- Texarkana 1992, writ denied).

6. What Findings Are Available?

As we indicated above, the courts of appeals are not consistent in their discussions of what findings are available to an appellant, particularly in a divorce context. Without question, the court must make findings on each material issue raised by the pleadings and evidence, but not on evidentiary issues. Findings are required only when they relate to ultimate or controlling issues. *Roberts v. Roberts*, 999 S.W.2d 424, 434 (Tex. App. – El Paso 1999, no pet.); *Dura-Stilts v. Zachry*, 697 S.W.2d 658 (Tex. App..--Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Loomis International v. Rathburn*, 698 S.W.2d 465 (Tex. App..--Corpus Christi 1985, no writ); *Lettieri v. Lettieri*, 654 S.W.2d 554 (Tex. App..--Fort Worth 1983, writ dism'd).

Special problems can arise in divorce appeals. In a divorce case, the ultimate issue concerning property is whether the marital estate was divided in a just and right manner. *Id.* However, any question that can properly be submitted to a jury should be worthy of a finding by the judge in a bench trial. Since jury findings as to both characterization of property and valuation are binding upon the trial court, *see Archambault v. Archambault*, 763 S.W.2d 50 (Tex. App..--Beaumont 1988, no writ); *Lawson v. Lawson*, 828 S.W.2d 158 (Tex. App..--Texarkana 1992, writ denied), findings should be available on characterization of property and value. *Roberts v. Roberts*, 999 S.W.2d at 434. Yet in *Lettieri*, the appellate court determined that the trial court is not required to set out its theories or the legal basis upon which it grounded the division of property. In *Jones v. Jones*, 699 S.W.2d 583 (Tex. App..--Texarkana 1985, no writ), the court determined that it was Mr. Jones' burden to request additional findings of fact to establish the specific valuation of the various community property assets and liabilities used by the trial court. The underlying assumption is, of course, that Jones was entitled to obtain findings on the values of assets. However, in *Wallace v. Wallace*, 623 S.W.2d 723 (Tex. Civ. App.--Houston [1st Dist.] 1981, writ dism'd), the court determined that the trial court does not have to make findings listing the value of each item. Nor does it have to list the factors which it considered in dividing the property, because the factors to be considered are not issues of fact to be determined by the trier of fact. (Here, too, however, the court was quite verbal about the appellant's responsibility to request additional findings as to values, which the appellant had not done.)

It is difficult to see just how a court of appeals can determine the fairness of the division without findings as to the values of the assets.

Wallace states that it is the burden of the parties to introduce evidence as to the values of the assets whereby a range of value can be determined by the trial court. But if the wife introduces a value of $250,000 while the husband values an asset at $50,000, it is virtually impossible to determine overall fairness without knowing what value the trial court assigned to the asset. Further, there is no way to determine that the court assigned a value within that range at all. Second, if the trial court is not required to state what factors it considered in dividing the property, the appellant is left in a posture of challenging the sufficiency of the evidence as to every conceivable factor which **might** have been considered, a process that unduly and unnecessarily complicates the appeal. This burden may be virtually impossible to overcome, and any error in the court's failure to identify the proper rungs is in all likelihood not reversible error. In *Tenery v. Tenery*, 932 S.W.2d 29 (Tex. 1996), the trial court awarded the wife a disproportionate division of the community estate. Despite a request for specific findings, the court declined to list the factors considered. The court of appeals determined that Mr. Tenery was not harmed by the trial court's failure to make the requested findings because there was sufficient evidence to support the division. The Supreme Court agreed, noting that the record reflected that Mr. Tenery had greater earning capacity than his wife, he was at fault in the breakup of the marriage, and that Mrs. Tenery would have benefitted from a continuation of the marriage. Thus, the record affirmatively established that Mr. Tenery had suffered no injury.

Joseph v. Joseph, 731 S.W.2d 597 (Tex. App..--Houston [14th Dist.] 1987, no writ), gave many divorce appellate lawyers hope. There the appellant husband appealed from the property division and timely requested findings of fact and conclusions of law. The trial court failed to file any. This omission was properly called to the court's attention, but still none were filed. While the opinion turns on the question of failure to file them rather than whether the appellant was entitled to findings on value, the conclusion is unmistakably clear: the appellant was jeopardized by the trial court's failure to make findings on values. The values of three properties were in dispute and the value of each property differed depending on the appraisal method utilized. The evidence indicated that one asset could be appraised at $246,000 value-in-place or $40,000 fair market value. The court concluded that the appellant had been placed in an unjust position of guessing at the valuation methods used when attacking the property division as an abuse of discretion. It further noted that he would have to presume a value when he attacked the valuation method as improper. Thus, he had suffered harm in the presentation of his appeal. The cause was reversed and remanded for a new trial.

The First District Court of Appeals in Houston remains unpersuaded by the *Joseph* philosophy, and has adhered to the *Wallace* decision. In *Finch v. Finch*, 825 S.W.2d 218 (Tex. App..--Houston [1st Dist.] 1992, no writ), the court reiterated that the values of the properties are evidentiary to the ultimate issue of whether the trial court divided the properties in a just and right manner and that it is the responsibility of the parties to provide the trial judge with a basis upon which to make the division. *But see Rafferty v. Finstad,* 903 S.W.2d 374, 379 (Tex. App..--Houston [1st Dist.] 1995, writ denied) (O'Connor, J., dissenting).

In *Roberts v. Roberts*, the El Paso Court of Appeals considered what findings are available in a divorce proceeding, stating:

> Because we believe that an appellant cannot demonstrate that a trial court abused its discretion in making a just and right division of the community estate without being able to quantify the size of the community pie or just how large a slice each spouse was served, we conclude that an appellant is entitled to findings on characterization and valuation when error is preserved.

999 S.W.2d at 435.

7. Conflicting Findings and Findings at Variance with the Judgment

When the findings of fact appear to conflict with each other, they will be reconciled if possible. If, however, they are not reconcilable, they will not support the judgment. *Yates Ford, Inc. v. Benevides*, 684 S.W.2d 736 (Tex. App..--Corpus Christi 1984, writ ref'd n.r.e.). When Rule 296 findings appear to conflict with findings recited in the judgment, the Rule 296 findings

control for purposes of appeal. TRCP 299a. This rule is in accord with the practice of the appellate courts, even before TRCP 299a was adopted. *See Southwest Craft Center v. Heilner*, 670 S.W.2d 651 (Tex. App..--San Antonio 1984, writ ref'd n.r.e.); *Law v. Law*, 517 S.W.2d 379, 383 (Tex. Civ. App.--Austin 1974, writ dism'd); *Keith v. Keith*, 763 S.W.2d 950 (Tex. App..--Fort Worth 1989, no writ).

A problem can arise if an amended judgment is signed after findings and conclusions have been given. In *White v. Commissioner's Court of Kimble County*, 705 S.W.2d 322 (Tex. App..--San Antonio 1986, no writ), judgment was entered on November 12, 1984. Findings of fact and conclusions of law were requested and filed. An amended judgment was entered on January 25, 1985, in response to a motion to correct. The appellate court ruled that the findings could not be relied upon to support the corrected judgment because they pertained only to the November 12 judgment.

Note also that if there are conflicts between statements made by the trial judge on the record and findings of fact and conclusions of law actually prepared, the formal findings will be deemed controlling. *Ikard v. Ikard*, 819 S.W.2d 644 (Tex. App..--El Paso 1991, no writ).

8. Conflict Between Findings and Admissions

The Supreme Court has considered whether a reviewing court is bound by admissions of parties as to matters of fact when the record shows that the admissions were not truthful and that the opposite of the admissions was in fact true. In *Marshall v. Vise*, 767 S.W.2d 699 (Tex. 1989), the plaintiff submitted requests for admissions which were never answered. Prior to the non-jury trial, the court granted the plaintiff's motion that his requests for admissions be deemed admitted. Nevertheless, the defendant presented testimony in direct contravention of the deemed admissions. Plaintiff, who had filed no motion for summary judgment, failed to urge a motion in limine, failed to object to the evidence when offered and failed to request a directed verdict. The court rendered judgment contrary to the facts deemed admitted and made findings of fact and conclusions of law contrary to the facts deemed admitted. The court of appeals concluded that the trial court's findings were directly contrary to the deemed admissions and were so against the great weight and preponderance of the evidence as to be manifestly erroneous. The Supreme Court concluded that unanswered requests for admission are in fact automatically deemed admitted unless the court permits them to be withdrawn or amended. An admission, once admitted, is a judicial admission such that a party may not introduce testimony to contradict it. Here, however, the plaintiff had failed to object; in fact he elicited much of the controverting testimony himself. Thus, he was found to have waived his right to rely on the admissions which were controverted by testimony admitted at trial without objection.

9. Which Judge Makes the Findings?

Suppose a trial judge hears the evidence in a case and enters judgment but before (s)he is able to make findings of fact and conclusions of law, (s)he dies, or is disabled, or fails to win re-election? In *Ikard v. Ikard*, 819 S.W.2d 644 (Tex. App..--El Paso 1991, no writ), the family court master heard the evidence by referral with regard to a requested increase in child support. The master prepared a written report and the order was signed by the judge of the referring court. In the intervening time between trial and entry of the order, the court master won the November election to a district court bench, and left the master's bench. Findings of fact and conclusions of law were prepared following a timely request. Due to the absence of the court master who had heard the evidence, the findings were approved by another court master and signed by the referring judge, neither of whom had heard the evidence. On appeal, Mr. Ikard claimed this procedure to have been reversible error. The appellate court disagreed, noting that a successor judge has full authority to sign the findings, which in most cases, has been prepared by counsel for the prevailing party and not by the trier of fact. The findings then become those of the trial court, regardless of who prepared them. *See also Roberts v. Roberts*, 999 S.W.2d 424, 430 n.5 (Tex. App. – El Paso 1999, no pet.); *Lykes Bros. Steamship Co., Inc. v. Benben*, 601 S.W.2d 418 (Tex. Civ. App.--Houston [14th Dist.] 1980, writ ref'd n.r.e.); *Horizon Properties Corp. v. Martinez*, 513 S.W.2d 264 (Tex. Civ. App.--El Paso 1974, writ ref'd n.r.e.).

Some appellate courts have taken a different approach when the trial judge is no

longer available. In *FDIC v. Morris*, 782 S.W.2d 521 (Tex. App..--Dallas 1989, no writ), the appellate court noted that the trial judge was no longer on the bench and was unavailable to respond to the order to prepare findings. Citing *Anzaldua v. Anzaldua*, 742 S.W.2d 782, 783 (Tex. App..--Corpus Christi 1987, writ denied), the court reversed the judgment.

10. Effect of Court's Failure to File

a. Must Complain in Brief

When findings and conclusions were properly requested, but none were filed by the trial court, and the trial court was properly reminded of its failure to file the findings and conclusions, the injured party must then complain about the trial court's failure to file findings and conclusions by point of error or issue presented in the brief, or else the complaint is waived. *Seaman v. Seaman*, 425 S.W.2d 339, 341 (Tex. 1968); *Owens v. Travelers Ins. Co.*, 607 S.W.2d 634, 637 (Tex. Civ. App.--Amarillo 1980, writ ref'd n.r.e.); *Southwest Livestock & Trucking Co. v. Dooley*, 884 S.W.2d 805 (Tex. App..--San Antonio 1994, writ denied).

b. When Does the Failure to File Cause Harmful Error?

The general rule is that the failure of the trial court to file findings of fact constitutes error when the complaining party has complied with the requisite rules to preserve error. *Wagner v. Riske*, 142 Tex. 337, 342; 178 S.W.2d 117, 199 (1944); *FDIC v. Morris*, 782 S.W.2d at 523. There is a presumption of harmful error unless the contrary appears on the face of the record. *City of Los Fresnos v. Gonzalez*, 830 S.W.2d 627 (Tex. App..--Corpus Christi 1992, no writ). Thus, the failure to make findings does not compel reversal if the record before the appellate court affirmatively demonstrates that the complaining party suffered no harm. *Las Vegas Pecan & Cattle Co. v. Zavala County*, 682 S.W.2d 254, 256 (Tex. 1984). When there is only one theory of recovery or defense pled or raised by the evidence, there is no demonstration of injury. *Guzman v. Guzman*, 827 S.W.2d 445 (Tex. App..--Corpus Christi 1992, writ denied); *Vickery v. Texas Carpet Co., Inc.*, 792 S.W.2d 759 (Tex. App..--Houston [14th Dist.] 1990, writ denied). *Accord*, *Landbase, Inc. v. T.E.C.*, 885 S.W.2d 499, 501-02 (Tex. App..--San Antonio 1994, writ denied) (failure to file findings and conclusions harmless when the basis for the court's ruling was apparent from the record).

The test for determining whether the complainant has suffered harm is whether the circumstances of the case would require an appellant to guess the reason or reasons that the judge has ruled against it. *Sheldon Pollack Corp. v. Pioneer Concrete*, 765 S.W.2d 843, 845 (Tex. App..--Dallas 1989, writ denied); *Fraser v. Goldberg*, 552 S.W.2d 592, 594 (Tex. Civ. App.--Beaumont 1977, writ ref'd n.r.e.). The issue is whether there are disputed facts to be resolved. *FDIC v. Morris*, 782 S.W.2d at 523.

c. Remedy: Remand vs. Abatement

A debate has raged over the appropriate remedy when a trial court fails to file timely requested findings of fact and conclusions of law. The choice is whether to reverse and remand for a new trial or to abate proceedings and order the trial judge to file findings and conclusions. Earlier cases tended to reverse and remand for a new trial. *See, e.g., Joseph v. Joseph*, 731 S.W.2d 597 (Tex. App. -- Houston [14th Dist.] 1987, no writ). However, more recent cases have abated the appeal and ordered the trial judge to file findings of fact and conclusions of law. *See Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768 (Tex. 1989); *Brooks v. Housing Authority of the City of El Paso*, 926 S.W.2d 316 (Tex. App. -- El Paso 1996, no writ); *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App. -- Houston [14th Dist.] 1996, no writ). In *Brooks v. Housing Authority of the City of El Paso*, the court held that

> whenever possible, appellate courts should attempt to remedy the absence of findings and conclusions by abating the appeal and remanding to the trial judge for entry of findings and conclusions, so that the appeal can be handled in a normal manner. If the trial court cannot forward findings and conclusions to the court of appeals due to loss of the record, problems with memory, passage of time, or other inescapable difficulties, reversal and remand for a new trial is a proper remedy.

926 S.W.2d at 321.

d. Failure to Make Additional Findings

With regard to additional findings, the case should not be reversed if most of the additional findings were disposed of directly or indirectly by the original findings and the failure to make the additional findings was not prejudicial to the appellant. *Landscape Design & Const., Inc.*, 604 S.W.2d 374 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.). Refusal of the court to make a requested finding is reviewable on appeal if error has been preserved. TRCP 299.

11. Effect of Court's Filing

TRCP 299 provides that when findings of fact are filed by the trial court, they shall form the basis of the judgment upon all grounds of recovery. The judgment may not be supported on appeal by a presumption or finding upon any ground of recovery no element of which has been found by the trial court. When one or more of the elements have been found by the court, however, any omitted unrequested elements, if supported by the evidence, will be supplied by presumption in support of the judgment. This presumption does not apply when the omitted finding was requested by the party and refused by the trial court. *Chapa v. Reilly*, 733 S.W.2d 236 (Tex. App..--Corpus Christi 1987, writ ref'd n.r.e.).

Findings of fact are accorded the same force and dignity as a jury verdict. When they are supported by competent evidence, they are generally binding on the appellate court. When a reporter's record is available, challenged findings are not binding and conclusive if they are manifestly wrong. The same is true of patently erroneous conclusions of law. *Reddell v. Jasper Federal Savings & Loan Association*, 722 S.W.2d 551 (Tex. App..--Beaumont 1987) *rev'd on other grounds* 730 S.W.2d 672 (1987); *De La Fuenta v. Home Savings Association*, 669 S.W.2d 137 (Tex. App..--Corpus Christi 1984, no writ). When no reporter's record is presented, the court of appeals must presume that competent evidence supported not only the express findings made by the court, but any omitted findings as well. *D&B, Inc. v. Hempstead*, 715 S.W.2d 857 (Tex. App..--Beaumont 1986, no writ); *Mens' Wearhouse v. Helms*, 682 S.W.2d 429 (Tex. App..--Houston [1st Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 474 U.S. 804 (1985).

12. Deemed Findings

When the trial court gives express findings on at least one element of a claim or affirmative defense, but omits other elements, implied findings on the omitted unrequested elements are deemed to have been made in support of the judgment. In other words, if a party secures an express finding on at least one element of an affirmative defense, then deemed findings arise as to the balance of the elements. *Linder v. Hill*, 691 S.W.2d 590 (Tex. 1985); *Sears, Roebuck & Co. v. Nichols*, 819 S.W.2d 900 (Tex. App..--Houston [14th Dist.] 1991, writ denied). When deemed findings arise, it is not an appellee's burden to request further findings or to complain of other findings made. It is the appellant's duty to attack **both the express and implied findings**.

