BOTTOM LINE APPELLATE ISSUES: POST-RENDITION MOTIONS

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I. SCOPE OF ARTICLE

This article is intended to address bottom line appellate issues for practitioners beginning after the trial judge makes his/her decision and before he or she has signed a judgment. It will discuss pre-judgment motions such as motions for directed verdict, motions for judgment on the verdict, motions for judgment notwithstanding the verdict and motions to disregard jury findings. This article will also discuss post-judgment motions such as motions for new trial and motions to modify, correct or reform the judgment as well as findings of fact and conclusions of law. It includes a brief discussion of the appellate timetables. The article's appendix includes checklists/timetables for findings of fact, motion for new trial, and notice of appeal which can be incorporated into a trial notebook. 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. PRE-JUDGMENT MOTIONS

The appellate process often, if not always, begins prior to the rendition of judgment or the return of the verdict. There are many situations in which prejudgment and post-judgment motions affect the appellate process.

For example, in the typical case, when the effect of the verdict or ruling is clear, the party entitled to judgment drafts the judgment and submits it to the court. TEX.R.CIV.P. 305. In some instances, however, the trial court may draft the judgment and sign it before counsel has the opportunity to file motions or circulate a proposed form of judgment. The latter occurrence can cause a variety of problems, and counsel should promptly determine whether viable questions of law exist in the rendition of judgment and which post-verdict motions are necessary or advisable.

A. Directed Verdict

1. In General

A "directed verdict," also called an "instructed verdict," is commonly defined as the action taken by a trial judge in a jury trial to decide the issues in the case without allowing them to be submitted to the jury because, as a matter of law, the party with the burden of proof has failed to make a prima facie case for jury consideration. *See, e.g.*, *Nassar v. Hughes*, 882 S.W.2d 36, 38 (Tex.App.–Houston [1st Dist.] 1994, writ denied).

Thus, a motion for directed verdict anticipates a jury verdict and is not properly employed in a nonjury case. *Homme v. Varing*, 852 S.W.2d 74, 77 (Tex.App.–Beaumont 1993, no writ). A "directed verdict" urged to the trial court is more properly termed a "motion for judgment." *Grounds v. Tolar I.S.D.,* 856 S.W.2d 417, 422, n. 4 (Tex. 1993) (Gonzalez, J., concurring) (technically, the use of the term "directed verdict" in a bench trial is incorrect, because there is no jury to direct).

Furthermore, while a partial instructed verdict is not expressly contemplated by the Texas Rules of Civil Procedure, it has been employed by trial courts as a convenient way of removing certain parts of a case from the jury. *Johnson v. Swain*, 787 S.W.2d 36, 36, n. 1 (Tex. 1989)

2. Grounds

A directed verdict is proper only under limited circumstances: (1) a specifically indicated defect in the opponent's pleading makes the pleading insufficient to support a judgment; (2) the evidence conclusively proves the movant is entitled to judgment as a matter of law; or (3) the evidence is legally insufficient to raise an issue of fact. *I-Gotcha, Inc. v. McInnis*, 903 S.W.2d 829, 837 (Tex.App.–Fort Worth 1995, writ denied); *see also*, *Carr v. Weiss*, 984 S.W.2d 753, 760 (Tex.App.–Amarillo 1999, writ denied) (absent an incurable defect in the pleadings, an instructed verdict is only warranted when the evidence

conclusively demonstrates that no other verdict could be rendered); *cf*., *Grounds v. Tolar I.S.D.*, 856 S.W.2d at 422 (a directed verdict can only be granted because the evidence is legally insufficient; it cannot be granted when the trial court determines that the plaintiff's evidence is factually insufficient to support a judgment).

A directed verdict for a defendant may be proper in two situations. First, a court may direct a verdict when a plaintiff fails to present evidence raising a fact issue essential to the plaintiff's right of recovery. *See, e.g.*, *Latham v. Castillo*, 972 S.W.2d 66, 67-68, 70-71 (Tex. 1998). Second, a trial court may direct a verdict for the defendant if the plaintiff admits, or the evidence conclusively establishes, a defense to the plaintiff's cause of action. *Prudential Ins. Co. of America v. Financial Review Services, Inc*., 43 Tex. Sup. Ct. J. 980, 982 (June 29, 2000)

3. Form of the Motion

TEX.R.CIV.P. 268 authorizes a motion for directed verdict as long as it states the specific grounds upon which it is based. *Carr*, 984 S.W.2d at 760. Although TRCP 268 requires a motion for instructed verdict to state specific grounds, the failure to so state is not fatal if there are no fact issues raised by the evidence. *Newman v. Link*, 866 S.W.2d 721, 725-726 (Tex.App.–Houston [14th Dist.] 1993, writ denied), *motion for reh'g denied*, 889 S.W.2d 288 (Tex. 1994) (*per curiam*).

However, TRCP 268 does not require a formal written motion for instructed verdict, and therefore the requirement of specificity may be met with an oral motion. *Dillard v. Broyles*, 633 S.W.2d 636, 645 (Tex.App.–Corpus Christi 1982, writ ref'd n.r.e.); *see also*, *Castillo v. Euresti*, 579 S.W.2d 581, 582 (Tex.Civ.App.–Corpus Christi 1979, no writ) (although the better practice is to file a written motion for an instructed verdict, a formal writing is not required where there is no evidence which warrants the submission of the case to a jury, especially when specific grounds are stated in the oral motion).

4. Timing of the Motion

A litigant may urge a motion for directed verdict when his opponent has rested, when his opponent has closed, or when all parties close. *Homme*, 852 S.W.2d at 77.

Thus, a trial court may not properly direct a verdict, on its own motion, if all of the evidence has not been presented. *Nassar*, 882 S.W.2d at 38. The trial court commits reversible error if it grants a directed verdict before the plaintiff has presented all his or her evidence. *Buckner*, 815 S.W.2d at 878.

5. Appellate Issues

a. Preservation of Error

A "no evidence point" is preserved through one of the following: (1) a motion for instructed verdict; (2) a motion for judgment notwithstanding the verdict; (3) an objection to the submission of the issue to the jury; (4) a motion to disregard the jury's answer to a vital fact issue; or (5) a motion for new trial. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 220 (Tex.1992).

b. Waiver

Texas law is well settled that a defendant, by electing not to stand on his motion for instructed verdict made after the plaintiff has rested its case, and by proceeding with the introduction of his own evidence, waives his or her motion for instructed verdict. *Downs v. Seaton*, 864 S.W.2d 553, 554 (Tex.App.–Tyler 1993, no pet).

c. Standard of Review

In reviewing the granting of an instructed verdict, the appellate court must determine whether there is any evidence of probative force to raise a fact issue on the material questions presented. *Szczepanik v. First Southern Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994). Accordingly, the appellate court considers all of the evidence in a light most favorable to the party against whom the verdict was instructed, and disregards all contrary evidence and inferences to the contrary; the appellate court gives the losing party the

benefit of all reasonable inferences created by the evidence. *S.V. v. R.V.*, 933 S.W.2d 1, 8 (Tex. 1996). If there is any conflicting evidence of probative value on any theory of recovery, an instructed verdict is improper and the case must be reversed and remanded for jury determination of that issue. *Szczepanik,* 883 S.W.2d at 649.

A "directed verdict" in a bench trial is considered a "motion for judgment." It should be noted that there are significant distinctions between a directed verdict in a jury case and a motion for judgment in a non-jury case. *Carrasco v. Texas Transp. Inst*., 908 S.W.2d 575, 576 (Tex.App.–Waco 1995, no writ). One distinction is the standard of review on appeal. *Id.* Because in a trial to the bench the judge is the arbiter of factual and legal issues, an appellate court must presume that the court ruled on the sufficiency of the evidence. *Qantel Business Sys. v. Custom Controls*, 761 S.W.2d 302, 305 (Tex. 1988). Therefore, the court's factual rulings will stand unless there is legally or factually insufficient evidence to support them. *Id.* However, the appellate court reviews the trial court's rulings on questions of law, such as a directed verdict, *de novo*. *Drollinger v. State of Ariz*., 962 F.2d 956, 958 (9th Cir.1991).

When conducting a *de novo* review, the reviewing court exercises its own judgment and redetermines each issue of fact and law. *See*, *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998). In such a review, the reviewing court accords the original court's decision absolutely no deference. *See, e.g., State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996).

B. Judgment On The Verdict

1. Motion for Judgment on the Verdict

Although TEX.R.CIV.P. 305 provides that "[a]ny party may prepare and submit a proposed judgment to the court for signature," a losing party should not submit a proposed judgment that is adverse to that party. If the trial court requires the losing party to submit a proposed judgment, that party should indicate in a cover letter that the judgment was prepared at the trial court's request, and all objections to form and substance are reserved. The same reservation can be indicated on the judgment.

All judgments must "conform to the pleadings, the nature of the case proved and the verdict, if any, [unless the trial court renders judgment notwithstanding the verdict on certain jury findings] and shall be so framed as to give the party [proposing the judgment] all the relief to which he may be entitled either in law or equity." TEX.R.CIV.P. 301.

The judgment should contain the full names of the parties "as stated in the pleadings for and against whom the judgment is rendered." TEX.R.CIV.P. 306. The judgment must be signed by the trial court and should provide a line for the date on which the trial court signed the judgment. TEX.R.CIV.P. 306a(1), (2). The party proposing the judgment must submit it to all parties who have appeared and remain in the case. TEX.R.CIV.P. 305.