13. Peculiarities of Conclusions of Law

Conclusions of law are generally lumped in with all discussions of findings of fact, but, in reality, they are rather unimportant to the appellate process. The primary purpose is to demonstrate the theory on which the case was decided. A conclusion of law can be attacked on the ground that the trial court did not properly apply the law to the facts. *Foster v. Estate of Foster*, 884 S.W.2d 497 (Tex. App.. -- Dallas 1994, no writ). However, erroneous conclusions of law are not binding on the appellate court and if the controlling findings of fact will support a correct legal theory, are supported by the evidence and are sufficient to support the judgment, then the adoption of erroneous legal conclusions will not mandate reversal. See, e.g., *Leon v. Albuquerque Commons Partnership*, 862 S.W.2d 693 (Tex. App..--El Paso 1993, no writ); *Westech Engineering, Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190, 196 (Tex. App..--Austin 1992, no writ); *Bexar County Cr. Dist. Atty v. Mayo*, 773 S.W.2d 642, 643 (Tex. App..--San Antonio 1989, no writ); *Bellaire Kirkpatrick Joint Venture v. Loots*, 826 S.W.2d 205, 210 (Tex. App..--Fort Worth 1992, writ denied). "If an appellate court determines a conclusion of law is erroneous, but the judgment rendered was proper, the erroneous conclusion of law does not require reversal." *Town of Sunnvale v. Mayhew*, 905 S.W.2d 234, 243 (Tex. App..--Dallas 1994), *rev'd on other grounds*, 964 S.W.2d 922 (Tex. 1998). The standard of review for legal conclusions is whether they are correct, *Zieben v. Platt*, 786 S.W.2d 797, 801-02 (Tex. App..--Houston [14th Dist.] 1990, no writ), and they are reviewable de

novo as a question of law. *Nelkin v. Panzer*, 833 S.W.2d 267, 268 (Tex. App..--Houston [1st Dist.] 1992, writ dism'd w.o.j.). In other words, the appellate court must independently evaluate conclusions of law to determine their correctness when they are attacked as a matter of law. *U.S. Postal Serv. v. Dallas Cty. App. D.*, 857 S.W.2d 892, 895-96 (Tex. App..--Dallas 1993, writ dism'd).

14. Challenges on Appeal

a. Challenging the Trial Court's Failure to Make Findings of Fact

The trial court's failure to make findings upon a timely request must be attacked by point of error or issue presented on appeal or the complaint is waived. *Perry v. Brooks*, 808 S.W.2d 227, 229-30 (Tex. App..--Houston [14th Dist.] 1991, no writ); *Belcher v. Belcher*, 808 S.W.2d 202, 206 (Tex. App..--El Paso 1991, no writ).

b. Challenging Findings and Conclusions on Appeal

Unless the trial court's findings of fact are challenged by point of error or issue presented in the brief, the findings are binding on the appellate court. *S&L Restaurant Corp. v. Leal*, 883 S.W.2d 221, 225 (Tex. App..--San Antonio 1994), *rev'd on other grounds*, 892 S.W.2d 855 (Tex. 1995) (*per curiam*); *Wade v. Anderson*, 602 S.W.2d 347, 349 (Tex. Civ. App.--Beaumont 1980, writ ref'd n.r.e.).

Frequently, trial courts include disclaimers to the effect that "any finding of fact may be considered a conclusions of law, if applicable" and vice-versa. There is a difference, however, in the standard of review to be applied to each. Findings of fact are the equivalent of a jury finding and should be attacked on the basis of legal or factual sufficiency of the evidence. *Associated Telephone Directory Publishers, Inc. v. Five D's Publishing Co.*, 849 S.W.2d 894, 897 (Tex. App..--Austin 1993, no writ); *Exxon Corp. v. Tidwell*, 816 S.W.2d 455, 459 (Tex. App..--Dallas 1991, no writ); *A-ABC Appliance of Texas, Inc. v. Southwestern Bell Tel. Co.*, 670 S.W.2d 733, 736 (Tex. App..--Austin 1984, writ ref'd n.r.e.). Conclusions of law should be attacked on the ground that the law was incorrectly applied.

Sometimes, however, findings of fact are mislabeled as conclusions of law, as in *Posner v. Dallas County Child Welfare*, 784 S.W.2d 585 (Tex. App..--Eastland 1990, writ denied). There, the ultimate and controlling findings of fact were erroneously labeled as conclusions of law, and instead of challenging these, the appellant challenged the immaterial evidentiary matters which were included in the findings of fact. The appellant found that the appellant was bound by the unchallenged findings which constituted undisputed facts even though they were mislabeled as conclusions of law. Thus, findings of fact (even if they are mislabeled as conclusions of law) must be attacked by point of error or issue presented on appeal or they become binding on the appellate court.

B. Findings In Child Support Orders

Section 154.130 of the Family Code provides that, without regard to TEX.R.CIV.P. 296 through 299, in all cases in which child support is contested and the amount of child support ordered by the court varies from statutory guidelines, the trial court shall make findings in the child support order. TEX.FAM.CODE ANN. § 154.130 (Vernon 1996).

1. Request

The provision requires that a written request may be made or filed with the court no later than 10 days after *the date of the hearing.* **THIS REQUIREMENT MEANS THE REQUEST MUST BE MADE WITHIN 10 DAYS AFTER THE HEARING, NOT WITHIN 10 DAYS AFTER THE DATE THE ORDER IS SIGNED.** An oral request is sufficient if made in open court during the hearing. Clearly, an oral request should be made on the record.

The importance of making the request for findings in child support cases is quite simple -- a court's order of child support will not be reversed on appeal unless the appellant can show a clear abuse of discretion. *Worford v. Stamper,* 801 S.W.2d 108 (Tex. 1990). The test for abuse of discretion is whether the trial court acted in an arbitrary or unreasonable manner. In *Worford*, the parties were divorced in 1975, when their son Trey was only 5 years old. Stamper was ordered to pay $180 per month in support plus one-half of medical expenses incurred on behalf of Trey's

medical disabilities. In 1986, a modification was filed, requesting the support be increased and that it be ordered to continue past Trey's 18th birthday. It was undisputed by the parties that Trey would never be able to support himself because of physical and mental handicaps. His developmental levels were between three and five years of age when he was 15 years old. His speech was unintelligible and he suffered from deformities which made it difficult for him to chew his food. He would require some maxillofacial surgery which would not be covered by insurance. The trial court increased the support to $1350 per month, required Stamper to carry medical insurance and to pay for one-half of all expenses not covered by the insurance. Stamper appealed. The court of appeals reversed, noting that the trial court abused its discretion because there was insufficient evidence to support the amount of child support awarded.

The Supreme Court reversed the court of appeals, noting that under Rule 5 of the Texas Supreme Court Child Support Guidelines in effect in 1987, the amount of child support for one child ranged from 19-23% of the first $4,000 of the obligor's net resources, but beyond that, the court may order additional amounts of child support as appropriate, and may consider the income of the parties and the needs of the child. The court also found that either party could have requested findings by the trial court concerning the amount of net resources available and the reasons that the amount ordered by the court varied from the amount computed by applying the percentage in the rules, but neither party requested and the trial court did not file any such findings. The Court then determined that Stamper's net income [some $6,000 to $7,000 per month] and the special needs of the child justified the increase. The court then, without oral argument, reversed the court of appeals and affirmed the trial court.

2. Purpose

The purpose of the provision appears to be an attempt to facilitate appeals from child support orders, and to establish in the decree a point-of-reference for a later modification action. If utilized properly, the formal findings and conclusions contemplated by TEX.R.CIV.P. 296 are not needed.

3. Trial Court's Duty

The trial court is required to include the findings in the child support order if such findings are properly requested. Although this requirement conflicts with TEX.R.CIV.P. 299a, the Texas Family Code provides that the requirement applies notwithstanding Rules 296 through 299. This rule does not preclude the court from making other findings and conclusions in compliance with the Rules of Civil Procedure, particularly when issues other than child support are involved. However, where child support is the only issue, what then?

• The findings required by the Family Code could be repeated as Rule 296 findings.

• Other factors which do not neatly fit into the §154.130 findings may be included in general findings and conclusions.

• If the request under §154.130 is not timely made, findings may still be requested under Rules 296 and 297.

• If the trial court fails to include the §154.130 findings in the child support order itself, despite a timely request, it may still be required to make the findings if the proper elements are requested under Rule 296. In this instance, two separate findings may be filed. It also appears that if the specific elements of §154.130 are included in the general findings, the error in failing to include findings in child support orders would be harmless.

One court has held that when a trial court does not strictly comply with the statutory requirement that the findings be enumerated in the support order itself, substantial compliance may be demonstrated if the findings are reduced to writing and filed among the papers of the cause. *Zajac v. Penkava,* 924 S.W.2d 405 (Tex.App.--San Antonio 1996, no writ). However, insertion of the findings into the support order will be helpful down the road if a modification is necessary. These findings establish what the circumstances of the parties were at the time of the divorce and whether the support ordered was in compliance with the guidelines.

Yet another court has concluded that the statutory requirements for findings in child support orders do not apply to retroactive support

under Section 160.005(c). *In the Interest of Valdez,* 980 S.W.2d 910, 913 (Tex.App.--Corpus Christi 1998, pet. denied).

4. Requirements

Section 154.130 requires the following findings:

• the monthly net resources of the obligor per month are $_____;

• the monthly net resources of the obligee per month are $_____;

• the percentage applied to the obligor's net resources for child support by the actual order rendered by the court is _____%;

• the amount of child support if the percentage guidelines are applied to the first $6,000 of the obligor's net resources is $_____ ;

• if applicable, the specific reasons that the amount of child support per month ordered by the court varies from the amount due under the guidelines are: _____; and

• if applicable, the obligor is obligated to support children in more than one household, and:

(A) the number of children before the court is _____;

(B) the number of children not before the court residing in the same household with the obligor is _____;

(C) the number of children not before the court for whom the obligor is obligated by a court order to pay support, without regard to whether the obligor is delinquent in child support payments, and who are not counted under Paragraph (A) or (B) is_____.

If you represent the obligee and are trying to sustain the trial court's award of sizeable child support, consider adding the following:

• Without further reference to the percentages recommended by the guidelines, the Court finds that additional amounts of child support are required, based upon the demonstrated needs of the child.

In *Hatteberg v. Hatteberg,* 933 S.W.2d 522 (Tex.App. --Houston [1st Dist.] 1994, no writ.), the trial court awarded $1000 in child support against an obligor with net monthly income in excess of $4000. Believing additional support was justified, Wife made an untimely request for statutory findings. The trial court did file findings of fact pursuant to Rules 296 and 297, but did not make all of the specific findings as required by former §14.057. While the court did not specify the precise amount of Husband's net income, it did find that the net income exceeded $4000 per month, that it had applied the guidelines to arrive at a presumptive award of $800, and that it had based the additional $200 in support on the proven needs of the child. Wife appealed on the basis that the trial court was required by statute to detail the precise net income and the reasons given for a variance from the guidelines. The appellate court rejected the argument, noting first that the request for statutory findings was untimely. Secondly, with regard to wife's argument that the trial court nevertheless had a statutory duty to make findings to justify the variance, the court found that there was no variance since the trial court had indeed awarded support in accordance with the presumptive award required under the guidelines. Whether the court would have made as broad a statement had the obligor objected to the variance is unclear. The court further held that former §14.057 does not require a trial court to make findings regarding its basis for the presumptive award unless requested, and as a result, the provisions requiring findings when there is a variance from the guidelines did not apply. *See also, Roosth v. Roosth,* 889 S.W.2d 445 (Tex.App.--Houston [14th Dist.] 1994, writ denied) (for child support set at $3,000 per month, it was not error for trial court to include findings that appellant's net resources were not capable of determination, but that they exceeded $ 4,000 per month, and that appellant was intentionally underemployed at time of divorce).

Arguably, the obligor could request specific findings under Rule 296 *et seq.* as to what the demonstrated needs of the children were. If

you represent the obligor, don't accept merely the §154.130 findings. Try to pin the trial court down as to what specific factors were considered and what the total monthly needs of the child are, in actual dollars. Utilize your right to follow up with formalized findings and conclusions. It may also be necessary to tie the court down to a formula if there are children born of different marriages. Courts (and opposing counsel) tend to make the findings as vague as possible. Be sure to follow through.

5. What's Your Remedy?

The intermediate appellate courts are not consistent in their remedies for the failure of the trial court to make the statutory findings when properly requested. In *Hanna v. Hanna,* 813 S.W.2d 626 (Tex.App.--Houston [1st Dist.] 1991, no writ), the court found that the failure to make findings in a child support order upon proper request is reversible error, and the appellate court reversed and remanded. *See also Morris v. Morris.* 757 S.W.2d 466 (Tex.App.--Houston [14th Dist.] 1988, writ denied) (in which trial court failed to make required child support findings, case was reversed). *Contra Chamberlain v. Chamberlain,* 788 S.W.2d 455 (Tex.App.--Houston [1st Dist.] 1990, writ denied) (in which the appellate court abated the appeal and directed the trial court to make the necessary findings).

The Supreme Court has recently visited the issue. In *Tenery v. Tenery,* 932 S.W.2d 29 (Tex. 1996), the record reflected that at the time of trial, the father's net resources were limited to $980 per month. Applying the child support guidelines to the net resources would have resulted in a child support order of $196 per month, for one child ($980 x 20%). The trial court instead set child support at $550 per month, and despite a request for additional findings concerning the reason the court varied from the guidelines, the court failed to comply. The court of appeals determined that Mr. Tenery had not been harmed by the court's failure to make additional findings. The Supreme Court disagreed, noting that when findings are timely requested but not filed, harm to the complaining party is presumed unless the contrary appears on the face of the record. Error is harmful if it prevents an appellant from properly presenting a case to the appellate court. The Court concluded that the trial court's refusal to abide by the child support guidelines and its failure to make the necessary findings concerning the reasons for its deviation prevented Mr. Tenery from effectively contesting the child support order on appeal. In a *per curiam* opinion, the Court reversed and remanded the cause to the court of appeals with instructions for it to direct the trial court to correct its error under former TEX.R.APP.P. 81(a) (now TRAP 44.4). Thus, it appears that the Supreme Court opted for abatement *a la Chamberlain v. Chamberlain,* 788 S.W.2d 455 (Tex.App.--Houston [1st Dist.] 1990, writ denied).

C. Findings In Visitation Orders

Section 153.258 of the Family Code provides that without regard to Rules 296 through 299 of the Texas Rules of Civil Procedure, in all cases in which possession of a child by a parent is contested and the possession of the child varies from the standard possession order, the trial court shall state in the order the specific reasons for the variance from the standard order. TEX.FAM.CODE ANN. § 153.258 (Vernon 1997). The court has this obligation only if a written request is filed within 10 days after the hearing or upon oral request in open court during the hearing.

1. Request

The provision clearly requires that a written request may be made or filed with the court no later than 10 days after the *date of the hearing.* **THIS REQUIREMENT MEANS THAT THE REQUEST MUST BE MADE WITHIN 10 DAYS OF THE HEARING, NOT WITHIN 10 DAYS OF THE DATE THE ORDER IS SIGNED.** An oral request is sufficient if made in open court during the hearing. Clearly, an oral request should be made on the record.

2. Trial Court's Duty

Under the provision, the trial court is required to insert the required findings **within the body of the visitation order.** Although this requirement conflicts with TEX.R.CIV.P. 299a, the disclaimer that the provision be applied notwithstanding Rules 296 through 299 applies. Thus it appears that the requested findings must be specified in the order, be it a decree of divorce or modification order. It also would appear that compliance with this rule would not preclude the

court from making other findings and conclusions in compliance with the Rules of Civil Procedure, particularly where issues other than visitation are involved.

3. Requirements

In contrast to the child support findings, the Family Code does not specify any particular findings or recitations.

D. Findings In Sanction Orders

1. TEX.R.CIV.P. 13 Sanctions

The imposition of Rule 13 sanctions involves the satisfaction of a two-part test. First, the party moving for sanctions must demonstrate that the opposing party's filings are groundless. Second, it must be shown that the pleadings were filed either in bad faith or for the purposes of harassment. *GTE Communications v. Tanner*, 856 S.W.2d 725, 731 (Tex. 1993); *Estate of Davis v. Cook*, 9 S.W.3d 288, 297 (Tex. App. – San Antonio 1999, no pet.). The imposition of Rule 13 sanctions lies within the discretion of the trial court and will not be reversed absent an abuse of discretion. *Stewart v. Transit Mix Concrete & Materials Co.,* 988 S.W.2d 252, 257-58 (Tex.App. -- Texarkana 1998, pet. denied). Rule 13 provides:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both. . .
>
> . . . **No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order.** 'Groundless' for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law . . . [Emphasis added]

Several recent appellate decisions have considered the language of the Rule and determined that its requirements are mandatory. *Keever v. Finlan,* 988 S.W.2d 300, 312 (Tex.App. -- Dallas 1999, pet. filed); *Thomas v. Thomas,* 917 S.W.2d 425 (Tex.App.--Waco 1996, no writ). Requiring a trial court to enunciate its reasons in the sanction order serves two purposes. First, it invites the trial court to reflect on the order before sanctions are imposed. Second, it informs the party of the offensive conduct in order to prevent its recurrence. *Id.* In *GTE Communications Systems Corp. v. Curry,* 819 S.W.2d 652 (Tex.App.--San Antonio 1991, orig. proceeding), the appellate court determined that a rule of civil procedure is to be interpreted by the same rules that govern statutes. When a rule is clear and unambiguous, the language must be construed according to its literal meaning. *Id*. at 653; *RepublicBank Dallas, N.A. v. Interkal, Inc.,* 691 S.W.2d 605, 607 (Tex. 1985); *Hidalgo, Chambers & Co. v. FDIC,* 790 S.W.2d 700, 702 (Tex.App.--Waco 1990, writ denied). The court in *GTE* found the language of Rule 13 to be clear and unambiguous in its provisions that no sanctions may be imposed except for good cause shown. The court further noted that the trial court must enumerate the particulars of the good cause in the sanction order and that this requirement of the rule is mandatory. Even more striking is the appellate court's description of the sanction order against GTE:

> The order in this case is defective in that it fails to comply with the mandatory requirements of rule 13. The order merely imposes sanctions. It does not find that good cause exists for such impositions; it does not find that the motion for summary judgment and affidavits were groundless and filed for the purpose of delay or harassment, or were made in bad faith; and, more

> fatally, it does not state any facts or particulars of the good cause.

Id. at 654.

A similar result occurred in *Kahn v. Garcia,* 816 S.W.2d 131, 133 (Tex.App.--Houston [1st Dist.] 1991, orig. proceeding) in which the appellate court noted:

> Rule 13 imposes a duty on the trial court to point out with particularity the acts or omissions on which sanctions are based. *Watkins v. Pearson,* 816 S.W.2d 131 (Tex.App.-Houston [14th Dist.] 1990, writ denied). Thus, an order imposing sanctions for pleadings, motions, and other papers under rule 13 differs markedly from an order imposing sanctions for discovery abuse under rule 215. Rule 215 does not require a court to designate the particulars amounting to 'good cause'. While respondent's order states that the motions for sanctions are 'meritorious', the order contains no specific mention of what conduct on the part of relator was good cause for imposition of sanctions.

Id. at 133. *See also Zarsky v. Zurich Management, Inc.,* 829 S.W.2d 398, 400 (Tex.App.--Houston [14th Dist.] 1992, writ dism'd by agr.), in which the appellate court compares the various sanction orders in these cases.

> The sanction orders in both *Kahn* and *Watkins* were held to be in violation of this [Rule 13] requirement. In *Kahn,* the order recited that the motions for sanctions were 'meritorious'. *Kahn,* 816 S.W.2d at 132. In *Watkins,* the order merely stated that 'for good cause being shown, monetary sanctions are hereby imposed . . . pursuant to Rule 13.' *Watkins,* 795 S.W.2d at 259. Similarly, the order signed by the trial judge states that 'the Court finds substantial evidence that this Third Party lawsuit . . . was frivolous and of no merit.' The recitation here fails to satisfy the particularity requirements of Rule 13. There is no statement or description of what was done in bad faith, or a description of how Mr. George acted to bring about the improper purpose. The trial court failed to show with particularity its reason for finding the third party lawsuit frivolous and meritless. Thus the trial judge abused his discretion in entering the sanctions order.

Thus, the findings must be fact-based and not merely conclusions of law. *Compare Keever v. Finlan,* 988 S.W.2d 300, 312 (Tex.App. -- Dallas 1999, pet. filed) (sanctions order finding that an attorney of record had "made false statements in an affidavit executed by him and filed with the Court" specifically identified the attorney's conduct and constituted good cause for imposition of sanctions) *with Schexnider v. Scott & White Memorial Hospital,* 953 S.W.2d 439, 441 (Tex.App.--Austin, 1997, no writ)(sanctions order based on "good cause" for filing a "groundless petition" brought in "bad faith" and "brought for the purpose of harassment" is erroneous on its face for omitting the particulars underlying the conclusions).

Some courts of appeals have held that the complaining parties may waive the particularity requirement of Rule 13 if they fail to make a timely complaint and that the trial court's failure to make particular findings in the order may constitute harmless error. *Alexander v. Alexander,* 956 S.W.2d 712, 714 (Tex.App.--Houston [14th Dist.] 1997, pet. denied); *Bloom v. Graham,* 825 S.W.2d 244, 247 (Tex.App.--Fort Worth 1992, writ denied); *Powers v. Palacios, 771* S.W.2d 716, 719 (Tex.App.--Corpus Christi 1989, writ denied). The El Paso Court of Appeals has determined that error may indeed be waived but a legitimate effort at obtaining findings will require an abatement similar to that utilized in the area of traditional findings of fact. *Campos v. Ysleta General Hospital, Inc. et al,* 879 S.W.2d 67 (Tex.App.--El Paso 1994, writ denied). In addition, a trial court's failure to make particular findings in a Rule 13 order may constitute harmless error when the trial court's findings of fact and conclusions of law supply the particulars of good cause required by Rule 13. *Gorman v. Gorman*, 966 S.W.2d 858, 867-68 (Tex. App. – Houston [1st Dist.] 1998, pet. denied). .

2. TEX.R.CIV.P. 215 Sanctions

Tex. R. Civ. P. 215.2 provides:

> *b. Sanctions by Court In Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rules 199.2(b)(1) or 200.1(b) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204 or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following.
>
> * * * * *
>
> (8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, **unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.** Such an order shall be subject to review on appeal from the final judgment. [Emphasis added].

It is also important to note that there is no requirement that the complaining party have requested or obtained formal findings of fact and conclusions of law with regard to the sanctions order. The Supreme Court has ruled that formal findings are unnecessary. In *Otis Elevator Company v. Parmelee,* 850 S.W.2d 179 (Tex. 1993), the Court stated:

> The court of appeals held that absent a statement of facts from the hearing on Maurine's motion for sanctions, or findings of fact or conclusions of law, the trial court must be presumed to have made all findings necessary to support its judgment. 817 S.W.2d at 735. This is incorrect. The court of appeals relied upon *Roberson v. Robinson,* 768 S.W.2d 280 (Tex. 1989), and *Lane v. Fair Stores, Inc.,* 243 S.W.2d 683 (Tex. 1951), both of which involved judgments after trial, not sanctions. Here, the trial court heard no evidence but expressly based its decision on the papers filed and the argument of counsel. Under these circumstances, there are no factual resolutions to presume in the trial court's favor.

Otis was determined on the basis of the Court's decision in *Transamerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913 (Tex. 1991), which was a discovery abuse case under TEX.R.CIV.P. 215. Rule 215 does not require any specific findings to be included within the body of the sanctions order. Nevertheless, the Supreme Court has construed that formal findings of fact are not necessary. *See IKB Indus. v. Pro-Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997). However, the trial court may issue them if it so chooses. *Chrysler Corp. v. Blackmon,* 841 S.W.2d 844, 852 (Tex. 1992); *Hartford Accident & Indemnity Co., v. Abasal,* 831 S.W.2d 559, 560 (Tex.App.--San Antonio 1992, orig. proceeding).

Because findings filed in a sanctions context are not accorded the same weight as findings made under TEX.R.CIV.P. 296 and 297, the appellate court is not limited to a review of the sufficiency of the evidence to support the findings made. These findings, unlike formal findings, are not binding on the reviewing court. *IKB Indus. v. Pro-Line Corp.*, 938 S.W.2d at 442; *Jefa Company, Inc. v. Mustang Tractor and Equipment Company,* 868 S.W.2d 905 (Tex.App.--Houston [14th Dist.] 1994, writ denied). Instead, the appellate court will conduct an independent inquiry to determine if the court abused its discretion in imposing the sanction. *USF&G v. Rossa,* 830 S.W.2d 668 (Tex.App.--Waco 1992, writ denied). In so doing, the appellate court will review the entire record, including the evidence, arguments of counsel, the written discovery on file and the circumstances surrounding the party's alleged discovery abuse to determine if the trial court abused its discretion in imposing the sanctions. *Jefa Company, Inc.*, 868 S.W.2d at 910; *USF&G v. Rossa,* 830 S.W.2d at 672. *See also Shook v. Gilmore & Tatge Mfg. Co.,* 851 S.W.2d 887, 893-94 (Tex.App.--Waco 1993, no writ). The purpose of findings of fact to support the imposition of discovery sanctions is to aid in the appellate review through a guided analysis; to

assure judicial deliberation; and to enhance the deterrent effect of the sanctions order.

However, appellate courts disagree about the applicability of discovery sanctions when the best interest of the child is involved. See *Leath v. Cauley-Leath*, 1999 WL 195747 (Tex. App. – Dallas 1999, no pet.) (husband's expert witnesses struck as discovery sanctions although court did conclude that he had not shown that the exclusion of his expert witnesses' testimony prevented the trial court from applying the best interest of the child standard); *In re P.M.B.*, 2 S.W.3d 618 (Tex. App. – Houston [14th Dist.] 1999, no pet.) (most of husband's evidence was struck as a discovery sanction; the court stated that compared to the best interest of the child. technical rules of pleading and practice are of little importance in determining child custody issues and that trial court abused its discretion in excluding the evidence without first attempting a lesser sanction that could ultimately allow the evidence to be presented).

3. TEX.CIV.PRAC. & REM.CODE Sanctions

Chapters 9 and 10 of the Texas Civil Practices and Remedies Code deal with frivolous pleadings and claims and sanctions for frivolous pleadings and claims respectively. Sections 9.012 and 10.004 provide what the trial court shall consider and what sanctions are available. Significantly, §10.005 provides:

> A court shall describe in an order imposing a sanction under this chapter the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed.

This language requires that findings be included in the sanctions order. In *University of Texas at Arlington v. Bishop*, ___ S.W.2d ____, 1999 WL 510981 (Tex. App. -- Fort Worth 1999, no pet.) (not yet reported), the Fort Worth Court of Appeals recognized that the requirement for particularity in the sanction order was mandatory and concluded that "it was error for the trial court to enter the ... sanctions order without describing and explaining the conduct of UTA it relied upon in assessing sanctions." ___ S.W.2d at ____. In determining whether the error was reversible, the appellate court stated:

> In evaluating whether the trial court's omission constitutes reversible error, we note that the trial court did make findings of fact and conclusions of law which describe and explain the sanctionable conduct.
>
> * * * * *
>
> While we do not condone the practice of using findings of fact and conclusions of law to satisfy section 10.005, we conclude that the findings and conclusions supplied the particulars lacking in the sanctions order and, thus, the trial court's failure to identify the sanctioned conduct with specificity in its ... order did not affect UTA's substantial rights or hinder its presentation of this appeal.

IX. MOTIONS FOR NEW TRIAL

The use of a motion for new trial in a non-jury appeal is similar to a jury appeal, except that it is not necessary to challenge either the legal or factual sufficiency of the evidence in a motion for new trial after a non-jury trial. Former TRAP 52(d) explicitly so provided; it was deleted during the 1997 rule amendments as "unnecessary," with reference to TRCP 324(a) and (b).

A. Errors Made in Rendering Judgment

On appeal from a non-jury trial, the appellant should be especially careful about errors occurring for the first time in rendition of the judgment. TRAP 33.1 requires that complaints on appeal must have been presented to the trial court (excepting sufficiency of the evidence). The trial court may err in rendering judgment, and if the complaint about the error on appeal will be anything but sufficiency of the evidence, it should be raised before the trial court. The motion for new trial may be used to raise such error. However, a motion to modify judgment may be the more appropriate vehicle.

B. Timetable For Filing - Rule 329(b) TRCP

The motion for new trial shall be filed within 30 days after judgment is signed by the court. If the motion is not determined by **written** order, it shall be deemed overruled by operation of law 75 days after judgment is entered. Balazik v. Balazik, 632 S.W.2d 939 (Tex. App..--Fort Worth 1982, no writ). Mere reference in an order that a hearing was held on the motion for new trial without specifically granting the motion will not suffice. The overruling by operation of law of a motion for new trial preserves error unless the taking of evidence was necessary to present the complaint in the trial court. TRAP 33.1(b). The automatic overruling of a motion for new trial on which there has been no trial court's ruling is constitutional. Texaco, Inc. v. Pennzoil Company, 729 S.W.2d 768 (Tex. App.. - Houston [1st Dist.] 1987, writ ref'd n.r.e.).

1. Plenary Power of Trial Court

The trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within 30 days after the judgment is signed, regardless of whether an appeal has been perfected. This power is extended when a motion for new trial is filed, such that the court may alter its original judgment at any point until 30 days after all motions have been overruled, either by written order or operation of law, whichever occurs first. After such time, the order may not be set aside except by bill of review.

Rule 329b(g) TRCP provides that a motion to correct, reform or modify a judgment has the same effect upon the court's plenary power and the appellate timetable as a motion for new trial. That rule seems simple enough, yet two decisions involve the construction of the rule, and they come to different conclusions.

In First Freeport National Bank v. Brazoswood National Bank, 712 S.W.2d 168 (Tex. App. -- Houston [14th Dist.] 1986, no writ), the appellant filed a motion for a modified judgment after rendition of the trial court's judgment. The appellate court concluded that the motion was really a motion for judgment n.o.v. and that such a motion is not one which will extend the appellate timetable pursuant to Rule 329b(g). It dismissed the appeal for want of jurisdiction.

In Brazos Electric Power Co-Op v. Callejo, 734 S.W.2d 126 (Tex. App..--Dallas 1987, no writ), the appellant filed a motion to modify judgment n.o.v. The appellee, relying on First Freeport, claimed that the motion did not operate to extend the appellate timetable. The Dallas court expressly declined to follow the Houston case and concluded that any post-judgment motion is effective in extending the time to perfect the appeal.

The subject was revisited in 1996 by the Supreme Court in *L.M. Healthcare, Inc., v. Childs*, 920 S.W.2d 286 (Tex. 1996). Judgment was rendered against the plaintiff on January 28, 1994 and on February 7, 1994 the plaintiff filed a motion for new trial. At a March 3rd hearing, the trial court signed a judgment on the January 28th pronouncement and an order denying the motion for new trial. On April 4th, the plaintiff filed a motion to modify judgment, requesting that the court include in its judgment a recitation that the dismissal was without prejudice to the plaintiff's refiling its suit. Hearing on this motion was held on May 11th and on May 17th, the trial court granted the relief requested and signed a modified judgment. The defendant alleged that the trial court signed the modified judgment after the expiration of its plenary power. The court of appeals concluded that a motion to modify judgment, although filed timely, cannot extend plenary power if it is filed after the trial court overrules a motion for new trial. As a result, the appellate court held that the trial court lacked jurisdiction to modify the judgment. The Supreme Court disagreed. The rules provide that a motion to modify judgment shall be filed within the same time constraints as a motion for new trial, which must be filed no later than the 30th day after judgment is signed. TRCP 329b(b) and (g). "That the trial court overruled Longmeadow's motion for new trial does not shorten the trial court's plenary power to resolve a motion to modify judgment". The Court concluded that the rules provide that a timely filed motion to modify

judgment extends plenary power separate and apart from a motion for new trial.

The Dallas appellate court raised another issue in A.G. Solar & Co., Inc. v. Nordyke, 744 S.W.2d 647 (Tex. App..--Dallas 1988, no writ). Here a motion for new trial was filed as to the first judgment of the court. That motion was overruled by operation of law. Afterwards, but while still having plenary power, the trial court entered a reformed judgment dated June 30. The cost bond was filed on September 22. Was it timely filed? The appellant argued that it was, because a motion for new trial had been filed. But the court held that the second judgment was a separate and new judgment. Since no motion for new trial was filed with regard to the second judgment, the cost bond was required to be filed 30 days later, i.e., by July 30. The filing on September 22 was untimely and the appeal was dismissed.