Under certain circumstances, a party may choose to file a motion for judgment on the verdict. If, however, the effect of the jury findings is not clear, or counsel is unwilling to embrace some of the findings, care should be taken in the form of the motion for judgment. A motion for judgment "on" the verdict is an affirmation that the findings are supported by competent evidence, *Braswell v. Braswell*, 476 S.W.2d 444, 446 (Tex.Civ.App.–Waco 1972, writ dism'd w.o.j.). Accordingly, the moving party cannot later complain on appeal about the sufficiency of the evidence to support the part of the judgment that rests on the findings, nor can it raise other complaints to the judgment. *Litton Indus. Prod. Inc. v. Gammage*, 668 S.W.2d 319, 321-322 (Tex. 1984); *Cosgrove v. Grimes*, 757 S.W.2d 508, 510, (Tex.App.–Houston [1st Dist. 1988], *rev'd on other grounds*, 774 S.W.2d 662, 663 (Tex.1989) (by moving for judgment in accordance with the jury verdict, without a motion to disregard unfavorable answers, the party affirmed that the jury's findings on all material issues were supported by the evidence, and was bound thereby).

The rationale for this principle is that a party should not be permitted to take a position on

appeal that is inconsistent with its position in the trial court, or to invite the trial court to render a particular judgment, and then complain about the judgment on appeal. *Miner-Dederick Constr. Corp. v. Mid-County Rental Serv. Inc.*, 603 S.W.2d 193, 198-199 (Tex. 1980). Nevertheless, points of error that are not inconsistent with an appellant's motion on the verdict are permitted. *See*, *e.g., Litton*, 668 S.W.2d at 322 (a motion for judgment on verdict prohibited an attack on the sufficiency of the evidence to support the actual damages, but did not prohibit the movant from attacking the award of treble damages, because the movant did not ask for entry of a judgment that trebled the damages); *see also Roberts v. Grande*, 868 S.W.2d 956, 959 (Tex.App.–Houston [14th Dist.] 1994, no writ).

Thus, the motion for judgment should specify those jury findings entitling the movant to judgment and those jury findings the movant is willing to embrace. *See*, *Wilson v. Burleson*, 358 S.W.2d 751, 753 (Tex.Civ.App.–Waco 1962, writ ref'd n.r.e.). If a judgment may be rendered on a portion of the verdict only, if other findings are disregarded, then a combined motion should be considered, incorporating a request to disregard specific findings. In addition, an alternative motion is permissible in which the party moves first for judgment on the verdict and, alternatively, for judgment notwithstanding certain jury findings. *Rogers v. Cook*, 115 S.W.2d 1148, 1150-51 (Tex.Civ.App.–Eastland 1938, writ dism'd w.o.j.). Even if a party moves for judgment on the verdict, a complaint is preserved if the trial court renders judgment for less than the verdict. *Emerson v. Tunnell,* 793 S.W.2d 947, 948 (Tex. 1990).

Some Texas appellate courts also have held that a litigant may preserve the right to complain about a judgment on appeal by requesting the trial court to sign a judgment, but expressly stating that the litigant agrees only with the form of the judgment and noting its disagreement with the content and result of the judgment. *Casu*, 896 S.W.2d at 390, *citing, First Nat'l Bank v. Fotjik*, 775 S.W.2d 632, 633 (Tex. 1989) (*per curiam*); *see also, Transmission Exch., Inc. v. Long*, 821 S.W.2d 265, 275 (Tex. App.–Houston [1st Dist.] 1991, writ denied).

When the jury's answers support rendition of judgment on alternative grounds of recovery, the failure to object to rendition of judgment on alternative grounds does not waive the prevailing party's right to defend the judgment on appeal based on those alternative grounds. *Oak Park Townhouses v. Brazosport Bank*, 851 S.W.2d 189, 190 (Tex. 1993).

2. Response to Motion For Judgment on the Verdict

When a motion for judgment "on" the verdict is filed, the losing party should consider filing a written response. The form of the response necessarily will be governed by the form of the motion for judgment. The response should point out any legal or procedural bases precluding the rendition of judgment. The response should object to any omission or misstatement of the proper parties or the court's rulings. Additionally, the response should raise any errors in the calculation and applicable rates of pre-judgment and post-judgment interest. Those same types of points should be preserved in a motion to modify, correct or reform the judgment, or other post-verdict motions, depending upon the types of complaints involved in the case. State in the response that the response is made without waiving the right to file post-verdict motions.

C. Motion for Judgment Notwithstanding the Verdict [JNOV], or to Disregard Jury Finding

1. Distinction Between JNOV and Motion to Disregard

a. Motion For JNOV

In a motion for judgment n.o.v. ("notwithstanding the verdict"), the movant challenges the verdict as a whole on the same grounds upon which a motion for directed verdict properly could have been sustained. TRCP 301; *see also, Stokes v. Puckett*, 972 S.W.2d 921, 923 (Tex.App.–Beaumont 1998, pet. denied) (the entry of a JNOV is only proper if there is no evidence from which the jury could have made its findings).

JNOV is proper when: (1) a defect specifically indicated in an opponent's pleading makes the pleading insufficient to support a judgment; (2) certain fact propositions are true which, under the substantive law, either establish the right of the movant, or negate the right of the opponent, to judgment; or (3) the evidence is insufficient to raise an issue on one or more fact propositions that must be established for the opponent to be entitled to judgment. *Exxon Corp. v. Quinn*, 726 S.W.2d 17, 19 (Tex. 1987).

b. Motion To Disregard Jury Finding

In contrast, a motion to disregard jury findings attacks certain jury findings, rather than the entire verdict. A motion to disregard a jury finding must identify those findings that have no support in the evidence or are immaterial. TRCP 301. A motion to disregard findings (1) must designate the finding and/or findings which the court is called upon to disregard, (2) must specify the reason why the finding or findings should be disregarded, and (3) may contain a request that judgment be entered upon the remaining findings after the specific findings have been set aside or disregarded. *See Dupree v. Piggley Wiggley Shop Rite Foods, Inc*., 542 S.W.2d 882, 592 (Tex.Civ.App.–Corpus Christi 1976, writ ref'd n.r.e.).

Motions for JNOV and motions to disregard jury findings both serve as a predicate for reversal and rendition in the trial court and on appeal. Robert W. Calvert, "*No Evidence" And "Insufficient Evidence" Points Of Error*, 38 TEX.L.REV. 361, 362 (1960).

2. Grounds

a. In General

As already discussed, a JNOV is proper when a directed verdict would have been proper. *See, e.g., Fort Bend County Drainage Dist. v. Sbrusch,* 818 S.W.2d 392, 394 (Tex. 1991). Simply put, a directed verdict is warranted only when the evidence conclusively demonstrates that no other verdict could have been rendered. *Bywaters v. Gannon*, 686 S.W.2d 593, 595 (Tex. 1985); *Beauchamp v. Hambrick*, 901 S.W.2d 747, 749 (Tex.App.–Eastland 1995, no writ).

In state court, a motion for directed verdict is not a prerequisite to a motion for JNOV. *Jackson v. City of Dallas*, 443 S.W.2d 771, 775 (Tex.Civ.App.–Dallas 1969), *rev'd on other grounds*, 450 S.W.2d 62 (Tex. 1970).

As also previously discussed, TRCP 301 provides that, upon motion and notice, the court may disregard any jury finding on a question that has no support in the evidence. Case law states that the court may disregard a finding if the finding is supported by no evidence or legally insufficient evidence, the issue is established as a matter of law, or the finding is immaterial. *See, e.g., Spencer*, 876 S.W.2d at 157.

b. No Evidence (Legal Insufficiency) and Matter Of Law Points

A no evidence point is sustained when the record demonstrates: (i) a complete absence of evidence of a vital fact; (ii) the only evidence offered to prove a vital fact is barred from consideration by rules of law or evidence; (iii) the evidence offered to prove a vital fact is no more than a mere scintilla; or (iv) the evidence conclusively establishes the opposite of a vital fact. *Cecil v. Smith*, 804 S.W.2d 509, 510 n. 2 (Tex. 1991); *see also,* Calvert, at 362-63. Evidence that amounts to no more than a mere surmise or suspicion constitutes "no evidence." *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993).

Therefore, to sustain a JNOV on appeal, there must be no evidence upon which the jury could have relied. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227-228 (Tex. 1990). "Some evidence" exists, precluding a JNOV, when the proof supplies a reasonable basis on which reasonable minds might reach different conclusions about the existence of a vital fact. *Orozco v. Sander*, 824 S.W.2d 555, 556 (Tex. 1992).

Alternatively, a JNOV may be proper "as a matter of law." A JNOV should be granted, for example, when the evidence is conclusive, and

one party is entitled to recover as a matter of law. *Mancorp, Inc.,* 802 S.W.2d at 227; *see also*, *Brush v. Reata Oil & Gas Corp*., 984 S.W.2d 720, 724 (Tex.App.–Waco 1998, pet. denied) (a party with the burden of proof at trial is entitled to JNOV on a particular issue only if the evidence establishes that issue as a matter of law).

Equally, JNOV is proper when a legal principle precludes recovery. *See CDB Software, Inc. v. Kroll*, 992 S.W.2d 31, 35 (Tex.App.–Houston [1st Dist.] 1998, pet. denied). For instance, when a claim is barred by limitations, judgment on the verdict is precluded and JNOV is proper. *Autry v. Dearman,* 933 S.W.2d 182, 190-91 (Tex.App.–Houston [14th Dist.] 1996, pet. denied).

In reviewing a no evidence question, the appellate court considers only the evidence and reasonable inferences that tend to support the jury's findings, disregarding all contrary evidence and inferences. plaintiff. *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1999), *citing*, *Best v. Ryan Auto Group, Inc*., 786 S.W.2d 670, 671 (Tex. 1990) (JNOV case).

It should be noted that affirming of the trial court's judgment is proper if it is supported by any ground asserted in the motion for judgment notwithstanding the verdict, even if the trial court's assigned rationale for granting the motion is erroneous. *Taco Cabana, Inc. v. Exxon Corp*., 5 S.W.3d 773, 777 (Tex.App.–San Antonio 1999, pet. denied).

c. Factual Insufficiency, or Against the Great Weight Points

It is important to distinguish a no evidence (legal sufficiency), or an "as a matter of law" complaint, from a factual sufficiency or against the great weight of the evidence complaint. The purpose of a legal sufficiency complaint is to obtain rendition of a favorable judgment. If the evidence is legally insufficient to support the jury verdict, a JNOV should be rendered setting aside the verdict. On the other hand, the purpose of a factual insufficiency complaint is to obtain a new trial.

Thus, factual insufficiency is not a ground for a motion for JNOV, but instead must be raised in a motion for new trial. *St. Paul Fire & Marine Ins. Co. v. Bjornson*, 831 S.W.2d 366, 369-370 (Tex. App.–Tyler 1992, no writ). However, if a no evidence point is preserved solely in a motion for new trial, the only relief available is a new trial. *Werner v. Colwell*, 909 S.W.2d 866, 870 n.1 (Tex. 1995); *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822-823 (Tex. 1985).

Similarly, a trial court cannot disregard an answer merely because the evidence is against the great weight and preponderance of the evidence, or is factually insufficient to support the answer; in that instance, the trial court may grant only a new trial. *Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588, 594 (Tex. 1986).

Practice Tip. In drafting post-verdict motions in the trial court, or points of error in appellate courts, do not merely use the words "insufficient evidence." A point that the evidence is "insufficient" to support the verdict has been interpreted merely as a ***factual*** sufficiency point. *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965). In order to obtain rendition, plainly state either "no evidence" or "legal sufficiency" points in a motion for JNOV, or in a motion to disregard a jury finding, or to obtain a new trial; plainly state "factual sufficiency" or "against the great weight" points in a motion for new trial.

d. Immateriality

While the ground of immateriality is not specifically mentioned in TRCP 301, it has long been recognized as a ground for disregarding a jury finding. *Spencer,* 876 S.W2d at 157; *C&R Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966).

A question is immaterial when it should not have been submitted, it calls for a finding beyond the province of the jury (such as a question of law) or when it was properly submitted but has been rendered immaterial by other findings. *Southeastern Pipe Line Co., Inc. v. Tichacek*, 997 S.W.2d 166, 172 (Tex. 1999); *see also, Spencer*, 876 S.W.2d at 157 (court may disregard as immaterial a jury's finding on a

question of law). For example, in *Sunwest Bank of El Paso v. Basil Smith Engineering Co., Inc*., 939 S.W.2d 671, 675 (Tex.App.–El Paso 1996, writ denied), the El Paso Court of Appeals held that a motion for JNOV, requesting, among other things, that the trial court disregard the jury's response to a discovery rule question as immaterial to the causes of action on which the jury found liability, was sufficient to preserve error on the issue of the trial court's failure to disregard the immaterial finding. The El Paso appellate court explicitly noted that whether the discovery rule applied to a cause of action was a matter of law for the court's determination. *Id.*

If jury findings render other findings immaterial, the trial court may properly disregard them; otherwise, the trial court has no authority to disregard them and commits reversible error in so doing. *Thedford v. Missouri Pacific R. Co.*, 929 S.W.2d 39, 45 (Tex.App.–Corpus Christi 1996, pet. denied).

However, if a finding upon an issue claimed to be immaterial could if made, or does as made, create a fatal conflict with other findings or otherwise affect the legal significance of the verdict and hence the judgment to be entered, the issue is material and must not be ignored. *Williams v. Compressor Eng'g Corp.*, 704 S.W.2d 469, 473 (Tex.App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.).

However, a trial court may not strike jury answers on the basis of a fatal conflict among them if there is any reasonable basis upon which they can be reconciled. *Bender v. Southern Pacific Transportation Co.*, 600 S.W.2d 257, 260 (Tex. 1980). For a verdict to be set aside, the conflicting answers must be such that one answer would establish a cause of action or defense, while the other would destroy it. *Little Rock Furniture Mfg. Co. v. Dunn*, 222 S.W.2d 985, 991 (Tex. 1949). The trial court must disregard the alleged conflicting answer, but take into consideration the rest of the verdict, and if it finds one of the answers would require judgment for the plaintiff and the other would require judgment for the defendant, the answers are fatally in conflict. *Williams*, 704 S.W.2d at 473.

An immaterial question should be distinguished from a defective question. A question is defective if it plainly attempts to request a finding on a recognized cause of action, but does so improperly. *Southeastern Pipe Line Co., Inc.*, 997 S.W.2d at 172.

Another perspective on the immateriality issue arises by means of the concept of the "controlling" issue. All parties are entitled to have controlling issues, raised by the pleadings and evidence, submitted to the jury. *See, e.g.*, *Brown v. Goldstein*, 685 S.W.2d 640, 641 (Tex. 1985). A "controlling issue" is one which, if answered favorably to the theory in which it is presented, will sustain a basis for judgment for the proponent of the issue. *See, e.g.*, *Bernal v. Garrison*, 818 S.W.2d 79, 83 (Tex.App.–Corpus Christi 1991, writ denied); *see also*, *Employers Cas. Co. v. Block*, 744 S.W.2d 940, 944 (Tex. 1988) (a controlling issue is one which requires a factual determination to render judgment in the case).

If an issue is not controlling, it is immaterial, and the court may properly disregard the issue as such. *See, e.g.*, *Spencer*, 876 S.W.2d at 157. If, on the other hand, a finding upon the issue could affect the legal significance of the verdict, and therefore the judgment, the issue is material and must not be disregarded. *See, Id., citing*, *C. & R. Transp., Inc*., 406 S.W.2d at 194. A trial court has no authority because of other apparently conflicting jury findings to disregard a finding with legal significance that has support in the evidence. *C&R Transport., Inc.*, 406 S.W.2d at 194-95. Additionally, the trial court may not look to answers to other jury questions to determine whether a jury's answer to a particular jury question has support in the evidence.

A trial court may disregard an immaterial jury finding and enter judgment on the remaining findings. *See, e.g.*, *Dewberry v. McBride*, 634 S.W.2d 53, 55 (Tex.App.–Beaumont 1982, no writ). Moreover, a trial court may disregard an immaterial jury finding on its own motion. *Id.*

e. Other Points of Error

A TRCP 301 motion can contain other legal complaints, but care must be taken to properly preserve such complaints. Motions to disregard jury findings and motions for JNOV are not proper methods for preserving issues of jury submission, other than issues alleging no support in the evidence. Specific objections to the court's charge must be made ***before*** the court has submitted the charge to the jury. TEX.R.CIV.P. 274; *Tubb*, 862 S.W.2d at 748.

3. Procedure

a. Motion, Notice And Hearing Requirement

(1). General Rule

Unlike TRCP 300 and its requirements for motion for judgment "on" the verdict, TRCP 301 prescribes a strict procedure to be followed for motions that attack the verdict.

Under the language of TRCP 301, the court may render judgment only upon "motion and reasonable notice." Moreover, although TRCP 301 does not explicitly so state, not only must there be a written motion and reasonable notice for a trial court to disregard a jury finding and/or render a JNOV, the written motion to disregard a jury finding "must be directed to the objectionable issue or issues and point out the reasons why such issues should be disregarded." *St. Paul Fire & Marine Ins. v. Bjornson*, 831 S.W.2d 366, 369 (Tex.App.–Tyler 1992, no writ).

Similarly, Texas appellate courts uniformly have construed the motion requirement of TRCP 301 to be jurisdictional in the sense that the trial court cannot *sua sponte* grant a JNOV. *Olin Corp. v. Cargo Carriers, Inc.*, 673 S.W.2d 211, 213-214 (Tex.App.–Houston [14th Dist.] 1984, no writ). Note, however, that although the trial court may not grant JNOV absent proper motion seeking such relief, it may grant JNOV on grounds other than those raised in that motion. *McDade v. Texas Commerce Bank, Nat'l Ass'n*, 822 S.W.2d 713, 717-718 (Tex.App.–Houston [1st Dist.] 1991, writ denied).

The record (preferably the judgment) must reflect the proper filing of the motion, the fact of notice or waiver, the appearances, the presentation of the motion at the hearing, and the ruling by the court. *Moore v. Cotter & Co.*, 726 S.W.2d 237, 240 (Tex.App.–Waco 1987, no writ); *see also*, *Lamb v. Franklin*, 976 S.W.2d 339, 343 (Tex.App.–Amarillo 1998, no pet.) (absent recitals in the judgment regarding the filing of a motion for JNOV, the fact of notice or waiver, that a hearing was had, the appearances, and a ruling on the motion, the record may be considered to determine whether the facts are shown elsewhere). Granting judgment in the absence of notice and a hearing is error. *Hines v. Parks*, 96 S.W.2d 970, 973 (Tex. 1936); *cf.*, *Lamb*, 976 S.W.2d at 343 (if the motion, notice, and hearing are not shown by any part of the record, a judgment disregarding the verdict or specific findings under TRCP 301 will be reversed).