Note that the 1997 rule amendments now specifically allow for extension of the appellate timetable upon the filing of a motion for new trial, a motion to modify the judgment, a motion to reinstate under TRCP 165a or a request for findings of fact and conclusions of law. TRAP 26.1(a)

2. Amended or Supplemental Motions

An amended motion for new trial may be filed without leave of court, provided it is filed within the 30-day period and before the original motion is overruled. The Dallas Court of Appeals has considered the distinction between an amended motion and a supplemental motion. In Sifuentes v. Texas Employers' Insurance Association, 754 S.W.2d 784 (Tex. App..--Dallas 1988, no writ), the appellant filed a motion for new trial on May 29, 1987 in which he raised factual insufficiency of the evidence. On June 4, 1987, Sifuentes filed "Plaintiff's Second Motion for New Trial." This motion did not complain of factual insufficiency. TEIA urged that the second motion was in fact an amended motion that superseded the original motion for new trial, so that there was no "live" motion for new trial raising factual insufficiency of the evidence as required by the rules. Waiver of the issue was claimed. The court of appeals disagreed, noting that the title of the motion gave no indication that it should be considered an amended motion. Instead, the language indicated that the second motion had been filed shortly after the trial court had conducted a hearing and orally overruled the first motion. No written order was signed. Because there was no written order overruling the original motion for new trial, the court chose to treat the second motion as a supplemental motion. The factual insufficiency points were accordingly preserved.

3. Citation by Publication

When the respondent has been served with citation by publication, the time for filing a motion for new trial is extended by TRCP 329. The court may grant a new trial upon petition showing good cause and supported by affidavit, filed within two years after the judgment was signed. The appellate timetable is computed as if the judgment were signed 30 days before the date the motion was filed. [Query: Can the respondent request findings of fact and conclusions of law, which normally must be done by the 20th day?]

C. Grounds For New Trial

Motions for new trial may be granted by the trial court so long as it comes within the umbrella of "good cause". TRCP 320. Many bases for granting a new trial strictly apply to jury trials, such as errors in the charge and jury misconduct. In non-jury trials, the practitioner may well be facing some of the following considerations:

1. Newly Discovered Evidence

Generally speaking, a new trial based upon newly discovered evidence in a civil proceeding will not be granted unless:

• admissible competent evidence is introduced showing the existence of the newly discovered evidence relied upon;

• the party seeking the new trial demonstrates that there was no knowledge of the evidence prior to trial;

• that due diligence had been used to procure the evidence prior to trial;

• that the evidence is not cumulative to that already given and does not tend to impeach the testimony of the adversary; and

• that the evidence would probably produce a different result if a new trial were granted.

Keever v. Finlan, 988 S.W.2d 300, 315 (Tex.App. -- Dallas 1999, pet. filed); *Wilkins v. Royal Indemnity Company,* 592 S.W.2d 64 (Tex.App.--- Tyler 1979, no writ).

Whether to grant a motion for new trial on the basis of newly discovered evidence lies within the sound discretion of the trial court. *Keever*, 988 S.W.2d at 315. The trial court must consider the weight and the importance of the new evidence and its bearing in connection with other evidence elicited at trial. *Id.* "The inquiry [is] not whether, upon the evidence in the record, it apparently might have been proper to grant the application in the particular case, but whether the refusal of it has involved the violation of a clear legal right or a manifest abuse of judicial discretion." *Id., citing Jackson v. Van Winkle,* 660 S.W.2d 807, 809 (Tex. 1983).

Courts may be more inclined to accept the theory of newly discovered evidence in cases involving child custody because of the welfare and well being of the children in issue. See C. v. C., 534 S.W.2d 359 (Tex.Civ.App.--Dallas 1976, no writ), in which the appellate court held that in an extreme case in which the evidence is sufficiently strong, failure to grant the motion for new trial may well be an abuse of discretion. See also Gaines v. Baldwin, 629 S.W.2d 81 (Tex. App..--Dallas 1981, no writ) which holds that the evidence presented must demonstrate that the original custody order would have a serious adverse effect on the welfare of the child and that presentment of that evidence would probably alter the outcome.

2. Default Judgments

New trials are routinely granted and default judgments set aside upon demonstration that the failure of the respondent to appear before judgment was not intentional or the result of conscious indifference but was due instead to mistake or accident. The motion for new trial must also raise a meritorious defense and there must be no delay or injury to the opposing party. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124 (1939). Although in *Craddock* the default judgment was taken because the defendant failed to answer, the same requirements apply to a post-answer default judgment. *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex.1987); *Grissom v. Watson*, 704 S.W.2d 325, 326 (Tex.1986). When there is defective service of process, however, there is no requirement that a litigant establish a meritorious defense. Such a requirement violates due process rights under the Fourteenth Amendment to the federal constitution. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988); *Lopez v. Lopez*, 757 S.W.2d 751 (Tex. 1988)

What happens if an attorney makes a conscious decision not to file an answer, perhaps mistakenly believing that the court does not have jurisdiction? If (s)he determines that (s)he has erred in interpreting the law, can (s)he successfully bring a motion for new trial claiming mistake? Not according to the Corpus Christi court. Carey Crutcher, Inc. v. Mid-Coast Diesel Services, Inc., 725 S.W.2d 500 (Tex. App..--Corpus Christi 1987, no writ). The attorney for the defendant represented Crutcher Equipment Corp. and Carey Crutcher, Inc., two distinct entities. Crutcher Equipment was in bankruptcy while Carey Crutcher, Inc. was not. A lawsuit filed against Carey Crutcher, Inc. was received by the attorney, who believed that the action was covered by the automatic bankruptcy stay. Thus, he did not file an answer. A default judgment was taken. On appeal, it was claimed that through a mistaken belief about the law, the attorney did not believe that an answer was necessary and thus, did not file

one. The appellate court determined that the attorney had made a conscious decision not to file an answer and that this was not the type of mistake that negates conscious indifference.

It is also important to recognize that default judgments in family law proceedings are quite different from civil cases generally. In Considine v. Considine, 726 S.W.2d 253 (Tex. App..--Austin 1987, no writ), a default judgment was taken on a motion to modify managing conservatorship. The court noted the distinction:

> In the usual case, the defendant who fails to file an answer is said to confess to the facts properly pleaded in the petition. Stoner v. Thompson, 578 S.W.2d 679 (Tex. 1979). In such a case, the non-answering defendant cannot mount an evidentiary attack against the judgment on motion for new trial or on appeal.
>
> In a divorce case, however, the petition is not taken as confessed for want of an answer. TEX. FAM. CODE §3.53 [now §6.701]. Even if the respondent fails to file an answer, the petitioner must adduce proof to support the material allegations in the petition. Accordingly, the judgment of divorce is subject to an evidentiary attack on motion for new trial and appeal.
>
> This Court knows of no Family Code provision relating to modification of prior orders that is comparable to §3.53. Reason suggests, nonetheless, that the same policy considerations underlying §3.53, applicable to original divorce judgments appointing conservators and setting support for and access to children, should also obtain in §14.08 [now Chapter 156 *et. seq.*] proceedings to modify like provisions in prior orders. . . As a result, in a case of default by the respondent, the movant must prove up the required allegations of the motion to modify.

726 S.W.2d at 254. *See* Armstrong v. Armstrong, 601 S.W.2d 724 (Tex.Civ.App.--Beaumont 1980, no writ).

Recently, the Fourteenth Court of Appeals has questioned the wisdom of applying the *Craddock* principles, which spring from traditional civil litigation, to the peculiarities of family law. In *Lowe v. Lowe,* 971 S.W.2d 720, 725-27 (Tex.App.--Houston [14th Dist.] 1998, pet. denied), the mother appealed a default judgment which had appointed her husband as managing conservator of two young children. Although finding that Mrs. Lowe had indeed satisfied the *Craddock* elements, the court noted that it did not find *Craddock* to be an appropriate test for suits involving the parent-child relationship. Discussing several reasons why that premise is true, the court noted that although the Texas Family Code provides that the paramount inquiry shall be the best interest of the child, the *Craddock* test omits the child's interests and looks only to the actions of whichever parent happens to be the defaulting party. The opinion concludes by inviting the Supreme Court to fashion a more workable rule and urging the family bar to propose a more appropriate rule.

3. Mistakes Made at Trial

This area includes the improper admission or rejection of certain evidentiary materials. If it can be demonstrated that a correct ruling would have probably altered the outcome of the trial, a new trial may be granted.

4. No Reporter's Record Available

Section 105.003(c) of the Family Code provides that a record shall be made in all suits affecting the parent-child relationship, unless expressly waived by the parties with the consent of the court. TRAP 34.6(f) provides that the inability to obtain the reporter's record in order to pursue an appeal will entitle the complaining party to a new

trial (i) if the party has timely requested a reporter's record; (ii) if, without that party's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed; (iii) if that exhibit or portion of the record is necessary to the appeal's resolution; and (iv) if the parties cannot agree on a complete record. The same is true if the trial was electronically recorded and a significant portion of the recording has been lost or destroyed.

This is a major change from former TRAP 50(e), which authorized a new trial if any portion of the record was lost or destroyed and was not subject of a harmful error analysis. In other words, if part of the record was missing and the appellant was not at fault, the appellate court would reverse. TRAP 34.6(f) requires the appellant to show the missing portion is necessary to the appeal before the trial court can grant a new trial based on a missing portion of the reporter's record, i.e., the court applies a harm analysis. *See Issac v. State*, 982 S.W.2d 96 (Tex. App. -- Houston [1st Dist.] 1998), aff'd, 989 S.W.2d 754 (Tex. Crim. App. 1999) (in which the courts compared TRAP 34.6(f) and former TRAP 50(e), determined that TRAP 34.6(f) applied, and applied a harm analysis).

5. Sufficiency of the Evidence

Remember that while complaints of factual insufficiency of the evidence to support a jury finding or a complaint that the finding is against the overwhelming weight of the evidence must be raised in a motion for new trial before it may be urged on appeal, there is no such requirement in non-jury trials.

a. "No Evidence" Points

A motion for new trial is not required in order to complain of legal sufficiency of the evidence [a "no evidence" point] in a non-jury trial. A "no evidence" or legal insufficiency point is a question of law which challenges the legal sufficiency of the evidence to support a particular fact finding. The standard of review requires a determination by the appellate court as to whether, considering only the evidence and inferences that support a factual finding in favor of the party having the burden of proof in a light most favorable to such findings and disregarding all evidence and inferences to the contrary, there is any probative evidence which supports the finding. Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965); Southwest Craft Center v. Heilner, 670 S.W.2d 651 (Tex. App..--San Antonio 1984, writ ref'd n.r.e.); Terminix v. Lucci, 670 S.W.2d 657 (Tex. App..--San Antonio 1984, writ ref'd n.r.e.); Dayton Hudson Corp. v. Altus, 715 S.W.2d 670 (Tex. App..--Houston [1st Dist.] 1986, writ ref'd n.r.e.).

Note that as a general rule, in the event a "no evidence" point of error is sustained, it is the court's duty to reverse and **render** rather than remand. National Life Accident Insurance Co. v. Blagg, 438 S.W.2d 905, 909 (Tex. 1969); Vista Chevrolet, Inc. v. Lewis, 709 S.W.2d 176 (Tex. 1986); *United Mobile Networks, L.P. v. Deaton*, 939 S.W.2d 146, 147 (Tex. 1997). However, to obtain the benefit of a rendered judgment, the appellant must have raised the no evidence issue in a motion for instructed verdict, an objection to the submission of a vital fact issue, a motion for judgment n.o.v., or a motion to disregard the jury's answer. While the no evidence issue may be preserved by motion for new trial, when it is preserved **only** by motion for new trial, the appellate court may only reverse and **remand**. It may not reverse and **render**. Gillespie v. Silvia, 496 S.W.2d 234 (Tex.Civ.App. -- El Paso 1973, no writ). This distinction is made because the motion for new trial asks for just that -- a new trial. Thus, remand is proper. However, when the motion before the court is styled, "Motion to Modify, Correct or Reform Judgment, Or in the Alternative, Motion for New Trial", rendition was proper following reversal. City of Garland v. Vasques, 734 S.W.2d 92 (Tex. App..--Dallas 1987, writ ref'd n.r.e.). In this situation, the city had prayed for rendition of a take nothing judgment on the basis of a no evidence claim while the motion for new trial was merely an alternative plea for relief.

b. "Insufficient Evidence"

"Insufficient evidence" or factual insufficiency involves a finding that is so against the great weight and preponderance of the evidence as to be manifestly wrong. The test for factual insufficiency is set forth in In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). In reviewing a point of error or issue presented asserting that a finding is against the great weight and preponderance of the evidence, the appellate court must consider all of the evidence, both the evidence which tends to prove the existence of a vital fact as well as evidence which tends to disprove its existence. If the finding is so contrary to the great weight and preponderance of the evidence as to be manifestly unjust, the point or issue should be sustained.

In drafting the motion for new trial or points of error or issues presented involving factual insufficiency, the better practice is to attack the jury findings separately. This is generally required because the objection must be specific enough to apprise the trial court of the alleged error. Security Savings Association v. Clifton, 755 S.W.2d 925 (Tex. App.. -- Dallas 1988, no writ). When the jury finds against the objecting party on all questions submitted, then a general objection that all findings are against the great weight and preponderance of the evidence is sufficiently specific.

6. Jury Misconduct

The movant for new trial must prove that:

• misconduct occurred;

• the misconduct was material; and

• based on the record as a whole, the misconduct probably resulted in harm to the movant.

Redinger v. Living, Inc., 689 S.W.2d 415, 419 (Tex. 1985); *Perry v. Safeco Ins. Co.,* 821 S.W.2d 279, 280 (Tex.App.--Houston [1st Dist.] 1991, writ denied); *Snyder v. Byrne,* 770 S.W.2d 65, 68 (Tex.App.--Corpus Christi 1989, no writ).

Additionally, Rule 327 requires the motion in this instance be accompanied by affidavit. It requires an evidentiary hearing demonstrating that the misconduct was material and that from a review of the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party. *Rodarte v. Cox,* 828 S.W.2d 65 (Tex.App.--Tyler 1991. writ denied); *Terminix v. Lucci,* 670 S.W.2d 657 (Tex.App.--San Antonio 1984, writ ref'd n.r.e.); *Gulf Coast Sailboats, Inc. v. McGuire,* 616 S.W.2d 385 (Tex.Civ.App.--Houston [14th Dist.] 1981, writ ref d n.r.e.).

TEX.R.EVID. Rule 606(b) likewise deals with juror misconduct:

> (b) Inquiry Into Validity of Verdict.
>
> Upon an inquiry into the validity of a verdict or indictment a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

Jury misconduct includes outside influence on jurors and incorrect answers by jurors during voir dire examination. TEX.R.CIV.P. 327. To preserve error regarding jury misconduct, the complaining party must present evidence proving the misconduct at a hearing on a motion for new trial. *See id.;* TEX.R.CIV.P. 324(b)(1). Although this evidence may generally include testimony from any person with knowledge of the misconduct, jurors may not testify about their deliberations or their mental processes during deliberations, but only about any outside influence that was improperly brought to bear on any juror. TEX.R.CIV.P. 327; TEX.R.EVID. 606(b); *Weaver v. Westchester Fire Ins. Co.,* 739 S.W.2d 23, 24

(Tex. 1987). As was noted in *Wooten v. Southern Pacific Trans. Co.*. 928 S.W.2d 76 (Tex.App.--Houston [14th Dist.] 1995, no writ), this approach represents a departure from prior law:

> Under former Rule 327(b), effective until April 1, 1984, a juror was permitted to testify as to matters and statements, or 'overt acts,' which occurred during deliberations. Under the former rule, only the actual mental processes of the jurors were excluded from consideration. Now, however, under the new rule a party can only inquire into whether an 'outside influence' affected the deliberations, and all testimony, affidavits, and evidence are limited to this issue. *Robinson Elec. Supply v. Cadillac Cable Corp.,* 706 S.W.2d 130, 132 (Tex.App.--Houston [14th Dist.] 1986, writ ref d n.r.e.).

When juror misconduct is attributable to a juror who voted favorably for the complaining party, there is no harmful error.

Whether jury misconduct has occurred is a question of fact to be determined by the trial court; absent an abuse of discretion, an appellate court will not overturn the court's ruling. TEX.R.CIV.P. 327; *Ortiz v. Ford Motor Credit Co.,* 859 S.W.2d 73 (Tex.App.--Corpus Christi 1993, writ denied); *Texas Gen. Indem. Co. v. Watson,* 656 S.W.2d 612, 615 (Tex.App.--Fort Worth 1983, writ ref'd n.r.e.); *McAllen Coca Cola Bottling Co., Inc. v. Alvarez,* 581 S.W.2d 201, 204 (Tex.Civ.App.--Corpus Christi 1979, no writ).