Additionally, proof of the filing of the motion and notice is necessary to preserve a complaint about the denial of the motion. *Houston County v. Leo L. Landauer & Assoc. Inc.*, 424 S.W.2d 458, 465-466 (Tex.Civ.App.–Tyler 1968, writ ref'd n.r.e.) (although the movant failed to notify the nonmovant of the filing of the motion for JNOV, the court held that the nonmovant was not prejudiced by the lack of the notice).

Practice Tip. In order to preserve legal complaints to the judgment and the verdict, the losing party should file a motion JNOV, or to disregard certain jury findings, under TRCP 301. Legal complaints include no evidence or legally insufficient evidence to support the verdict and judgment as well as other legal, procedural or substantive errors committed in the case.

(2). Immateriality: Exception To Motion, Notice And Hearing Requirement

Because litigants are entitled to have material, disputed, fact issues determined by a jury, ordinarily a trial judge may not simply disregard, on its own initiative or motion, a jury finding and/or render a JNOV. However, one exception exists to the general rule: trial courts have the authority to disregard immaterial findings *sua sponte*. *Second Injury Fund of Texas v. Garcia*, 970 S.W.2d 706, 710

(Tex.App.–Amarillo 1998, pet. denied); *see also*, *Spencer*, 876 S.W.2d at 157 (if a jury finding is legally immaterial, a trial court can disregard the finding on its own motion). When a trial court disregards an immaterial jury issue on its own motion, the trial court's rendition of judgment on the remaining findings is not considered a JNOV. *McDaniel v. Continental Apartments, J.V.*, 887 S.W.2d 167, 171 (Tex.App.–Dallas 1994, writ denied).

In an opinion by the Houston Fourteenth Court of Appeals, the law regarding immaterial findings was better articulated:

> Appellees maintain that the trial court cannot ignore a jury's answer to a special issue on its own initiative and in the absence of a motion under [TRCP] 301. This is a correct statement of the law. While the court may, on its own motion, disregard jury findings on a special issue that is immaterial, it is not empowered to disregard a jury finding on a material issue on its own initiative and in the absence of proper motion and notice.

Arch Constr., Inc. v. Tyburec, 730 S.W.2d 47, 51(Tex.App.–Houston [14th Dist.] 1987, writ ref'd n.r.e.) (Citations omitted.).

(3). Form of the Motion

A motion for JNOV or a motion to disregard certain jury findings need not follow any particular format; however, the motion must be in writing and it should refer to TRCP 301. Recall that a written motion to disregard a jury finding "must be directed to the objectionable issue or issues and point out the reasons why such issues should be disregarded." *St. Paul Fire & Marine Ins.*, 831 S.W.2d at 369.

If the motion seeks to disregard the entire verdict, it should be entitled "Motion For Judgment Notwithstanding The Verdict" or "Motion For Judgment Non Obstante Veredicto," it should state the grounds with specificity, and it should be filed with the trial court.

Similarly, if the motion seeks to set aside only particular jury findings, it should be entitled "Motion To Disregard Certain Jury Findings," it should identify the objectionable jury questions and answers, it should state the reasons for disregarding them, and it should be filed with the trial court. *Colom v. Vititow*, 435 S.W.2d 187, 191 (Tex.Civ.App.–Houston [14th Dist.] 1968, writ ref'd n.r.e.). In *Colom*, the Houston appellate court held that the defendant's "motion for entry of judgment," which attempted to "waive" the jury's answers to two questions, was insufficient to serve as a TRCP 301 motion to disregard those jury answers. The Houston Fourteenth Court of Appeals held that the trial court erred in disregarding the answers to those two questions because they were not attacked on a no evidence ground and therefore any objection was waived. *Id.*

However, if the motion requests the court to render judgment in the attached form of judgment, which clearly eliminates the jury's answer to a question, the motion is tantamount to moving the court to disregard that finding. *Traders & Gen. Ins. Co. v. Heath*, 197 S.W.2d 130, 135 (Tex.Civ.App.–Galveston 1946, writ ref'd n.r.e.); *see also*, *Carrico v. Busby*, 325 S.W.2d 413 415 (Tex.Civ.App.–Houston 1959, writ ref'd n.r.e.); *but cf.*, *Hann v. Life & Casualty Insurance Co. of Tennessee*, 312 S.W.2d 261, 264 (Tex.Civ.App.–San Antonio 1958, no writ).

The substance of the body and prayer of the motion determine the nature of a motion for JNOV, or a motion to disregard jury findings. *Dittberner v. Bell*, 558 S.W.2d 527, 531 (Tex.Civ.App.–Amarillo 1977, writ ref'd n.r.e.); *see, e.g.*, *City of Garland v. Vasquez*, 734 S.W.2d 92, 97-98 (Tex.App.–Dallas 1987, writ ref'd n.r.e.) (holding that a "Motion to Modify, Correct or Reform Judgment or, in the Alternative, for New Trial," that specifically complained that there was no evidence to support the jury's findings to three questions, and prayed for vacation of judgment and rendition of a take-nothing judgment, constituted a combination motion for new trial and motion for JNOV); *First*

Freeport Nat'l Bank v. Brazoswood Nat'l Bank, 712 S.W.2d 168, 170 (Tex.App.–Houston [14th Dist.] 1986, no writ) (holding that posttrial motions captioned "motion to disregard special issue findings" and "motion to modify and enter judgment" were actually motions for JNOV).

A party may request additional or alternative relief in a motion which includes a request for a JNOV. In *Sullivan v. Booker*, 877 S.W.2d 370, 371 (Tex.App.–Houston [1st Dist.] 1994, writ denied), the losing party argued on appeal that the trial court had erred in granting a JNOV absent a motion asking for such relief. However, the Houston First Court of Appeals pointed out that the prevailing party had filed a motion asking the trial court (1) to enter judgment in his favor based on the issue of liability, (2) to disregard special issue jury findings and defendant's motion for judgment in his favor, (3) to modify jury verdict, and (4) for judgment notwithstanding the verdict. *Id*. Thus, held the Houston appellate court, a request for judgment notwithstanding the verdict was before the trial court. *Id*.

b. Time Requirements

While a motion for JNOV logically precedes the rendition of judgment, the Texas Rules of Civil Procedure do not specify the time for filing. Nonetheless, the motion should be made before the judgment becomes final and the trial court loses plenary power. *Spiller v. Lyons*, 737 S.W.2d 29, 29 (Tex.App.–Houston [14th Dist.] 1987, no writ); *see also*, *City of Garland v. Vasquez*, 734 S.W.2d 92 (Tex.App.–Dallas 1987, writ ref'd n.r.e.) (a motion for judgment notwithstanding the verdict may be filed and acted upon by the trial court after judgment is entered and before the judgment becomes final; in addition, jury findings may be disregarded in the same time frame); *Eddings v. Black*, 602 S.W.2d 353, 356-357 (Tex.Civ.App.–El Paso 1980), *writ ref'd n.r.e.*, 615 S.W.2d 168 (Tex. 1981); *Cleaver v. Dresser Indus.*, 570 S.W.2d 479, 483 (Tex.Civ.App.–Tyler 1978, writ ref'd n.r.e.); *Walker v. S&T Truck Lines*, 409 S.W.2d 942, 943 (Tex.Civ.App.–Corpus Christi 1967, writ ref'd). *But see Commonwealth Lloyd's Insurance Co. v. Thomas*, 825 S.W.2d 135, 141 (Tex.App.–Dallas 1992), *judgment vacated by agr.*, 843 S.W.2d 486 (Tex. 1993) (the court held that motions for JNOV should be treated like motions to modify, correct or reform the judgment and filed within the time for filing those motions, which, like a motion for new trial, is 30 days after the judgment is signed).

The motion may be filed after rendition of judgment and after a motion for new trial has been filed, provided it is filed before the motion for new trial has been overruled by court order or operation of law. *Eddings,* 602 S.W.2d at 357, *citing*, 4 R. McDonald, TEXAS CIVIL PRACTICE §17.32 at 210 (1971).

c. Stages at Which No Evidence and Matter of Law Points May Be Raised

TEX.R.CIV.P. 279 specifically provides that a claim that the evidence was legally insufficient to warrant the submission of any question "***may be made for the first time after verdict***, regardless of whether the submission of such question was requested by the complainant." (Emphasis added.) *See also*, *Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 543 (Tex. 1998); *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 417 (Tex. 1998) (as a rule, a contention that evidence is insufficient to support a judgment need not be raised before the verdict).

Yet, no evidence or legal sufficiency complaints properly are preserved at ***each*** of the following stages: (i) objection to the submission of a pertinent jury question; (ii) motion for directed verdict; (iii) motion to disregard the answers to the jury question(s); and (iv) motion for judgment non obstante veredicto. *Cecil*, 804 S.W.2d at 510-11; *Aero Energy, Inc.*, 699 S.W.2d at 822. Additionally, no evidence and legal sufficiency complaints can be raised in a motion for new trial; however, if those complaints are preserved solely in a motion for new trial, the only relief to which the movant will be entitled is remand for a new trial, rather than rendition of judgment. *Werner*, 909 S.W.2d at 870, n.1.

d. Appellate Considerations

(1). Predicate for Appellate Complaint

Due to the nature of the grounds asserted in a motion for JNOV, a motion for new trial is not a prerequisite to an appeal of the court's ruling on the motion for JNOV. TEX R.CIV P. 324. As a matter of strategy, a party may use a motion for JNOV to preserve points of error seeking the rendition of judgment without repeating the points in a motion for a new trial.

(2). Standard of Review

The propriety of a trial court disregarding a jury finding raises a "no evidence" point of error [as does the propriety of a JNOV]. *City of El Paso v. W.E.B. Inv*., 950 S.W.2d 166, 171 (Tex.App.–El Paso 1997, pet. denied). The jury's determination must be sustained even if the great weight and preponderance of the evidence is to the contrary. *Scharer v. John's Cars, Inc*., 776 S.W.2d 228, 230-31 (Tex.App.–El Paso 1989, writ denied). An appellate court reviews the evidence in the light most favorable to the jury finding, considering only the evidence and inferences tending to support that finding. *City of El Paso*, 950 S.W.2d at 171. If the appellate court finds more than a scintilla of evidence to support the jury's determination of the issue, the appellate court must reinstate the disregarded portion of the jury's verdict and enter an appropriate judgment. *Tubb*, 862 S.W.2d at 744-45.

(3). Cross-points

TEX.R.CIV.P. 324(c) provides that when judgment is rendered notwithstanding the entire verdict or disregarding certain findings, an appellee may bring forward by cross-point on appeal any ground that would have prevented the verdict from supporting the judgment in favor of the appellant.

When an appellate court holds that a trial court has erroneously entered a JNOV, the appellate court must reverse the trial court's judgment and enter judgment in accordance with the verdict, unless the appellee presents cross-points sufficient to vitiate the jury's verdict or to prevent an affirmance of the judgment, had one been entered on the verdict. *Municipal Admin. Servs., Inc. v. City of Beaumont*, 969 S.W.2d 31, 40 (Tex.App.–Texarkana 1998, no pet.); *see also*, *Jackson v. Ewton*, 411 S.W.2d 715, 717 (Tex.1967).

e. Family Law Applications

(1). Effect of Jury Verdict

Pursuant to section 105.002(d) of the Texas Family Code, a party is entitled to a jury trial, and the trial court may not contravene a jury verdict, on the issues of (1) the appointment of a managing conservator, (2) the appointment of joint managing conservators, (3) the appointment of a possessory conservator, or (4) the determination of the primary residence of the child. *See also*, *Davis v. Davis,* 794 S.W.2d 930, 935 (Tex.App.–Dallas 1990, no writ) (the trial court may not enter a decree that contravenes the verdict of the jury with respect to appointing a managing conservator); *Kotrla v. Kotrla*, 718 S.W.2d 853, 856 (Tex.App.–Corpus Christi 1986, writ ref'd n.r.e.) (the jury's verdict is binding on the trial court if there is sufficient evidence to uphold the jury's finding); *cf.*, *In re Marriage of Robinson*, 16 S.W.3d 451, 454 (Tex.App.–Waco 2000, no pet.) (notwithstanding the trial court's inability to contravene the jury's decision on custody disputes, the reviewing appellate court has the authority to consider, and sustain where warranted, properly raised legal sufficiency issues).

On the other hand, a jury verdict on the issues of (1) child support, (2) a specific term or condition of possession of or access to the child, or (3) any right or duty of a possessory or managing conservator, other than the issue of primary residence, is advisory only. *Id*.

Accordingly, it is settled Texas law that a trial court cannot disregard a jury finding as to the appointment of conservators, or the designation of a child's primary residence, and cannot enter a JNOV in the face of such a jury verdict. *See, e.g.*, *Fambro v. Fambro*, 635 S.W.2d 945, 947-948 (Tex.App.–Fort Worth 1982, no writ) (the trial judge could not disregard the jury's finding that a material and substantial change in the

circumstances of the parties had occurred since the rendition of divorce decree, and that the preservation of the wife as managing conservator would be injurious to the welfare of child, substitute his own findings for that of the jury, and then render JNOV contrary to jury's finding); *see also*, *In the Interest of Rodriguez*, 940 S.W.2d 265, 275 (Tex.App.–San Antonio 1997, writ denied) (Carr, J., dissenting) (the trial court in a custody case does not possess the power to grant a motion JNOV); *In the Interest of Soliz*, 671 S.W.2d 644, 648 (Tex.App.–Corpus Christi 1984, no writ) (it was improper for the trial court to enter a JNOV in the mother's suit for modification of a prior decree which gave custody of the minor child to the father).

Practice Tip: Juries are unpredictable. In difficult custody cases, it might be wise, before the jury returns its verdict, to file a motion for directed verdict. If you wait until the verdict is returned, and you lose, then you will have to wait for relief at the appellate level. *See, e.g.*, *Fambro*, 635 S.W.2d at 947 (in a jury case, where there is no evidence of a material change of conditions that affects the best interest and welfare of the minor child, the trial court should, upon a motion for an instructed verdict by the custodian, grant the same, and refuse to change the custodial provisions contained in the former judgment).

(2). Disregarding Jury Answers

In *Harris v. Harris*, 765 S.W.2d 798, 805 (Tex.App.–Houston [14th Dist.] 1989, writ denied), the Houston appellate court held that a contingent fee contract was the property of a law partnership in which the husband was a partner, regardless of whether the contract itself could be classified or considered as a separate partnership (the wife had argued that the contingent fee contract had created a new and distinct partnership). The jury had answered affirmatively that the contract had, in effect, created a partnership. *Id.* at 804. Thus, according to the Houston Fourteenth Court of Appeals, the jury's finding was immaterial, and the trial court did not err by disregarding the finding. *Id*. at 805; *see also*, *York v. York*, 678 S.W.2d 110, 111-13 (Tex.App.–El Paso 1984, writ ref'd n.r.e.) (in a post-divorce partition suit, the trial court erred in disregarding jury findings as to the net revenues of oil and gas leases, because there was evidence in support of the jury findings); *Woods v. Woods*, 419 S.W.2d 921, 922-923 (Tex.Civ.App.–Fort Worth 1967, no writ) (in a divorce case, the trial court erred in disregarding a jury finding that the husband's cruel treatment or outrages toward the wife, which rendered their further living together insupportable, were brought on and provoked by the acts and conduct of the wife, when there was evidence that the wife had frequently dated another man, that she spent two hours in a motel room with the other man after reconciliation with her husband had taken place, that she had been with that man at other times after the time of reconciliation, and that she had confessed her love for that man in the presence of her pastor and family friends).

(3). Judgment Notwithstanding the Verdict

In *Wimberly v. Wimberly*, 456 S.W.2d 572, 573 (Tex.Civ.App.–Dallas 1970, writ dism'd), a divorce case, the jury found that each spouse had been guilty of excesses, cruel treatment, or outrages, which were of such a nature as to render their further living together as husband and wife insupportable, as well as that the husband had committed adultery. The husband filed a motion for JNOV in which he asked the court to set aside and disregard the answers of the jury regarding his alleged excesses, cruel treatment, or outrages, on the grounds that there was no evidence of cruel treatment on his part; the court granted the motion and proceeded to enter judgment of in favor the husband and against the wife, who, naturally, appealed. *Id.*

On appeal, the Dallas appellate court agreed with the wife that the trial court's action constituted reversible error, since there was evidence in support of the jury's findings, *i.e.*, that the husband was guilty of exerting physical violence upon the wife, that he had been keeping company with another woman, that he had made an effort to get his son to engage in illegal activity by delivering liquor into dry areas, and that he had changed the family residence over the objection of the wife. *Id.*; *see also*, *Edgington v. Maddison*, 870 S.W.2d 187, 189-190 (Tex.App.–Houston [14th Dist.] 1994, no writ) (jury's finding that the

value of assets transferred to the husband's creditor was grossly excessive so as to constitute fraud upon the wife's community property rights was supported by sufficient evidence, and therefore the trial court properly refused to render a JNOV contravening the jury's finding).

In *Wimberly*, the Dallas Court of Appeals also held that the wife did not have to complain about the trial court's action in her motion for new trial as a precondition to her appellate complaints, since TRCP 324 expressly provided that a motion for new trial is not a prerequisite to the right of one to complain or appeal the action of the court in rendering JNOV. *Wimberly*, 456 S.W.2d at 573-574.

III. MOTION FOR NEW TRIAL

The use of a motion for new trial in a non-jury appeal is similar to its use in 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 the rendition of the judgment. TEX.R.APP.P 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 a more appropriate vehicle.

B. Timetable For Filing–TRCP 329(b)

A motion for new trial shall be filed within 30 days after judgment is signed by the court. TEX.R. CIV. P. 329b(a). If the motion is not determined by ***written*** order, it shall be deemed overruled by operation of law 75 days after judgment is entered law. TEX.R. CIV. P. 329b(c); *see also*, Balazik v. Balazik, 632 S.W.2d 939, 941 (Tex.App.–Fort Worth 1982, no writ) (before a court order or judgment may be vacated, set aside, modified, or amended, it must be done within the time period prescribed by the Rules of Civil Procedure, and must be done by a written order which is express and specific).