D. Other Post-Trial Motions

1. Motion for Directed Verdict, JNOV or to Disregard Jury Findings

A motion for directed verdict, judgment *non obstante veredicto,* or to disregard jury findings will preserve for appeal a contention that the evidence is legally insufficient to support the verdict of the jury. TEX.R.CIV.P. 301; *Aero Energy Corp. v. Circle C Drilling Co.,* 699 S.W.2d 821, 822 (Tex. 1985). These motions will not preserve a factual sufficiency point, which must be preserved in a motion for new trial. TEX.R.CIV.P. 324(b)(2)-(3).

2. Motions to Modify, Correct or Reform the Judgment

One method of complaining of error in rendition of judgment is to file a motion to modify the judgment. This method would be appropriate when the relief you want is a modified or new judgment, as opposed to a new trial. Preserving error by motion to modify judgment was approved by the San Antonio Court of Appeals in *Bulgerin v. Bulgerin,* 724 S.W.2d 943 (Tex.App.--San Antonio 1987, no writ). The appellee urged by cross-point that she was entitled to prejudgment interest. She had prepared a judgment including it which the trial court denied by deleting the provision from the order. The appellee then filed a motion to modify the judgment specifically including a request for prejudgment interest. Her motion was denied. The appellate court held that the right to recover was waived if not asserted in the trial court, but the filing of the motion to modify was sufficient to preserve error for review.

If the trial court signs a modified judgment within its plenary power, the appellate timetable is restarted. *Check v. Mitchell,* 758 S.W.2d 755, 756 (Tex. 1988); *Pursley v. Ussery,* 982 S.W.2d 596, 598 (Tex.App.--San Antonio 1998, pet. denied).

X. STRUCTURING THE APPEAL

A. Challenging Alignment of Constituent Elements

The trial court's judgment is the capstone of the case, built upon elements which are themselves built upon other elements. If the appellant preserves error properly, the trial court's judgment must be supported by conclusions of law applied to specific findings of fact that are supported by evidence and by pleadings. *See, e.g., Light v. Wilson*, 663 S.W.2d 813, 814 (Tex. 1984) ("conclusions of law which are not based on findings of fact and supported by pleadings will not sustain a judgment"). The chance of reversal increases when the appellant forces the trial judge to commit to specific findings of fact and specific conclusions of law, for if the elements of the case (pleadings, evidence, fact findings, conclusions of law, and judgment) are not properly aligned, reversal should occur. *See* TRCP 301 which states that "[t]he judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any...."

1. Judgment Should Conform to Conclusions of Law

In *Light v. Wilson,* 663 S.W.2d 813, 814 (Tex. 1984), the Supreme Court stated that "[c]onclusions of law which are not based on findings of fact and supported by pleadings will not sustain a judgment."

This statement, which was not supported by citation to authority, appears to imply that a judgment must be sustained by conclusions of law. *Accord Walker v. Whitman*, 759 S.W.2d 781, 783 (Tex. App..--Fort Worth 1988, no writ). However, in *Wirth, Ltd. v. Panhandle Pipe & Steel, Inc.,* 580 S.W.2d 58, 62 (Tex.Civ.App.---Tyler 1979, no writ), the appellate court stated:

> Rules 300 and 301, TEX. R. CIV. P., require among other things that the judgment must conform to the findings of fact, but we are not aware of any rule that requires the judgment to conform to the conclusions of law.

Thus, it is said that "[e]rroneous legal conclusions are not grounds for reversal when the court's fact findings are supported by the evidence and are sufficient to support the judgment." *Smith v. Smith,* 620 S.W.2d 619, 626 (Tex.Civ.App.--Dallas 1981, no writ); *accord*, *Hunt City Appraisal Dist. v. Rubbermaid, Inc.*, 719 S.W.2d 215 (Tex. App..--Dallas 1986, writ ref'd n.r.e.).

2. Judgment must Conform to the Findings of Fact

The trial court's judgment must conform to the verdict of the jury, TRCP 301, or the trial court's findings of fact. *Wirth, Ltd. v. Panhandle Pipe & Steel, Inc.,* 580 S.W.2d 58, 62 (Tex.Civ.App.--Tyler 1979, no writ). This rule that the judgment must conform to the verdict or findings is different from the rule that the verdict or findings must be supported by sufficient evidence. For example, when there is no reporter's record, a presumption arises that the evidence supports the jury's verdict or the trial court's findings of fact. In contrast, the lack of a reporter's record does not affect the relation between the judgment and the verdict or the findings of fact. *See Segrest v. Segrest,* 649 S.W.2d 610 (Tex. 1983). The judgment and the verdict, or findings of fact, are reflected in the clerk's record, not the reporter's record. If no findings of fact are filed or properly requested, then implied findings will be inferred from the judgment itself. Thus, even when there is no reporter's record, and the verdict or findings of fact are binding on the parties and are presumed to be supported by the evidence, still, the correctness of legal conclusions drawn from these facts is subject to appellate review. *Vasquez v. Vasquez,* 645 S.W.2d 573 (Tex.Civ.App.-El Paso 1982, writ ref'd. n.r.e.). In the event of a conflict between the judgment and the findings of fact and conclusions of law, the findings and conclusions are controlling. TRCP 299a.

3. Findings of Fact must Conform to Evidence

The judgment must conform to the nature of the case proved. TRCP 301. When the evidence establishes the facts as a matter of law, a motion for directed verdict or motion for judgment is in order. *Collora v. Navarro,* 574 S.W.2d 65 (Tex. 1978). In such a situation, there are no fact issues to resolve, and jury questions or findings of fact are not appropriate. Whether the judgment conforms to the undisputed facts will turn on whether the law is applied correctly by the trial court.

However, when the evidence does not indisputably establish the facts necessary to resolve the dispute, then the fact finder must ascertain the ultimate facts on which a judgment for or against each party can be based. In a jury trial, this is done through answers to jury questions. In a bench trial, this is done through the trial court's findings of fact, either express or implied. In either type of case, the verdict or findings of fact must be supported by the evidence. *Swanson v. Swanson,* 228 S.W.2d 156, 158 (Tex. 1950) (trial court's findings are not conclusive when the statement of facts is in the record).

The standard of review of the legal and factual sufficiency of the evidence to support findings of fact is the same in a jury and non-jury trial. *See Tucker v. Tucker*, 908 S.W.2d 530, 532 (Tex. 1995); *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996); *Escobar v. Escobar*, 728 S.W.2d 474 (Tex. App..--San Antonio 1987, no writ). The rule is also the same when you are attacking implied findings of fact, as opposed to express written findings of fact.

> When a statement of facts is brought forward, these implied findings may be challenged by factual sufficiency and legal sufficiency points the same as jury findings or a trial court's findings of fact.

Roberson v. Robinson, 768 S.W.2d 280 (Tex. 198-9). When, as appellant, you have no express findings of fact, just make up the implied findings that necessarily follow from the judgment and challenge them: "The evidence is legally/factually insufficient to support an implied finding that . . . ."

4. Judgment must Conform to Pleadings

TRCP 301 provides in part that "[t]he Judgment of the court shall conform to the pleadings . . . ." The Supreme Court has said:

> A judgment must be based upon pleadings, and as this Court has stated, "[A] plaintiff may not sustain a favorable judgment on an unpleaded cause of action, in the absence of trial by consent . . . ." *Oil Field Haulers Association, Inc. v. Railroad Commission*, 381 S.W.2d 183, 191 (Tex. 1964). In determining whether a cause of action was pled, plaintiff's pleadings must be adequate for the court to be able, from an examination of the plaintiff's pleadings alone, to ascertain with reasonable certainty and without resorting to information aliunde the elements of plaintiff's cause of action and the relief sought with sufficient information upon which to base a judgment.

Stoner v. Thompson, 578 S.W.2d 679, 682-83 (Tex. 1979).

A variance between the pleadings and proof that is substantial, misleading, and prejudicial is fatal. *Kissman v. Bendix Home Systems*, 587 S.W.2d 675, 677 (Tex. 1979). However, the aggrieved party may have to object to the judgment exceeding the scope of the pleadings. *See Ron Craft Chevrolet, Inc. v. Davis*, 836 S.W.2d 672, 675 (Tex. App. -- El Paso 1992, writ denied) (objection that no pleadings supported the submission of a jury question); *Siegler v. Williams*, 658 S.W.2d 236, 240 (Tex. App..--Houston [1st Dist.] 1983, no writ).

While the inclusion in the pleading of a "general prayer" has helped to overcome a challenge on the "variance" issue in a number of cases, "a prayer must be consistent with the facts stated as a basis for relief." *Kissman v. Bendix Home Systems*, 587 S.W.2d 675, 677 (Tex. 1979). "Only the relief consistent with the theory of the claim reflected with the petition may be granted under a general prayer." *Id*. at 677. The general prayer is therefore an uncertain ally, and appears to lend support, or not, according to the predisposition of the appellate court on the pleading question involved in the case.

B. Challenging Sufficiency of The Evidence

The standards by which the sufficiency of the evidence is measured are relatively clear. Use of those standards by practitioners and the courts is another matter. A proper approach to sufficiency review is important in aiding the courts in their job and in presenting your client's case to the court. The use of an improper analysis by a court of appeals can be reversible error. *E.g., Pool v. Ford Motor Co.,* 715 S.W.2d 629, 632-33 (Tex. 1986).

1. Legal Sufficiency Analysis

The Supreme Court requires the courts of appeals to examine a legal sufficiency challenge, if made, before a factual sufficiency challenge on the same point. *Glover v. Texas Gen. Indem. Co.,* 619 S.W.2d 400, 401 (Tex. 1981). This preserves the Supreme Court's jurisdiction to review legal sufficiency challenges. *See* Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX.L.REV. 361, 369-71 (1960). It is only logical that briefs filed in the courts of appeals should follow suit. The analysis of the record for a legal sufficiency challenge requires that the court look only at evidence supporting the finding. *National Union Fire Ins. Co. v. Dominguez,* 873 S.W.2d 373, 376 (Tex. 1994); *Garza v. Alviar,* 395 S.W.2d 821, 823 (Tex. 1965). Therefore, presentation to the appellate court of the legal sufficiency argument should involve presentation of only the evidence supporting a finding; anything extra is wasted paper.

A "no evidence" or legal insufficiency point is a question of law which challenges the legal sufficiency of the evidence to support a particular fact finding. The standard of review

requires a determination by the appellate court concerning whether, considering only the evidence and inferences that support a factual finding in favor of the party having the burden of proof in a light most favorable to such findings and disregarding all evidence and inferences to the contrary, there is any probative evidence which supports the finding. *Garza v. Alviar,* 395 S.W.2d 821, 823 (Tex. 1965); *Dayton Hudson Corp. v. Altus,* 715 S.W.2d 670 (Tex.App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Terminix v. Lucci,* 670 S.W.2d 657 (Tex.App.--San Antonio 1984, writ ref'd n.r.e.); *Southwest Craft Center v. Heilner,* 670 S.W.2d 651 (Tex.App.--San Antonio 1984, writ ref'd n.r.e.);

There are basically two separate "no evidence" claims. When the party having the burden of proof suffers an unfavorable finding, the point of error challenging the legal sufficiency of the evidence should be that the fact or issue was established as "a matter of law". When the party without the burden of proof suffers an unfavorable finding, the challenge on appeal is one of "no evidence to support the finding". *See Creative Manufacturing, Inc. v. Unik,* 726 S.W.2d 207 (Tex.App.--Fort Worth 1987, no writ).

A "no evidence" point of error may be sustained only when the record discloses:

• a complete absence of evidence of a vital fact;

• the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact;

• the evidence offered to prove a vital fact is no more than a mere scintilla of evidence; or

• the evidence establishes conclusively the opposite of a vital fact.

Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 334 (Tex. 1998).

a. Appellate Remedy

Note that as a general rule, in the event a "no evidence" point of error is sustained, it is the court's duty to reverse and render rather than remand. *Vista Chevrolet, Inc. v. Lewis,* 709 S.W. 2d 176 (Tex. 1986); *National Life Accident Insurance Co. v. Blagg,* 438 S.W.2d 905, 909 (Tex. 1969) . However, to obtain the benefit of a rendered judgment, the appellant must have raised the no evidence issue in a motion for instructed verdict, an objection to the submission of a vital fact issue, a motion for judgment n.o.v., or a motion to disregard the jury's answer. While the no evidence issue may be preserved by motion for new trial, when it is preserved **only** by motion for new trial, the appellate court may only reverse and **remand**. It may not reverse and **render.** *Gillespie v. Silvia,* 496 S.W.2d 234 (Tex.Civ.App.--El Paso 1973, no writ). This distinction is made because the motion for new trial asks for just that -- a new trial. Thus, remand is proper. However, when the motion before the court is styled, "Motion to Modify, Correct or Reform Judgment, Or in the Alternative, Motion for New Trial", rendition is proper. *City of Garland v. Vasquez,* 734 S.W.2d 92 (Tex.App.--Dallas 1987, writ ref'd n.r.e.). In this situation, the city had prayed for rendition of a take nothing judgment on the basis of a no evidence claim while the motion for new trial was merely an alternative plea for relief. *See generally In re Wallingford*, ___ S.W.3d ____,1999 WL 1186804 (Tex. App. -- Austin 1999, orig. proceeding) (record contained no evidence to support motion to disqualify relator's attorney resulting in granting of writ of mandamus).

b. The "Scintilla" Standard

The concept of legal sufficiency of the evidence encompasses the common terminology that there is "no evidence" to support a jury finding, or that a proposition is proved "as a matter of law." The concept really relates to the following questions, depending upon one's status as proponent or opponent of a fact in issue: (1) is there any legally recognized evidence in support of a finding? (2) is there any legally recognized evidence opposed to a non-finding? The term "legally recognized" encompasses the idea that certain factual situations, though there is evidence present, are as a matter of law "no evidence" of a fact in issue.

The threshold question in a legal sufficiency review is whether the evidence constitutes *more than a scintilla* of evidence probative of a fact in issue. Zero evidence always fails, of course. Direct evidence of a fact in issue is always more than a scintilla; therefore, if there is some direct evidence of a fact in issue, a jury

finding of that fact will be sustained against a legal sufficiency attack. Whether evidence is direct or circumstantial is a critical inquiry. Some circumstantial evidence is deemed so weak that it is considered no evidence of a fact in issue as a matter of law, i.e. it is a mere scintilla. This is the case when the circumstantial evidence requires multiple inferences to reach a finding of a fact in issue, *Browning-Ferris, Inc. v. Reyna,* 865 S.W.2d 925, 927 & n.3 (Tex. 1993), or when the inference of a fact in issue from circumstantial evidence is no more likely than an inference of the opposite of a fact in issue. *Walmart v. Gonzalez,* 968 S.W.2d 934, 936 (Tex. 1998); *$57,600 v. State,* 730 S.W.2d 659, 662 (Tex. 1987). Finally, circumstantial evidence falls into the "mere scintilla" category unless the evidence furnishes some reasonable basis for the conclusion by reasonable minds as to the existence of a vital fact. *National Union Fire Ins. Co. v. Dominguez,* 873 S.W.2d 373, 376 (Tex. 1994); *Orozco v. Sander,* 824 S.W.2d 555, 556 (Tex. 1992). These theories are still alive and well in the jurisprudence of the Supreme Court, and can rescue or hamstring practitioners on appeal. Therefore, analysis of the number of inferential steps required to reach a finding of a fact in issue, and just plain deep thought about other inferences from circumstantial evidence, is worth the time.

2. Factual Sufficiency Analysis

"Insufficient evidence" or factual insufficiency involves a finding that is so against the great weight and preponderance of the evidence as to be manifestly wrong. The test for factual insufficiency points is set forth in *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660 (1951). In reviewing a point of error asserting that a finding is against the great weight and preponderance of the evidence, the appellate court must consider all of the evidence, both the evidence which tends to prove the existence of a vital fact as well as evidence which tends to disprove its existence. If the verdict is so contrary to the great weight and preponderance of the evidence as to be manifestly unjust, the point should be sustained. This is true even if the finding is supported by more than a scintilla of evidence and even though reasonable minds might differ as to the conclusions to be drawn from the evidence.

The realm of insufficient evidence exists when there is some evidence of a fact in issue, sufficient such that a jury question is warranted, but that evidence won't support a finding in favor of the proponent of that fact in issue. The parlance used by the courts of appeals is that such a finding “shocks the conscience” or that it is "manifestly unjust" limited by such phrases as “the jury's determination is usually regarded as conclusive when the evidence is conflicting," "we cannot substitute our conclusions for those of the jury," and "it is the province of the jury to pass on the weight or credibility of a witness's testimony." *See, e.g., Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10, 30 (Tex. 1994); *Beall v. Ditmore,* 867 S.W.2d 791, 795 (Tex.App.--El Paso 1993, writ denied).