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). Further, the automatic overruling of a motion for new trial, on which there has been no trial court's ruling (even if the trial court intentionally refuses to rule), is constitutional. Texaco, Inc. v. Pennzoil Company, 729 S.W.2d 768, 852 (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. TEX.R. CIV. P. 329b(d). 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. TEX.R. CIV. P. 329b(e). After such time, the order may not be set aside except by bill of review. TEX.R. CIV. P. 329b(f). Further, a trial court cannot extend time to file a motion for new trial. *L.M. Healthcare, Inc. v. Childs*, 929 S.W.2d 442, 444 (Tex. 1996).

TEX.R. CIV. P. 329b(g) 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. According to the Texas Supreme Court, Rule 329b provides that a timely filed motion to modify judgment extends the trial court's plenary power, separate and apart from a motion for new trial. *L.M. Healthcare, Inc.*, 929 S.W.2d at 444. In other words, that the trial court overruled the motion for new trial did not shorten the trial court's plenary power to resolve the pending motion to modify judgment. *Id*.

The issue of the premature filing of a motion for new trial frequently raises its ugly head. A.G. Solar & Co., Inc. v. Nordyke, 744 S.W.2d 646, 647 (Tex. App.–Dallas 1988, no writ), after suffering an adverse judgment, the defendant filed, on April 27, a motion for new trial, and, by a separate instrument, a motion to correct and reform the judgment. Both motion were subsequently overruled by operation of law. *Id.* Afterwards, but while still having plenary power, the trial court entered a reformed judgment, dated June 30. *Id*. On September 22, in an attempt to appeal the June 30 judgment, and without having filed another motion for new trial directly attacking the June 30 judgment, the defendant filed a cost bond. *Id*.

On appeal, the issue was whether the April 27 motion for new trial extended the time to file a cost bond for 90 days after the corrected judgment (dated June 30). *Id*. The defendant argued that its April 27 motion for new trial (as distinct from its motion to correct and reform judgment) also assailed the June 30 judgment in the same way that it assailed the earlier judgment. *Id*. For its argument that the cost bond was timely filed, the defendant cited former Rule of Appellate Procedure 58 (in civil cases, if the trial court has signed an order modifying, correcting, or reforming the order appealed from, or has vacated that order and signed another, any proceedings relating to an appeal of the first order may be considered applicable to the second...), and TEX.R.CIV.P. 306c (premature motion for new trial "shall be deemed to have been filed on the date of but subsequent to the date of signing of the judgment the motion assails). *Id.*

However, the Dallas Court of Appeals held that, when a premature motion for new trial has already been disposed of (in *Solar*, by being overruled by operation of law), it can no longer "assail" a subsequent judgment under TRCP 306c, and can no longer "be properly applied" to that judgment under former TRAP. *Id*. at 647-648. Because the defendant's motion for new trial had been overruled by the time that the June 30 judgment was signed, and because the defendant did not re-assert the motion, the time to perfect the appeal expired no later than July 30. *Id*. Further, because the defendant failed to post a bond by that date, and it failed to file a timely motion to extend the time to file a bond, the Dallas appellate court dismissed the appeal for lack of jurisdiction. *Id*. at 648.

The Houston Fourteenth Court of Appeals appears to disagree with the holding in *Solar*. In *Nuchia v. Woodruff*, 956 S.W.2d 612, 614 (Tex.App.–Houston [14th Dist.] 1997, pet. denied), the movant claimed its April 10, 1995 motion for new trial, which was directed at an earlier interlocutory judgment and overruled nearly five months prior to the final judgment, should be considered applicable to the final judgment signed on October 5, 1995. The Houston appellate court noted that, as long as the motion for new trial assailed the final judgment, under former TRAP 58 and TRCP 306c, it would be considered a proceedings "relating to an appeal," and would be deemed filed on October 5, 1995. *Id*.

The adverse party, of course, argued that the premature motion for new trial did not the October 5 judgment because it was overruled before the judgment was signed and was therefore not a live pleading. *Id*. The adverse party, in support of its argument, cited *Solar's* holding that the appellate deadline was not extended by a premature motion for new trial that had been overruled by operation of law before the court signed a second judgment. *Id.*

However, the Houston appellate court looked to *Harris County Hosp. Dist. v. Estrada*, 831 S.W.2d 876, 880 (Tex.App.–Houston [1st Dist.] 1992, no writ), in which the Houston First Court of Appeals declined to recognize a live pleading distinction for prematurely filed motions, emphasizing that neither [former] TRAP 58 nor TRCP 306c of the rules limited their application to live pleadings, and reasoned that such a requirement would defeat the purpose of the rules. *Id*. The Houston Fourteenth of Appeals, in *Nuchia*, also noted that the Texas Supreme Court, in *Fredonia State Bank v. General American Life Ins*., 881 S.W.2d 279, 282 (Tex.1994), concluded that, with respect to preservation of error, the better reasoned approach was set forth in *Estrada*, but noted as well that its opinion did not purport to resolve the conflict between *Solar* and *Estrada*. *Id.*

Thus, stated the Houston appellate court in *Nuchia*, the movant's prematurely filed motion for new trial obviously assailed the subsequently signed judgment, under TRCP 306c, and could "be properly applied" to the subsequent judgment under [former] TRAP 58. *Id*. at 614-615. Ultimately, the movant's motion was deemed filed on October 5, 1995, after the final judgment was signed, and extended the time for filing the transcript with the appellate court so that the Houston Fourteenth Court of Appeals had the authority to consider the transcript and to rule on the merits of the underlying cause. *Id*. at 615.

Note that TRAP 26.1(a) now specifically allows 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.

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. TRCP 329b(b). 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 Dallas 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 329(a). Many grounds for granting a new trial strictly apply only to jury trials, pursuant to TEX.R.CIV.P. 324(b), such as errors in the charge, jury misconduct, factual insufficiency of the evidence to support a jury finding, a complaint that a jury finding is against the overwhelming weight of the evidence, a complaint of inadequacy or excessiveness of the damages found by the jury, or incurable jury argument. In non-jury trials, the practitioner may well be confronted with additional considerations.

1. Newly Discovered Evidence

Generally speaking, a new trial based upon newly discovered evidence in a civil proceeding will not be granted unless: (1) admissible competent evidence is introduced showing the existence of the newly discovered evidence relied upon; (2) the party seeking the new trial demonstrates that there was no knowledge of the evidence prior to trial; (3) due diligence had been used to procure the evidence prior to trial; (4) the evidence is not cumulative to that already given and does not tend to impeach the testimony of the adversary; and (5) the evidence would probably produce a different result if a new trial were granted. *See, e.g., Keever v. Finlan,* 988 S.W.2d 300, 315 (Tex.App.–Dallas 1999, pet. dism'd).

Whether to grant a motion for new trial on the basis of newly discovered evidence lies within the sound discretion of the trial court. *Id* 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. In C. v. C., 534 S.W.2d 359, 360-362 (Tex.-Civ.App.–Dallas 1976, no writ), evidence was presented for the first time at the motion for new trial hearing that showed the father, who had been appointed managing conservator, was a man of violent temper who cruelly and harshly disciplined his children. On appeal, the Dallas 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. *Id.* at 361-362; see also, Gaines v. Baldwin, 629 S.W.2d 81, 83 (Tex.App.–Dallas 1981, no writ) (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).

More recently, in *In re C.B.M.,* 14 S.W.3d 855, 861 (Tex.App.-Beaumont 2000, no pet.), a voluntary paternity suit brought by

the father, the father presented evidence in support of his motion for new trial, alleging that it was "newly discovered." The Beaumont Court of Appeals, however, considered such evidence cumulative of other evidence concerning his employment, his university attendance, his temperament, and his babysitting duties that had been introduced at trial. *Id*. According to the Beaumont appellate court, there was no suggestion of evidence of a character that would strongly show that the original custody order would have a seriously adverse effect on the interest and welfare of the child; therefore, there was no indication of such evidence that would probably change the result. *Id.* The Ninth Court of Appeals ultimately held that, in custody cases, the trial court is not required to hear evidence at the hearing on the motion for new trial where the offer of proof indicates that the evidence is not newly discovered and is not evidence of the character outlined in *C. v. C.* and the line of cases relying upon it. *Id*. at 862.

2. Default Judgments

New trials are routinely granted and default judgments set aside upon demonstration that (1) the failure to file an answer or appear was not intentional or the result of conscious indifference, but was due to mistake or accident; (2) a meritorious defense exists; and (3) granting a new trial will not result in delay or prejudice to the plaintiff. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124, 126 (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). 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, 86-871 (1988); *Lopez v. Lopez*, 757 S.W.2d 721, 723 (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, *i.e.,* made a mistake of law, can (s)he successfully bring a motion for new trial claiming mistake? According to the Texas Supreme Court, a mistake of law may be sufficient to satisfy the first element of the three element *Craddock* test. *Bank One, Texas v. Moody*, 830 S.W.2d 81, 84 (Tex.1992); *see also*, *e.g.*, *Angelo v. Champion Restaurant Equipment Co.*, 713 S.W.2d 96,97 (Tex.1986) (mistaken belief that paying underlying claim was sufficient answer); *Texas State Bd. of Pharmacy v. Martinez*, 658 S.W.2d 277, 280-81 (Tex.App.–Corpus Christi 1983, writ ref'd n.r.e.) (mistaken belief that exclusive venue rested in county other than the county of suit).