In drafting the motion for new trial or points of error involving factual insufficiency, the better practice is to attack the jury findings separately. This is generally required because the objection must be specific enough to apprise the trial court of the alleged error. *Security Savings Association v. Clifton*, 755 S.W.2d 925 (Tex.App.--Dallas 1988, no writ). When the jury finds against the objecting party on all questions submitted, then a general objection that all findings are against the great weight and preponderance of the evidence is sufficiently specific.

In constructing points of error, or issues for review, for a factual sufficiency challenge, remember that there are two distinct complaints here as well. When the party having the burden of proof complains of an unfavorable finding, the point of error should allege that the findings "are against the great weight and preponderance of the evidence". The "insufficient evidence" point of error is appropriate only when the party without the burden of proof on an issue complains of the fact findings. *Neily v. Aaron,* 724 S.W.2d 908 (Tex.App.--Fort Worth 1987, no writ).

a. Jury vs. Nonjury Trials

Having established that the standard of review is the same for affirmative jury findings as it is for the jury's failure to make findings, it must also be noted that the test for determining factual sufficiency of the evidence is the same in a jury and nonjury trial. *Escobar v. Escobar,* 728 S.W.2d 474 (Tex.App.--San Antonio 1987, no

writ); *State Bar v. Roberts,* 723 S.W.2d 233 (Tex.App.--Houston [1st Dist.] 1986, no writ); *Foreman v. Graham,* 693 S.W.2d 774 (Tex.App.--Fort Worth 1985, no writ).

b. Court of Appeals is Final Arbiter of Factual Sufficiency

Although recent dissents from the Supreme Court of Texas argue otherwise, *see, e.g., Transport Ins. Co. v. Faircloth,* 898 S.W. 2d 269 (Tex. 1995)(Hightower, J., concurring and dissenting), a claim of insufficient evidence raises a question of fact rather than law and only the courts of appeals can review the issue. The Supreme Court has no jurisdiction to consider questions of fact, *Vallone v. Vallone,* 644 S.W.2d 655 (Tex. 1983), and it may not consider a point of error challenging factual insufficiency of the evidence. *Dyson v. Olin,* 692 S.W.2d 456 (Tex. 1985). The court does have jurisdiction, however, to determine whether the court of appeals used the correct rules of law in reaching its conclusion on an insufficient evidence point. *Hannon v. Sohio Pipeline Co.,* 623 S.W.2d 314, 315 (Tex. 1981).

c. Findings of Fact and Conclusions of Law Not Required to Raise Sufficiency

A request for findings of fact and conclusions of law is not required in order to raise the issue of sufficiency of the evidence. *Pruet v. Coastal States Trading Company,* 715 S.W.2d 702 (Tex.App.--Houston [1st Dist.] 1986, no writ). However, remember that a complaint of factual insufficiency to support a jury verdict or a complaint that a jury verdict is against the overwhelming weight of the evidence must be presented in a motion for new trial in order to preserve error on appeal. TEX.R.CIV.P. 324(b).

d. Appellate Remedy

If an "insufficient evidence" point is sustained on appeal, the appellate court must reverse and remand for new trial. *Glover v. Texas General Indemnity Co.,* 619 S.W.2d 400, 401 (Tex. 1980). The court of appeals has no jurisdiction to render based on a great weight and preponderance of the evidence point. *Wright-Way Spraying Service v. Butler,* 690 S.W.2d 897 (Tex. 1985).

3. Method of Analysis

The standards by which the sufficiency of the evidence is measured are relatively clear. Use of those standards by practitioners and the courts is another matter. A proper approach to sufficiency review is important in aiding the courts in their job and in presenting your client's case to the court. The use of an improper analysis by a court of appeals can be reversible error. *Pool v. Ford Motor Co.,* 715 S.W.2d 629, 632-33 (Tex. 1986).

a. Legal Sufficiency Analysis

The Supreme Court of Texas requires the courts of appeals to examine a legal sufficiency challenge, if made, before a factual sufficiency challenge on the same point. *Glover v. Texas Gen. Indem. Co.,* 619 S.W.2d 400, 401 (Tex. 1981). This preserves the Supreme Court's jurisdiction to review legal sufficiency challenges. It is only logical that briefs in the courts of appeals should follow suit. The analysis of the record for a legal sufficiency challenge requires that the court look only at evidence supporting the finding. *National Union Fire Ins. Co. v. Dominguez,* 873 S.W.2d 373, 376 (Tex. 1994); *Garza v. Alviar,* 395 S.W.2d 821, 823 (Tex. 1965). Therefore, presentation to the appellate court of the legal sufficiency argument should involve presentation of only the evidence supporting a finding; anything extra is wasted paper. Though the concept seems straightforward, many presentations are in the form of a comparison of the evidence, which is a presentation suited for factual sufficiency argument only. If a comparison of the evidence is presented, then an appellate judge's first thought is that the legal sufficiency point of error is without merit. Challenging a finding on legal sufficiency grounds might entail a showing of the absence of direct evidence supporting a finding; a showing that circumstantial evidence supporting a finding is not legally recognized as evidence; a showing that other circumstantial evidence does not support the finding; and undermining an opponent's presentation of evidence in support of a finding. Attacking jury findings on the basis that a fact in issue is conclusively established or established as a matter of law requires the extra step, once it is shown there is legally insufficient evidence supporting a finding, of showing that some other proposition is conclusively established. *Holley v. Watts,* 629 S.W.2d 694, 696 (Tex. 1982). Attacking findings based on legal sufficiency points of error in Texas requires practitioners to prove there is nothing with

something. This is often a difficult task, and the Fifth Circuit has rejected the framework used in Texas courts in favor of an examination of all the evidence and a standard of whether reasonable minds could differ as to a finding. *See Boeing v. Shipman,* 411 F.2d 365 (5th Cir. 1969)(*en banc).* Practitioners in Texas courts, though, are stuck with this task unless the Supreme Court adopts some other standard.

b. Factual Sufficiency Analysis

The factual sufficiency analysis takes place after the legal sufficiency analysis, if any. The method employed requires the reviewing court to look at all of the evidence, not just the evidence supporting a jury finding. *In re Kings Estate,* 150 Tex. 662, 244 S.W. 2d 660, 661 (1952). For example, in *Ellis County State Bank v. Keever,* 915 S.W.2d 478 (Tex. 1996), the court of appeals affirmed a punitive damage award and the defendant appealed. The Supreme Court noted that the court of appeals had reviewed only the evidence supporting the award. The Court then admonished the lower court that while conducting a factual sufficiency review of the damage award under *Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10 (Tex. 1994), it must detail all of the relevant evidence and explain why the evidence supports or does not support the punitive damages award. The Court remanded the case to the court of appeals for a *Moriel* analysis. The converse is equally true. When the court of appeals overturns findings because of factual insufficiency, it must consider all of the evidence and state why the finding is factually insufficient or is so against the great weight and preponderance of the evidence as to be manifestly unjust. In *Ortiz v. Jones*, 917 S.W.2d 770 (Tex. 1996), the Supreme Court reversed because the court of appeals did not discuss and apparently did not consider the evidence supporting the finding. Further, the Supreme Court requires the court of appeals to lay out the relevant facts with regard to factual sufficiency challenges sustained to insure that the appellate court applied the correct method of analysis. *Pool v. Ford Motor Co.,* 715 S.W.2d 629, 635-36 (Tex. 1986). This is an opportunity for an advocate to marshal all the facts, showing that the client's position is the righteous one and that the jury was swayed by some adverse force to find as they did.

c. A Word to the Wise

Don't lose sight of the standards of review for sufficiency of the evidence. Carefully examine your opponent's arguments to insure that the appropriate method of analysis is employed. If an opponent supports a legal sufficiency challenge by presenting a weight of evidence argument, argue it is a concession of the point by the fact that your opponent is making a factual sufficiency argument. In addition, carefully examine the appellate court's opinion to insure that the appropriate method of analysis is employed. If the court of appeals looks at all the evidence when disposing of a legal sufficiency point, challenge it as error on rehearing, and take it up to the Texas Supreme Court on petition for review if it refuses. If the court of appeals looks only at the evidence from one side on a factual sufficiency point, challenge it as error on rehearing, and take it up to the Texas Supreme Court on petition for review that the court of appeals applied the wrong legal standard. Opinions of appellate courts and the arguments of opponents are never perfect, and they can offer golden opportunities for the practitioner with a firm grasp of sufficiency review.

4. Sufficiency Review of Enhanced Burdens of Proof

Enhanced burdens of proof, i.e. clear and convincing evidence, are prevalent in family law, and are repeatedly mentioned as part of tort reform. The burden of proof necessary to recover punitive damages has been elevated from preponderance of the evidence to clear and convincing evidence. TEX.CIV.PRAC. & REM.CODE § 41.003, amended by Acts 1995 Leg., ch. 19, § 1, eff. Sept. 1, 1995. What effect does an enhanced burden of proof have on review of sufficiency of the evidence? There is clearly no effect with regard to legal sufficiency review because the standard is so low -- any evidence. Review of the factual sufficiency of the evidence with regard to an enhanced burden of proof has generated conflicting authority, however.

a. Higher Standard Cases

The El Paso Court of Appeals has adopted an enhanced standard of factual sufficiency review in those cases when the burden of proof at trial was clear and convincing evidence. Citing *Neiswander v. Bailey*, 645 S.W.2d 835, 835-36 (Tex.App.--Dallas 1982, no writ), the court determined it would "consider whether the

evidence was sufficient to produce in the mind of the fact finder a firm belief or conviction as to the truth of the allegation sought to be established." *In Interest of B.R.,* 950 S.W.2d 113, 199 (Tex.App.-- El Paso 1997, no writ). *See also, Lozano v. State,* 958 S.W.2d 925, 928 (Tex.App.--El Paso 1997, no pet.); *In Interest of G.B.R.*, 953 S.W.2d 391, 396 (Tex.App.--El Paso 1997, no writ). The *Neiswander* court had relied on authority from other jurisdictions, and the common sense notion that a higher burden of proof required a stricter standard of review. The standard promulgated in *Neiswander* was "whether the trier of fact could reasonably conclude that the existence of the fact is highly probable." Other courts of appeals adopted this standard. *E.g., Ybarra v. Texas Dept. of Human Servs.,* 869 S.W.2d 574, 580 (Tex.App.--Corpus Christi 1993, no writ); *Neal v. Texas Dept. of Human Servs.,* 814 S.W.2d 216, 222 (Tex.App.--San Antonio 1991, writ denied); *Williams v. Texas Dept. of Human Servs.,* 788 S.W.2d 922, 926 (Tex.App.--Houston [1st Dist.] 1990, no writ); *In re L.R.M.*, 763 S.W.2d 64, 66 (Tex.App.--Fort Worth 1989, no writ); *In re Estate of Glover*, 744 S.W.2d 197, 199 (Tex.App.--Amarillo 1987) (discussing the higher standard of review in dicta), *writ denied per curiam*, 744 S.W.2d 939 (Tex. 1988)(the per curiam opinion did not mention the court of appeals' discussion of the higher standard of review). Another group of opinions from the courts of appeals references the burden of proof at trial with the factual sufficiency standard of review in a fashion that indicated a stricter review than regular factual sufficiency review. *See Doria v. Texas Dept. of Human Resources,* 747 S.W.2d 953, 959 (Tex.App.--Corpus Christi 1988, no writ); *G.M. v. Texas Dept. of Human Resources,* 717 S.W.2d 185, 186 (Tex.App.--Austin 1986, no writ); *Baxter v. Texas Dept. of Human Resources,* 678 S.W.2d 265, 267 (Tex.App.--Austin 1984, no writ).

b. Same Standard Cases

Other courts of appeals have backed away from a higher standard of review for factual sufficiency when the burden of proof at trial was by clear and convincing evidence. This trend seems to begin with *D.O. v. Texas Department of Human Services,* 851 S.W.2d 351, 353 (Tex.App.--Austin 1993, no writ). *See also In the Interest of W.S., R.S., and A.S.,* 899 S.W.2d 772, 776 (Tex.App.--Fort Worth 1995, no writ); *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex.App.--Fort Worth 1995, no writ); *In re A.D.E.,* 880 S.W.2d 241, 245 (Tex.App.--Corpus Christi 1994, no writ); *Oadra v. Stegall*, 871 S.W.2d 882, 892 (Tex.App.--Houston [14th Dist.] 1994, no writ). These decisions rely on *Meadows v. Green,* 524 S.W.2d 509, 510 (Tex. 1975) and *State v. Turner*, 556 S.W.2d 563, 565 (Tex. 1977), which in turn relied on *Omohundro v. Matthews,* 341 S.W.2d 401, 410-11 (Tex. 1960) and *Sanders v. Harder*, 227 S.W.2d 206, 209-10 (Tex. 1950).

Supreme Court authority relied on by the courts of appeals may not be as solid as it has been treated. *Meadows* involved a *legal sufficiency* challenge predicated on a motion for new trial, not a factual sufficiency challenge. 524 S.W.2d at 510; *Green v. Meadows,* 517 S.W.2d 799, 802-803 (Tex.Civ.App.--Houston [1st Dist.] 1974), *rev'd*, 524 S.W.2d 509 (Tex. 1975). The court of appeals in *Meadows* seemed to apply a factual sufficiency review when the language of the opinion is examined in context. It almost appears as if the court of appeals treated "clear and convincing" as a *type* of evidence rather than a burden of proof, in which case they applied a proper standard to an erroneous view of what clear and convincing evidence is, finding there was "no evidence" of a clear and convincing character. The Supreme Court treated the case as if the court of appeals had applied a factual sufficiency review when such was not preserved. *See* 524 S.W.2d at 510. That court clearly stated there are only two standards of review, but the cases relied upon, *Omohundro* and *Sanders* may not say that.

The Supreme Court opinion in *State v. Turner*, also relied on in *D.O. v. Texas Department of Human Resources,* is similarly unclear. There, the trial court had instructed the jury that the burden of proof was clear and convincing evidence, but the court of appeals

reversed on the ground that the appropriate burden was the "beyond a reasonable doubt" burden of criminal prosecutions. The Supreme Court reversed, holding that the burden at trial was by a preponderance of the evidence and again stating there were but two standards of review. The character of the Supreme Court's opinion lends itself more to the proposition that there was no intermediate *burden of proof*, rather than the proposition that there was no intermediate *standard of review* for issues predicated on an intermediate burden of proof.

Meadows and *Turner* both quoted an extensive passage from *Sanders v. Harder,* 148 Tex. 593, 227 S.W.2d 206, 209-10 (1950):

> In certain types of cases courts have frequently pointed out that the facts must be established by clear and convincing evidence. That rule . . . arose at a time when such suits were cognizable only in courts of chancery where matters of fact, as well as of law, were tried by the chancellor. Verdicts of juries in those courts were advisory only. In our blended system the field in which that rule operates is very narrow. In practical effect it is but an admonition to the judge to exercise great caution in weighing the evidence. No doctrine is more firmly established than that the issues of fact are resolved from a preponderance of the evidence, and special issues requiring a higher degree of proof than a preponderance of the evidence may not be submitted to a jury. In ordinary civil cases trial courts and Courts of Civil Appeal may set aside jury verdicts and grant new trials when, in their opinion, those findings, though based upon some evidence, are against the great weight and preponderance of the evidence, but they may not render judgment contrary to such findings. In those cases in which the "clear and convincing" rule is applicable if, in the opinion of the trial judge, the evidence in support of the verdict does not meet the test of that rule, he may set it aside and order a new trial; but he should not render judgment contrary thereto. (citations omitted).

This statement shows that a "clear and convincing" burden of proof affects, if at all, only factual sufficiency review, because the only relief allowed, remand for new trial, is the only available remedy when a factual sufficiency point is sustained. The same passage indicates that there is another standard for review of factual sufficiency when there is a higher burden of proof, because the passage's reference to "that rule" seems to be to the rule of clear and convincing evidence, and thus, the implication that there is some other standard associated with it. The predicate in *Sanders* was a judgment non obstante veredicto rendered by the trial court and affirmed by the court of civil appeals, and improper in the factual sufficiency review context, independent of the standard of that review.

Finally, the *Omohundro* case says nothing about the standard of review. The Supreme Court treated the issue, couched in the terms "the jury's findings to certain special issues are not supported by clear and convincing evidence," as jurisdictional. *Omohundro v. Matthews,* 161 Tex. 367, 341 S.W.2d 401, 410-11 (Tex. 1960). The Court stated that this contention was an attack on the sufficiency of the evidence, over which it had no jurisdiction. The Court, citing *Sanders*, stated that the clear and convincing test was merely another method of measuring the weight of the evidence, and thus is also a fact question. Worthy of note is that the petitioner's application for writ of error was predicated on a motion for judgment non obstante veredicto, which would not preserve factual sufficiency questions for review, and that it did not attack the court of civil appeals' disposition on the basis of an error of law.

Taken literally, the Supreme Court's statement merely acknowledges that the clear and convincing standard is a different burden of proof at trial, and that it affects only factual sufficiency review. The statement provides no foundation for later courts' reliance on it for the proposition that there are only two standards of sufficiency review.

XI. BRIEFING IN THE COURT OF APPEALS AND SUPREME COURT

A. General Requirements

1. Form of Documents

TRAP 9 describes in great detail the form for documents filed in an appellate court. TRAP 9.4 requires that documents must

- be on 8½ by 11 inch paper with at least one-inch margins all around,
- be double-spaced although footnotes, block quotations, short lists, and issues or points may be single-spaced,
- be printed in standard 10-character-per-inch (cpi) nonproportionally spaced Courier typeface or in 13-point or larger proportionally spaced typeface; however, if the document is printed in a proportionally spaced typeface, footnotes may be printed in typeface no smaller than 10-point,
- be bound so that it will lie flat when opened, but covers must not be plastic or be red, black or dark blue,
- the front cover must contain (i) the case style, (ii) the case number, (iii) the title of the document being filed, (iv) the name of the party filing the document, and (v) the name, mailing address, telephone number, fax number, and State Bar of Texas number of the lead counsel for the filing party, and
- if a party requests oral argument in the court of appeals, the request must appear on the front cover of the party's first brief.

2. Certificate of Service

The rule also states the specific requirements for a certificate of service. The certificate must be signed by the person who made the service, the date and manner of service, the name and address of each person served, and if the person served is a party's attorney, the name of the party represented by the attorney. TRAP 9.5(e).

3. Motions in the Appellate Courts

TRAP 10 explains most of the common requirements for motions in the appellate courts. *It also adds a certificate of conference requirement to all motions in civil cases.* TRAP 10.1(a)(5). The rule permits a party to file a response to a motion at any time before the court rules on the motion without leave of court. TRAP 10.1(b).

B. Briefing in the Court of Appeals

While the briefing rule was rewritten in 1997, the content is not substantially different. However, the briefing rule must be read in conjunction with TRAP 9, which dictates the form of documents filed in the appellate courts. In addition, although the briefing rules are liberally construed, substantial compliance is required. *See, e.g. Harkins v. Dever Nursing Home*, 999 S.W.2d 571, 573 (Tex. App. – Houston [14th Dist.] 1999, no pet.) (Failure to comply with the briefing rules may result in court striking brief). *See generally* John Hill Cayce, Jr., Anne Gardner, & Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 BAYLOR L.REV. 867, 942-71(1997).

1. Form of Briefs

A party may state either *issues presented or points of error*. TRAP 38.1(e). The brief must have a statement of facts, stating "concisely and without argument the

facts pertinent to the issues presented . . .." TRAP 38.1(f). The brief must have a summary of the argument, which should be a "succinct, clear, and accurate statement of the arguments made in the body of the brief." TRAP 38.1(g).

2. Cross-points

The provisions of Civil Procedure Rule 324(c) regarding cross-points to vitiate the verdict are moved to TRAP 38.2(b), but the substance is not changed.

3. Reply Briefs

A reply brief is now allowed. TRAP 38.3. However, an appellate court may consider and decide the case before a reply brief is filed.

4. Appendix

The brief should have an appendix containing a copy of the trial court's judgment, the jury charge and verdict, or findings of fact and conclusions of law, and the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based. The appendix may include other items. TRAP 38.1(j). An appendix to the appellee's brief does not need to include any item already contained in an appendix filed by the appellant. TRAP 38.2(a)(C).

5. Length

The page limit for each of the appellant's and the appellee's briefs remain at 50. A reply brief may not exceed 25 pages. *But the aggregate number of pages of the briefs filed by a party may not exceed 90 pages.* TRAP 38.4.

6. Time to File

In an ordinary appeal, the appellant's brief is due 30 days after the clerk's record is filed or 30 days after the reporter's record is filed, whichever is later. TRAP 38.6(a) Under the former rule, the appellant's brief was due 30 days after "the filing of the transcript and statement of facts." Former rule 74(k). The appellee's brief is now due 30 days after the appellant's brief is filed, rather than 25 days. TRAP 38.6(b); *see also* former rule 74(m). However, there is no rule permitting the filing of a motion for extension of time to file an appellee's brief. Each court of appeals has a different procedure for extending time to file an appellee's brief -- some still require the filing of a motion while others permit you to grant yourself an extension. Check with the particular court in which your appeal is pending. The appellant's reply brief is due 20 days after the date the appellee's brief is filed. TRAP 38.6(c)

7. Cases Recorded Electronically

Specific provisions are included for cases recorded electronically. *See* TRAP 38.5 The record in a case recorded electronically is due at the same time as the record in any other case. Formerly, the record in a case recorded electronically was due earlier than the record in other cases.

8. Parallel Briefing

Since TRAP 25 requires perfection of an appeal by any party who seeks to alter the trial court judgment, there may be multiple appellants in any case. In light of the provision requiring an *appellant* to file an appellant's brief (*see* TRAP 38.6(a) "*an* appellant must file a brief...), it is clear that each appellant must file an appellant's brief. Each appellee may then file a brief in response, to which each appellant may file a reply brief. In other words, there may be parallel briefing in the courts of appeals. This is a significant change in procedure.

As previously noted, a party is limited to 90 pages of briefing. TRAP 38.4. Thus, if a party is an appellant, he or she may file a 50 page brief and a 25 page reply. If that party also is an appellee, he or she may file a 50 page response to the appellant's brief. Taken together, that party may file a total of 125 pages of briefing — except for the provision limiting the party to 90 pages -- "the aggregate

number of pages of all briefs filed by a party must not exceed 90...." TRAP 38.4.

9. Dismissal

When dismissing an appeal either by agreement of the parties or on motion by appellant, a court of appeals now has discretion to determine whether to withdraw an opinion it has already issued. TRAP 42.1. Although the new rule provides that an agreement or motion for dismissal may not be conditioned on withdrawal of an opinion, practitioners who want the opinion withdrawn should request, if not insist, that the opinion be withdrawn based upon creative yet arguably legitimate reasons. TRAP 42.1.

C. Motions for Rehearing

The motion for rehearing is no longer a jurisdictional prerequisite to Supreme Court review and is not required to preserve error. TRAP 49.9. However, a preservation concept is included in the petition for review rule.

> If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.

TRAP 53.2(f).

A motion for rehearing may be filed in the court of appeals and, if filed, will affect the time for filing a petition for review in the Texas Supreme Court. *See* TRAP 53.7(a)(2). A party who files a petition for review may not later file a motion for rehearing in the court of appeals. But any other party may file a motion for rehearing even if a petition for review has already been filed. TRAP 53.7(b). If a motion for rehearing is filed after a petition for review was filed, the petitioner must inform the Supreme Court of the filing of the motion for rehearing. TRAP 53.7(b). A motion for rehearing may not be longer than 15 pages. TRAP 49.10.

D. Appealing to the Supreme Court

1. Conceptual Differences

Texas Supreme Court practice has radically changed in the past several years. *See generally* John Hill Cayce, Jr., Anne Gardner, & Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 BAYLOR L.REV. 867, 990 (1997). The application for writ of error is replaced by a 15 page petition for review focused predominantly, if not exclusively, on why the Supreme Court should exercise discretion to hear the case. Although most of the discussion has focused on how to "squeeze" an application for writ of error into a 15 page petition for review, the most significant change is conceptual: "[t]he argument should state the reasons why the Supreme Court should exercise jurisdiction to hear the case with specific reference to the [following] factors...." TRAP 53.2(i).

- Whether the justices of the court of appeals disagree on an *important* point of law.
- Whether there is a conflict between the courts of appeals on an *important* point of law.
- Whether a case involves the construction or validity of a statute.
- Whether a case involves constitutional issues.
- Whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected.
- Whether the court of appeals has decided an *important* question of state law that should be, but has not been, resolved by the Supreme Court.

TRAP 56.1(a) (emphasis added). *See generally* James A. Vaught & R. Darin Darby,

Internal Procedures in the Texas Supreme Court Revisited: The Impact of the Petition for Review and Other Changes, 31 TEX. TECH. L.REV. 63, 74-75 (2000). These factors are very similar to the following current jurisdictional requirements in section 22.001(a) of the Government Code:

- A case in which the justices of a court of appeals disagree on a question of law material to the decision;
- A case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;
- A case involving the construction or validity of a statute necessary to a determination of the case;
- A case involving state revenue;
- A case in which the railroad commission is a party; and
- any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction....

TEX. GOV. CODE § 22.001(a)(1)-(6).

2. Procedural Differences

The major procedural differences in practice in the Supreme Court under the new appellate rules include

a. Filing the Petition

The petition for review must be filed *in the Supreme Court* rather than the court of appeals. If the petition for review is mistakenly filed in the court of appeals, the petition is deemed to have been timely filed the same day with the Supreme Court clerk, and the court of appeals clerk must immediately send the petition to the Supreme Court. TRAP 53.7(g).

The petition must be filed within 45 days after the date of the court of appeals judgment or within 45 days after the date of the court of appeals' last ruling on all timely filed motions for rehearing. TRAP 53.7(a). Formerly, the application for writ of error was filed within 30 days after the ruling on all timely filed motions for rehearing. See former rule 130(b).

b. Petition for Review

The petition must state, without argument, the basis of the Court's jurisdiction. TRAP 53.2(e). The petitioner may state either issues presented or points of error. TRAP 53.2(f). The petition must have a statement of facts including the procedural background and a summary of the argument. TRAP 53.2(g) & (h). The petitioner is not required to argue all issues included in the statement of issues presented. TRAP 53.2(I). A party who seeks to alter the court of appeals' judgment must file a petition for review. TRAP 53.1. The rule incorporates the holding of *McKelvy v. Barber*, 381 S.W.2d 59 (Tex. 1964), and its progeny, regarding grounds for lesser relief not addressed by the court of appeals. TRAP 53.3(c)(3) & 53.4.

c. Appendix and Record

The petition must be accompanied by an appendix containing the judgment of the trial court, the jury charge and verdict or the findings of fact and conclusions of law, the opinion and judgment of the court of appeals, and the text of any relevant rule, regulation, ordinance, statute, or constitutional provision on which the suit is based. TRAP 53.2(k)(1). Other items may be included.

The record is not sent to the Supreme Court unless requested by the Court (although the statement of facts and argument must be supported by "record references"). The record may be requested by the Supreme Court at any

time (before or after granting the petition); but it is not automatically filed as was the case in current practice. TRAP 54.1.

d. Response and Reply

The response is filed in the Supreme Court within 30 days after the petition is filed. TRAP 53.7(d). A party may file a waiver of response. Even if a waiver is filed, the petition will not be granted until a response has been filed or requested by the Texas Supreme Court. TRAP 53.3. The Court encourages practitioners to file a waiver of response.

A reply to the response is permitted. However, the Court may consider and decide the case before a reply brief is filed. TRAP 53.5. The reply must be filed within 15 days after the response is filed. TRAP 53.7(e).

e. Length -- Petition, Response and Reply

The petition and response are limited to 15 pages. The reply is limited to 8 pages. TRAP 53.6.

f. Extension of Time

An extension of time is available to file a petition, response, or reply. TRAP 53.7(f).

g. Briefs on the Merits

The Court may, with or without granting the petition, request briefs on the merits. TRAP 55.1. The petitioner's brief on the merits is limited to 50 pages, as is the response. A reply to the response is limited to 25 pages. TRAP 55.6. The Court may set a briefing schedule. If it doesn't, the petitioner's brief on the merits is due 30 days after the Court's request; the respondent's brief is due "20 days after receiving the petitioner's brief"; and the reply is due "15 days after receiving the respondent's brief." TRAP 55.7.

h. Motions for Rehearing

A motion for rehearing may be filed with the Supreme Court within 15 days from the date when the Court renders judgment or makes an order disposing of a petition for review. TRAP 64.1. A motion for rehearing or response may not be longer than 15 pages. TRAP 64.6.

E. Original Proceedings

All original proceedings in the Courts of Appeals (both civil and criminal) and in the Supreme Court are governed by TRAP 52 and are treated alike.

1. Motion for Leave Abolished

The biggest change in 1997 was that a motion for leave to file petition for writ of mandamus is no longer required. Under the former rules, a party was required to file both a motion for leave and a petition. *See* former rule 121(a)(1) and (2). They were both presented to the clerk at the same time. The motion for leave was filed by the clerk, but the petition was only received by the clerk, pending the granting of the motion for leave. This legal fiction is no longer necessary under the new rules — the party simply files a petition for writ of mandamus and the court acts on that petition.

2. Style

The style is changed. Formerly, the case was styled as the relator v. the respondent — usually a judge or court of appeals. The judges were not enchanted with having their names on cases since they had no interest in the action. So the new rule provides that the petition will be styled *In re [name of relator]*. TRAP 52.1.

3. Petition – Length

The petition will generally follow the form of a brief to the court of appeals, or a petition for review to the Supreme Court. In the courts of appeal, the petition is limited to 50 pages. TRAP 52.6. In the Supreme Court, the petition is limited to 15 pages, TRAP 52.6, but the Court may request further briefing as it would in a petition for review. TRAP 52.8(b)(2).

4. Response -- Length

A party may file a response to the petition, but it is not required. TRAP 52.4. The length of the response is limited 50 pages in the courts of appeal or 15 pages in the Texas Supreme Court. TRAP 52.6 If a response is filed, the petitioner may file a reply. TRAP 52.5 The reply may be no more than 8 pages. TRAP 52.6.

The court will not grant relief -- other than temporary relief -- without first receiving a response (or at least asking for one and not getting it). TRAP 52.4. Furthermore, if the court is of the tentative opinion that relator is entitled to the relief sought or that a serious question concerning the relief requires further consideration, the court (1) must request a response if one has not been filed, (2) may request full briefing, and (3) may set the case for oral argument. TRAP 52.8(b).

5. Appendix and Record

TRAP 52.3(j) and 52.7 seem to create an artificial distinction between an "appendix" and a "record." An "appendix" is required and must contain (1) a certified or sworn copy of any order complained of, or any other document showing the matter complained of, (2) any order or opinion of the court of appeals, if the petition is filed in the Supreme Court, and (3) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based. TRAP 52.3(j)

A "record" is required and must contain (1) a certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding, and (2) a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced in connection with the matter complained of. TRAP 52.7(a). After the record is filed, the relator or any other party to the proceeding may file additional materials for inclusion in the record. TRAP 52.7(b).

6. Temporary Relief

The relator may file a motion for temporary relief requesting that the underlying proceeding be stayed or for any other temporary relief while the petition is pending. *However, the relator must notify or make a diligent effort to notify all parties by expedited means (i.e., by telephone or fax) that a motion for temporary relief has been or will be filed and must certify to the court that relator has complied with this requirement before temporary relief will be granted.* TRAP 52.10(a).

7. Motion for Rehearing

The new rules specifically allow a motion for rehearing in an original proceeding. TRAP 52.9. The former rule neither permitted nor prohibited a motion for rehearing, but it was common practice to file it. A motion for rehearing may not be longer than 15 pages. TRAP 52.9.

XII. PARENTAL NOTIFICATION STATUTE - CHAPTER 33, TEXAS FAMILY CODE

A. Parental Notice

A physician may not perform an abortion on a pregnant unemancipated minor unless certain conditions are satisfied.

The physician performing the abortion gives at least 48 hours actual notice, in person or by telephone, of the physician's intent to perform the abortion to a parent of the minor, if the minor has no managing conservator or guardian, or a court-appointed managing conservator or guardian. The 48 hours actual notice requirement may be waived by an affidavit of a parent of the minor, if the minor has no managing conservator or guardian, or a court-appointed managing conservator or guardian. If a parent, managing conservator or guardian cannot be notified after a reasonable effort, a physician may perform an abortion if the physician gives 48 hours constructive notice, by certified mail, restricted delivery, sent to the last known address, to the parent, managing conservator or guardian. The 48 hour period begins when the notice is mailed. If

the a parent, managing conservator or guardian is not notified within the 48-hour period, the abortion may proceed even if the notice by mail is not received.

A judge of a court having probate jurisdiction, a judge of a county court of law, a judge of a district court or a court of appellate jurisdiction (on appeal) issues an order authorizing the minor to consent to the abortion. In addition, a probate court, county court of law, district court or court of appeals, by its inaction, constructively authorizes the minor to consent to the abortion.

The physician performing the abortion concludes that on the basis of the physician's good faith clinical judgment, a condition exists that complicates the medical condition of the pregnant minor and necessitates the immediate abortion of her pregnancy to avert her death or to avoid a serious risk of substantial and irreversible impairment of a major bodily function and certifies in writing to the Texas Department of Health and in the patient's medical record the medical indications supporting the physician's judgment that the above-described circumstances exist.