However, the Texas Supreme Court has also stated that not every act of a defendant that could be characterized as a mistake of law is a sufficient excuse under *Craddock* to justify a new trial. *Bank One, Texas*, 830 S.W.2d at 84; *see also, Carey Crutcher, Inc. v. Mid-Coast Diesel Services, Inc*., 725 S.W.2d 500, 502 (Tex.App.–Corpus Christi 1987, no writ) (attorney did not understand effect of bankruptcy stay); *First National Bank of Bryan v. Peterson,* 709 S.W.2d 276, 279 (Tex.App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.) (response to writ of garnishment; froze accounts but did not submit funds to the court); *Butler v. Dal Tex Mach. & Tool Co.*, Inc., 627 S.W.2d 258, 260 (Tex.App.–Fort Worth 1982, no writ) (read but did not understand citation, and did nothing).

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, 254 (Tex. App.–Austin 1987, no writ), in which a default judgment was taken on a motion to modify managing conservatorship, the Austin Court of Appeals stated:

> In the usual case, the defendant who fails to file an answer is said to confess to the facts properly pleaded in the petition. 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. 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 [former Texas Family Code] §3.53. [now §6.701] 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 [former Texas Family Code] §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. (Citations omitted.)

See also, Armstrong v. Armstrong, 601 S.W.2d 724, 725 (Tex.Civ.App.–Beaumont 1980, no writ) (the Beaumont appellate court was unwilling to follow, blindly, the rule that, where the judgment is by default, all well-pleaded allegations of the party requesting a new trial are taken as admitted, in a case involving the care, custody, and control of children of tender years).

The Houston Fourteenth Court of Appeals has expressly 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. The Houston appellate 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 altogether and looks only to the actions of whichever parent happens to be the defaulting party. The Fourteenth Court of Appeal's opinion in *Lowe* concludes by inviting the Texas Supreme Court to fashion a more workable rule in the family law context, and urging the Texas

family law 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. TEX.R.APP.P. 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.

TRAP 34.6(f) 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. Current 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, 101 (Tex.App.–Houston [1st Dist.] 1998), *aff'd,* 989 S.W.2d 754 (Tex.Crim.App. 1999) (the portion of the record lost due to a failure of a tape recorder during the trial, which included the opening statements and the direct examination of one of arresting officers, was not necessary to defendant's appeal, and, thus, she was not entitled to new trial, where the abbreviated record, which included the entire testimony of other arresting officer, provided sufficient evidence to support the judgment).

5. Sufficiency of the Evidence

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. *See,* TRCP 324(b); *see also,* the discussion of "no evidence" points hereinabove in the "Pre-judgment Motions" section.

Recall 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. See, e.g., National Life Accident Insurance Co. v. Blagg, 438 S.W.2d 905, 909 (Tex. 1969). However, as previously discussed, 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; it may not reverse and ***render***. *See, e.g., Hebisen v. Nassau Dev. Co.*, 754 S.W.2d 345, 349 (Tex.App.–Houston [14th Dist.] 1988, writ denied).

b. "Insufficient 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. *See,* TRCP 324(b).

Practice Tip. In drafting a 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. As stated in *Smith v. Brock*, 514 S.W.2d 140, 142 (Tex.Civ.App.–Texarkana 1974, no writ):

> The requirements of particularity for assignments of error in a motion for new trial are not only for the benefit of the appellate court. They are primarily for the benefit of the trial court. They are designed to perform the important function of not merely laying a predicate for an appeal, but of presenting to the trial judge each ruling or error complained of in such a way that he can clearly identify and understand it, so that he may be able to review all of them with more deliberate consideration than is practicable during trial, and will then have the first full and fair opportunity to correct the errors or grant a new trial if need be.

In *Ramey v. Collagen*, 821 S.W.2d 208, 211 (Tex.App.–Houston [14th Dist.] 1991, writ denied), the appellant asserted in her motion for new trial that, "when the record is viewed as a whole, the jury's verdict is against the great weight and preponderance of the evidence." The Dallas Court of Appeals noted that jury had not found against the appellant on every issue submitted to it, and therefore, lacking the requisite specificity, the appellant's "great weight" point was not properly preserved for appeal in her motion for new trial and could not be considered on appeal. *Id.*; *see also, Security Savings Ass'n v. Clifton*, 755 S.W.2d 925, 927 (Tex.App.–Dallas 1988, no writ) (a general objection that all the findings are against the great weight and preponderance of the evidence is sufficiently specific where the jury finds against the objecting party on every question submitted; thus where there were several jury findings, the motion for new trial allegation that, "when viewed as a whole, the jury's verdict is against the great weight and preponderance of the evidence," was not specific enough to preserve error); *cf.*, *Crundwell v. Becker*, 981 S.W.2d 880, 884 (Tex.App.–Houston [1st Dist.] 1998, pet. denied) (when there was only one jury finding, the motion for new trial, alleging that the jury's findings that the defendants were not negligent were so against the overwhelming great weight and preponderance of the evidence as to be manifestly wrong and unjust, preserved error on appeal).

6. Jury Misconduct

In order to prevail on a claim of jury misconduct, the movant for new trial must prove that: (1)misconduct occurred, (2) the misconduct was material, and (3) based on the record as a whole, the misconduct probably resulted in harm to the movant. *See, e.g.*, *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).

Additionally, TEX.R.CIV.P. 327 requires that the motion for new trial alleging jury misconduct be accompanied by an 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. *Id.*; *see also*, *Rodarte v. Cox,* 828 S.W.2d 65, 76-77 (Tex.App.–Tyler 1991. writ denied).

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

> 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 as well as incorrect answers by jurors during voir dire examination. TRCP 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.*; TRCP 324(b)(1). Although such 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. TRCP 327; TRE 606(b); *see also, Weaver v. Westchester Fire Ins. Co.,* 739 S.W.2d 23, 24 (Tex. 1987). 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. TRCP 327; *see also*, *Sanchez v. King*, 932 S.W.2d 177, 180 (Tex.App.–El Paso 1996, no writ).

IV. 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, 946 (Tex.App.–San Antonio 1987, no writ). The appellee urged by cross-point that she was entitled to prejudgment interest. *Id*. At the conclusion of the trial, she had prepared a judgment, including prejudgment interest, which the trial court denied by deleting the provision from the order. *Id*. The appellee then filed a motion to modify the judgment specifically including a request for prejudgment interest, which was denied by the trial court. *Id*. On appeal, the San Antonio Court of Appeals held that the right to recover was waived if not asserted in the trial court, but that the filing of the motion to modify was sufficient to preserve error for review. *Id*.

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).

V. 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 TEX.R.CIV.P. 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 [section 154.130 of the Texas Family Code] and findings in visitation orders [section 153.258 of the Texas Family Code].

A. Rule 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. Here's why, as elegantly explained by the Houston Fourteenth Court of Appeals in *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241 (Tex.App.–Houston [14th Dist.] 1999, pet. denied).

In Texas, there is a general presumption of validity extending to the judgments of courts of general jurisdiction. *Id*. at 251.

> The presumption of validity is applied on appeal in inverse relation to the amount of knowledge available to the appellate court. Where the record is ambiguous or silent, the presumption of validity will supply by implication every proof, element, factual finding, or proper application of the law needed to support the judgment. Thus, where there is neither a reporter's record nor findings of fact, the appellate court will assume the trial court heard sufficient evidence to make all the necessary findings needed to support its judgment.
>
> When the reviewing court has the benefit of a detailed record, sufficiency of the evidence is no longer presumed. However, the presumption of validity still operates to resolve all other ambiguities in favor of the judgment. Accordingly, if the trial court files no findings of fact and conclusions of law, all findings necessary to the court's judgment, if supported by the record, will be implied. In such cases, the judgment will be affirmed if it may be upheld on any basis that has support in the evidence under any theory of law applicable to the case. (Citations omitted.)

Id. at 251-52. Critically, the presumption of validity is only prima facie, of course, and may be rebutted. *Id*. at 252.

Accordingly, an important predicate for a successful appeal is to establish what facts were found by the trial court. *Id*. Furthermore, to limit the scope of the presumption, it is advantageous to the appellant to narrow the issues on appeal by requesting findings of fact and conclusions of law. *Id*.

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, e.g., Roberts v. Roberts*, 999 S.W.2d 424, 433 (Tex.App.–El Paso 1999, no pet.); *see also, John G. & Stella Kenedy Mem'l Found. v. Dewhurst*, 994 S.W.2d 285, 308 (Tex.App.–Austin 1999, no pet.) (it is generally improper for a trial court to make findings of fact and conclusions of law following a jury trial).

In *Baley v. W/W Interests, Inc.*, 754 S.W.2d 313, 316 (Tex.App.–Dallas 1988, no writ), the Dallas 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, 366 (Tex.App.–Fort Worth 1987, writ denied) (the trial court was not required to make finding based upon the evidence as to a just and fair wage rate for the purpose of determining worker's compensation, where the employee did not tender any issue on a just and fair wage rate and did not timely object to the trial court's failure to submit the issue to the jury).

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.

Practice Tip. In the family law context, 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*, 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); *but cf.*, *Heafner & Associates v. Koecher*, 851 S.W.2d 309, 312-13 (Tex.App.–Houston [1st Dist.] 1992, no writ) (when the judgment regarding attorney's fees resulted from findings made by the trial court, after a bench trial, independent of the jury's verdict, the party had a right to have the trial court file findings of fact and conclusions of law in order to urge error on appeal).