A physician who intentionally performs an abortion on a pregnant unemancipated minor in violation of Chapter 33 commits a criminal offense punishable by a fine not to exceed $10,000. It is a defense to prosecution under Chapter 33 that the minor falsely represented her age or identity to the physician to be at least 18 years of age by displaying an apparently valid governmental record of identification such that a reasonable person under similar circumstances would have relied on the representation. However, the defense does not apply if the physician is shown to have had independent knowledge of the minor's actual age or identity or failed to use due diligence in determining the minor's age or identity.

B. Judicial Approval

A pregnant minor who wishes to have an abortion without notification to one of her parents, her managing conservator, or her guardian may file an application for a court order authorizing the minor to consent to the performance of an abortion without notification to either of her parents or a managing conservator or guardian. The application may be filed in any county court at law, court having probate jurisdiction, or district court, including a family district court, in this state. A filing fee is not required and court costs may not be assessed against a minor filing an application.

The trial court shall appoint a guardian ad litem for the minor. If the minor has not retained an attorney, the court shall appoint an attorney to represent the minor. If the guardian ad litem is an attorney admitted to the practice of law in this state, the court may appoint the guardian ad litem to serve as the minor's attorney. The court shall rule on an application and shall issue written findings of fact and conclusions of law not later than 5 p.m. on the second business day after the date the application is filed with the court. On request by the minor, the court shall grant an extension of the period specified by this subsection. If a request for an extension is made, the court shall rule on an application and shall issue written findings of fact and conclusions of law not later than 5 p.m. on the second business day after the date the minor states she is ready to proceed to hearing. If the court fails to rule on the application and issue written findings of fact and conclusions of law within the period specified, the application is deemed to be granted and the physician may perform the abortion as if the court had issued an order authorizing the minor to consent to the performance of the abortion without notification.

The court shall determine by a preponderance of the evidence whether the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents or a managing conservator or guardian, whether notification would not be in the best interest of the minor, or whether notification may lead to physical, sexual, or emotional abuse of the minor. If the court finds that the minor is mature and sufficiently well informed, that notification would not be in the minor's best interest, or that notification may lead to physical, sexual, or emotional abuse of the minor, the court shall enter an order authorizing the minor to consent to the performance of the abortion without notification to either of her parents or a managing conservator or guardian and shall execute the required forms.

If the court finds that the minor does not meet the these requirements, the court may not authorize the minor to consent to an abortion without the notification. The court shall keep a record of all testimony and other oral proceedings in the action. The court shall enter judgment on the application immediately after the hearing is concluded. The court may not notify a parent, managing conservator, or guardian that the minor is pregnant or that the minor wants to have an abortion. The court proceedings shall be conducted in a manner that protects the anonymity of the minor.

In *In re Jane Doe*, 43 Tex. Sup. Ct. J. 454 (February 25, 2000), a pregnant, unmarried minor sought an order from the trial court allowing her to consent to an abortion without having to notify either of her parents. At the conclusion of a hearing, the trial court denied Jane Doe's application and issued written findings and conclusions in accordance with Chapter 33. Jane Doe appealed to the court of appeals, which affirmed the trial court's judgment without an opinion. She then appealed to the Texas Supreme Court contending that she has conclusively established that she is mature and is sufficiently well informed to make a decision about terminating her pregnancy without notifying her parents.

The Texas Supreme Court set forth the standard of proof for determining whether the minor is mature and sufficiently well informed:

> We conclude that a trial court should take into account the totality of circumstances the minor presents in determining whether she is mature and sufficiently well informed. In order to establish that she is sufficiently well informed, the minor must make, at a minimum, three showings.
>
> First, she must show that she has obtained information from a health-care provider about the health risks associated with an abortion and that she understands those risks. That would include an understanding of the risks associated with the particular stage of the minor's pregnancy.
>
> Second, she must show that she understands the alternatives to abortion and their implications. As with any medical procedure, part of making an informed decision is knowing the available alternatives. A minor should be able to demonstrate that she has given thoughtful consideration to her alternatives, including adoption and keeping the child. She should also understand that the law requires the father to assist in the financial support of the child. She should not be required to justify why she prefers abortion above other options, only that she is fully apprised of her options.
>
> Third, she must show that she is also aware of the emotional and psychological aspects of undergoing an abortion, which can be significant if not severe for some women. She must also show that she has considered how this decision might affect her family relations. Although the minor need not obtain this information from licensed, professional counselors, she must show that she has received information about these risks from reliable and informed sources, so that she is aware of and has considered these aspects of the abortion procedure.
>
> While a minor must demonstrate a knowledge and appreciation of the various considerations involved in her decision, she should not be required to obtain information or other services from any particular provider. Nor should she be required to meet with or review materials that advocacy or religious groups provide. The inquiry is whether she has obtained information on the relevant considerations from reliable sources of her choosing that enable her to make a thoughtful and informed decision.
>
> A determination of maturity necessarily involves more trial court discretion. However, if a court determines that a minor has not demonstrated that she is mature enough to make a decision to undergo an abortion, then the court should make specific findings concerning its determination so that there can be meaningful review on appeal. Similarly, if a court concludes that a minor is not credible in some respect that directly relates to its determination of maturity,

> the court should make specific findings in that regard as well.
>
> A minor who can show that she is sufficiently well informed may also establish in the process that she is mature. In making a determination of maturity, there are, however, some criteria that should not be relied upon as conclusively showing immaturity. The United States Supreme Court [in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, (1982)] has said that one of those is the fact, standing alone, that the pregnant female is a minor. That Court has also admonished that states and courts "may not make a blanket determination that all minors . . . are too immature to make this decision or that an abortion never may be in the minor's best interests without parental approval." Akron I, 462 U.S. at 440. A child's age, educational background or grades in school, while indicative of some level of maturity, are not conclusive on the issue of maturity. Nor is participation in extra-curricular activities. It should also go without saying that a minor's socio-economic status should not bear on the decision.

Id. at 459-60 (citations omitted).

In *In re Jane Doe 2*, ___ Tex. Sup. Ct. J. ___ (March 7, 2000), a pregnant, unmarried minor sought an order from the trial court allowing her to consent to an abortion without having to notify either of her parents. At the conclusion of a hearing, the trial court denied Jane Doe's application and issued the following written findings and conclusions: "(1) that the minor was not mature and sufficiently well informed to decide to have an abortion without notifying either of her parents; (2) that it was in the minor's "best interest to notify her parents"; and (3) that there was "no evidence that notification of [the minor's] parents may lead to physical, sexual, or emotional abuse . . . ." *Id.* at ____. Jane Doe appealed to the court of appeals, which affirmed the trial court's judgment without an opinion. She then appealed to the Texas Supreme Court challenging the trial court's denial of her application on the ground that "notification would not be in [her] best interests . . . ."

The Texas Supreme Court set forth the factors for determining whether it is in the minor's best interest to notify her parents. These factors include the following:

> (1) the minor's emotional or physical needs; (2) the possibility of emotional or physical danger to the minor; (3) the stability of the minor's home and whether notification would cause serious and lasting harm to the family structure; and (4) the relationship between the parent and the minor and the effect of notification on that relationship. An additional factor that courts in other jurisdictions have considered is whether notification may lead the parents to withdraw emotional and financial support from the minor. This list is not exhaustive, and in making the best-interests determination the trial court should consider all relevant circumstances. We note, however, that a minor's generalized fear of telling her parents does not, by itself, establish that notification would not be in the minor's best interests.

Id. at ____.

C. Appeal

A minor whose application for judicial approval is denied may appeal to the court of appeals having jurisdiction over civil matters in the county in which the application was filed. On receipt of a notice of appeal, the clerk of the court that denied the application shall deliver a copy of the notice of appeal and record on appeal to the clerk of the court of appeals. On receipt of the notice and record, the clerk of the court of appeals shall place the appeal on the docket of the court. A filing fee is not required and court costs may not be assessed against a minor filing an appeal. The court of appeals shall rule on an appeal under this section not later than 5 p.m. on the second business day after the date the notice of appeal is filed with the court that denied the application. On request by the minor, the court shall grant an extension of the period specified by this subsection. If a request for an extension is made, the court shall rule on the appeal not later than 5 p.m. on the second business day after the date the minor states she is ready to proceed. If the court

of appeals fails to rule on the appeal within the period specified by this subsection, the appeal is deemed to be granted and the physician may perform the abortion as if the court had issued an order authorizing the minor to consent to the performance of the abortion without notification.

A ruling of the court of appeals issued under Chapter 33 is confidential and privileged and is not subject to disclosure under Chapter 552, Government Code concerning public information, or discovery, subpoena, or other legal process. The ruling may not be released to any person but the pregnant minor, the pregnant minor's guardian ad litem, the pregnant minor's attorney, another person designated to receive the ruling by the minor, or a governmental agency or attorney in a criminal or administrative action seeking to assert or protect the interest of the minor.

An expedited confidential appeal shall be available to any pregnant minor to whom a court of appeals denies an order authorizing the minor to consent to the performance of an abortion without notification to either of her parents or a managing conservator or guardian.

In *In re Jane Doe*, 43 Tex. Sup. Ct. J. 454 (February 25, 2000), the Texas Supreme Court held that the standard of review that appellate courts are to apply in reviewing trial court rulings concerning "whether the minor is mature and sufficiently well informed, is legal and factual sufficiency of the evidence, not abuse of discretion. In *In re Jane Doe 2*, ___ Tex. Sup. Ct. J. ___ (March 7, 2000), the Texas Supreme Court held that the standard of review that appellate courts are to apply in reviewing trial court rulings regarding whether notification is in the minor's best interests is abuse of discretion. In *In re Jane Doe 2*, ___ Tex. Sup. Ct. J. ___ (March 7, 2000), the Texas Supreme Court held that the standard of review that appellate courts are to apply in reviewing trial court rulings regarding whether notifying her parents may cause them to abuse her emotionally or physically, is legal and factual sufficiency of the evidence.

D. Miscellaneous

A trial court may issue an order requiring the State to pay (1) the cost of any attorney ad litem and any guardian ad litem appointed for the minor, (2) the costs of court associated with the application or appeal, and (3) any court reporter's fees incurred. In addition, a guardian ad litem appointed under Chapter 33 and acting in the course and scope of the appointment is not liable for damages arising from an act or omission of the guardian ad litem committed in good faith.

XIII. MISCELLANEOUS

A. Appellate Sanctions

1. Appeals and Petitions for Review

TRAPS 45 and 62 govern sanctions for petitions for review in the Supreme Court and appeals in the courts of appeal. Under these rules, the court can award a sanction if the "appeal is frivolous." The sanction is awarded to "each prevailing party" and there is no limit on the amount of the sanction. The new rules do impose a requirement of "notice and a reasonable opportunity for response." TRAPS 45 & 62. See John Hill Cayce, Jr., Anne Gardner, & Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 BAYLOR L.REV. 867, 1014 (1997). In *Swate v. Crook*, 991 S.W.2d 450 (Tex. App. -- Houston [1st Dist.] 1999, pet. denied), the Court of Appeals sanctioned the appellant/father for bring a frivolous appeal and awarded appellee/mother $5,000.00 in attorney's fees as damages. In awarding sanctions, the Court explained that sanctions "will be imposed only if the record clearly shows the [appellant] father has no reasonable expectation of reversal, and the [appellant] father has not pursued the appeal in good faith. *Id.* at 455. Four factors which tend to indicate that an appeal is frivolous include: (1) the unexplained absence of a statement of facts; (2) the unexplained failure to file a motion for new trial when it is required to successfully assert factual sufficiency on appeal; (3) a poorly written brief raising no arguable points of error; and (4) the appellant's unexplained failure to appear at oral argument. *American Paging of Texas, Inc. v. El Paso Paging, Inc.*, 9 S.W.3d 237, 241 (Tex. App. – El Paso 1999, pet. filed)

2. Original Proceedings

The new rules add a sanction applicable to original proceedings. The standard is whether *the party or attorney* is "not acting in good faith." TRAP 52.11. The rule sets out several criteria for determining whether the person was acting in good faith. They include whether the petition is "clearly groundless"; whether the petition was filed "solely for delay of an underlying proceeding"; whether the petition or appendix "grossly misstat[es] or omit[s] an obviously material fact" or if the appendix or record is "clearly misleading because of the omission of obviously important and material evidence or documents." TRAP 52.11.

B. Estoppel to Appeal

This is also known as the "acceptance of benefits doctrine." A litigant cannot treat a judgment as both right and wrong. Thus, a party who has voluntarily accepted the cannot appeal from that judgment. *Carle v. Carle*, 234 S.W.2d 1002, 1004 (Tex. 1950). The "acceptance of benefits doctrine" applies in direct appeals, direct appeals by writ of error (now restricted appeals) and equitable bill of review proceedings. *See Carle v. Carle*, 234 S.W.2d at 1003 (direct appeal); *Bloom v. Bloom*, 935 S.W.2d 942, 946-47 (Tex. App. -- San Antonio 1996, no writ) (direct appeal by writ of error); *Newman v. Link*, 889 S.W.2d 288, 289 (Tex. 1994) (bill of review). In order to consider whether a party is estopped from appealing, the record must reflect the relevant facts showing voluntary acceptance of the benefits of the judgment. *Rogers v. Rogers*, 806 S.W.2d 886, 889 (Tex App. -- Corpus Christi 1991, no writ); *Miller v. Miller*, 569 S.W.2d 592, 593 (Tex. Civ. App. -- San Antonio 1978, no writ). There are two exceptions to the "acceptance of benefits doctrine" even when the appealing party accepts benefits under the judgment. First, the "entitlement exception" which applies when the appealing party accepts nothing more than what he or she would be entitled to receive on retrial. *Carle v. Carle*, 234 S.W.2d at 1004. *See Balaban v. Balaban*, 712 S.W.2d 775 (Tex. App. -- Houston [1st Dist.] 1986, writ ref'd n.r.e.). Second, the "economic necessity exception" which applies when the acceptance of benefits is not voluntary because the appealing party is driven to accept benefits out of economic necessity. *See Carle v. Carle*, 234 S.W.2d at 1004; *Gonzalez v. Gonzalez*, 614 S.W.2d 203 (Tex. Civ. App. -- Eastland 1981, writ dism'd w.o.j.).

The "acceptance of benefits doctrine" frequently arises in divorce cases because a spouse tends to take and use the property awarded to him or her in the divorce while appealing from the divorce judgment. *See, e.g., Roye v. Roye*, 531 S.W.2d 242, 244 (Tex.Civ. App. -- Tyler 1975, no writ); *Nixon v. Nixon*, 348 S.W.2d 434, 440-41 (Tex.Civ. App. -- Houston [1st Dist.] 1961, writ ref'd n.r.e.). However, even if an appealing party accepts a portion of a divorce judgment, the appealing party is not necessarily estopped from appealing the entire judgment. In *Roa v. Roa*, 970 S.W.2d 163, 166 (Tex. App. -- Fort Worth 1998, no pet.), the appellate court held that even though the appealing party had accepted the decree of divorce and division of property, she had not accepted those portions of the judgment addressing child custody, visitation, and support. The appellate court also recognized that issues related to the custody of children are severable from the remainder of a divorce decree. *Id.*

In addition, Texas courts have declined to consider an appeal from a custody decree when the appealing party refuses to obey the adverse judgment. *See Baker v. Baker*, 588 S.W.2d 677 (Tex. Civ. App. -- Eastland 1979, writ ref'd n.r.e.).

C. Interlocutory Appeals

Temporary orders, temporary restraining orders and temporary injunctions are not appealable orders. TEX. FAMILY CODE §§ 6.507, 109.001(c). *See Dancy v. Daggett*, 815 S.W.2d 548, 549 (Tex. 1991). An order that appoints or modifies an existing conservatorship, that grants or denies a motion to terminate the parent-child relationship or that adjudicates paternity is appealable. *See In re Hidalgo*, 938

S.W.2d 492 (Tex. App. -- Texarkana 1996, no writ); *In re M.C.*, 917 S.W.2d 268 (Tex. 1996); *Dreyer v. Green*, 871 S.W.2d 697 (Tex. 1993). Appellate courts disagree concerning whether a protective order is an appealable order. *See Normand v. Fox*, 940 S.W.2d 401 (Tex. App. -- Waco 1997, no writ) (not appealable); *James v. Hubbard*, 985 S.W.2d 516 (Tex. App. -- San Antonio 1998, no pet.) (appealable); *Winsett v. Edgar*, 1999 WL 962497 (Tex. App. – Fort Worth 1999, no pet.) (appealable).

D. Local Rules

Most of the courts of appeal have local rules or "guidelines"which govern or guide the local practice before the particular courts. It is important to read and follow these rules. Many of the local rules are available on-line at "www.courts.state.tx.us/appcourt.htm".