In *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 TRCP 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. On appeal, 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, 890 (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 the facts recited are conclusively established and supported by the decree as a matter of law. *Holloway v. Holloway*, 671 S.W.2d 51, 59 (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 ***not*** 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, 685 (Tex.Civ.App.–Tyler 1976, writ dism'd); *see also, Yarbrough v. Phillips Petroleum Co.*, 670 S.W.2d 270, 272 (Tex.App.–Houston [1st Dist.] 1983, writ ref'd n.r.e.). Equally, when the trial court grants a motion for judgment at the close of the plaintiff's case. *Qantel Business Systems, Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 304 (Tex. 1988).

• When a judgment notwithstanding the jury verdict is entered. *Fancher v. Cadwell*, 159 Tex. 8, 314 S.W.2d 820, 822 (1958).

• When a summary judgment is granted. *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994).

• In an appeal to district court from an administrative agency. *Valentino v. City of Houston*, 674 S.W.2d 813, 820 (Tex.App.–Houston [1st Dist.] 1983, writ ref'd n.r.e.).

• When a default judgment is granted. *Wilemon v. Wilemon*, 930 S.W.2d 290, 296 (Tex.App.–Waco 1996, no pet.).

• When a case is dismissed for want of subject matter jurisdiction without an evidentiary hearing. *Zimmerman v. Robison*, 862 S.W.2d 162, 164 (Tex.App.–Amarillo 1993, no writ).

In cases when findings are not authorized, any request for findings is without effect. *See, e.g., Timmons*, 840 S.W.2d at 586.

While findings in certain pretrial and post-trial matters may be helpful, they are not required. *Chandler v. Chandler*, 991 S.W.2d 367, 388 (Tex.App.–El Paso 1999, pet. denied). For example, findings are not necessary to review the trial court's ruling on a motion for new trial. *Osborn v. Osborn*, 961 S.W.2d 408, 411, n. 3 (Tex.App.–Houston [1st Dist.] 1997, pet. denied)

(although a hearing on a motion for new trial is not a case tried without a jury, findings can be helpful). Since a hearing on a motion to recuse, purely a pretrial matter, is not a "case tried without a jury;" when an order is entered denying a motion to recuse, findings for denying the motion may be helpful, but they are not required. *Chandler*, 991 S.W.2d at 388.

TEX.R.APP.P. 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, 114 (Tex.App.–Houston [1st Dist.] 1994, no writ) (involving an interlocutory appeal of a denial of a motion for arbitration). One Texas 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. As already mentioned, 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. evidence. *See, e.g., IKB Indus. Ltd. v. Pro-Line Corp*., 938 S.W.2d 440, 445 (Tex. 1997). 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, 373 (Tex. 1988). In other words, in the absence of formal findings, the record may support implied findings.

It is critical to recognize that, if a reporter's record is brought forward on appeal, implied findings can be challenged by legal and factual insufficiency points. *See, e.g., Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989). Further, implied findings will not be presumed if formal findings were properly requested, but not provided by the trial court.

Practice Tip. 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 generally extends the time for perfecting appeal from 30 days to 90 days after the judgment is signed by the court. TEX.R.APP.P. 26.1(a)(4). According to the Texas Supreme Court:

> A timely filed request for findings of fact and conclusions of law extends the time for perfecting appeal when findings and conclusions are required by Rule 296, or when they are not required by Rule 296 but are not without purpose--that is, they could properly be considered by the appellate court. Examples are judgment after a conventional trial before the court, default judgment on a claim for unliquidated damages, judgment rendered as sanctions, and any judgment based in any part on an evidentiary hearing.

IKB Indus. Ltd., 938 S.W.2d at 443.

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. TEX.R.APP.P 35.1(a). A timely request for findings and conclusions does ***not*** extend the trial court's period of plenary power. *See*, TEX.R.CIV.P. 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. Again, in the words of the Texas Supreme Court:

> A request for findings of fact and conclusions of law does not extend the time for perfecting appeal of a judgment rendered as a matter of law, where findings and conclusions can have no purpose and should not be requested, made, or considered on appeal. Examples are summary judgment, judgment after directed verdict, judgment non obstante veredicto, default judgment awarding liquidated damages, dismissal for want of prosecution without an evidentiary hearing, dismissal for want of jurisdiction without an evidentiary hearing, dismissal based on the pleadings or special exceptions, and any judgment rendered without an evidentiary hearing.

IKB Indus. Ltd., 938 S.W.2d at 443; *see also, 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").

Other reported Texas cases hold 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", so that a request for findings does not extend the 30-day deadline for perfecting appeal. *Zimmerman v. Robinson*, 862 S.W.2d 162, 164 (Tex.App.–Amarillo 1993, no writ); *see also*, *O'Donnell v. McDaniel*, 914 S.W.2d 209,210 (Tex.App.–Fort Worth 1995, writ denied) (when an appeal is from a dismissal rendered without an 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) (the divorce case was not transformed from a case tried with a jury to a "case tried without a jury,"within the meaning of the rule establishing the time limit for filing an appeal, so as to extend the time for an appeal, when the trial judge acted on the wife's motion for judgment n.o.v., made certain fact findings, and made its own division of certain properties between parties without jury intervention; thus, the appellate timetable was not extended, even though the trial judge was not bound by some of the jury's answers).

4. Sequence for Obtaining Findings

a. Initial Request

TRCP 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 TRCP 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, 72 (Tex.App.–Houston [1st Dist.] 1989, no writ). In addition, TEX.R.CIV.P. 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 Texas Supreme Court, in *Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768, 772 (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 TRCP 296. Presentment to the trial judge is no longer required.

c. Response by Court

TEX.R.CIV.P. 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

The untimely filing of findings by the trial court can be indescribably frustrating, and all too often occurs. As discussed hereinbelow, the current judicial climate, lamentably, gives appellate lawyers and their clients very little substantive relief.

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. *Id*. at 378. The wife requested additional findings on the issues of cruelty, adultery and desertion. *Id*. 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. *Id*. at 379. The husband attempted to have the additional findings disregarded because they were filed untimely. *Id*. at 380.

The Dallas 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. *Id*. at 381. The Dallas Court of Appeals also noted that the husband had not demonstrated any harm which he suffered because of the late filing. *Id.; 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.) (the court of appeals considered allegedly late filed supplemental findings and conclusions because the appellant neither filed a motion to strike nor showed that she was harmed by the delay in the filing.); *Summit Bank v. The Creative Cook*, 730 S.W.2d 343, 345 (Tex.App.–San Antonio 1987, no writ) (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. Injury may occur in one of two forms: (1) the litigant was unable to request additional findings, or (2) the litigant was prevented from properly presenting his or her appeal findings. *See, e.g., Jefferson County Drainage Dist. v. Lower Neches Valley Auth.*, 876 S.W.2d 940, 960 (Tex.App.–Beaumont 1994, writ denied).

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, 170 (Tex.Civ.App.–Corpus Christi 1980, writ ref'd

n.r.e.). In *Robles v. Robles*, 965 S.W.2d 605, 621 (Tex.App.–Houston [1st Dist.] 1998, pet. denied), however, the trial court did not sign its findings until one month after the husband filed his appellate brief; the findings weren't filed in the appellate court until two months after the husband's brief was filed. The Houston First Court of Appeals distinguished *Stefek* by noting that, in *Stefek*, the Corpus Christi appellate court refused the findings of fact because the appellant did not timely comply with the provisions for requesting such findings and conclusions, and not because of the trial court's untimely filing. *Id*. at 610. In *Robles*, the Houston appellate court acknowledged that the trial court prepared and filed findings of fact and conclusions of law in an untimely manner, but held that the husband had not shown harm. *Id*. at 611.

In *Labar v. Cox*, 635 S.W.2d 801, 803(Tex.App.–Corpus Christi 1982, writ ref'd n.r.e.), the Corpus Christi Court of Appeals held that the trial court's late filing of findings to be error, but further held that such error could still be corrected by the trial court, and therefore could not be the basis for a reversal. Nonetheless, the Corpus Christi appellate court declined to permit the trial court to correct its procedural errors, because other errors existed which required a reversal. *Id*. at 804.

e. Reminder Notice

TRCP 297 provides that if the trial court fails to submit 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, 895 (Tex. 1986); *Saldana v. Saldana*, 791 S.W.2d 316, 319 (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. TEX.R.CIV.P. 298. Thus, a party complaining that a trial court's findings or conclusions are incorrect or incomplete has a procedure available in trial court for requesting specified, additional, or amended findings. *Thomas v. Casale*, 924 S.W.2d 433, 437 (Tex.App.–Fort Worth 1996, pet. denied).

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. TRCP 298. No findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings or conclusions. *Id.*

In Texas, the law is unequivocal: it is incumbent upon appellants to request additional findings on a contested issue if they desire such findings. *O'Farrill Avila v. Gonzalez*, 974 S.W.2d 237, 248 (Tex.App.–San Antonio 1998, pet. denied). A request for additional findings is in the nature of an objection; therefore, the request must be for specified additional or amended findings and conclusions. *See, Vickery*, 5 S.W.3d at 256.

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). 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, 111

(Tex.Civ.App.–Tyler 1978, no writ), (the failure to request a specific finding on reimbursement waived any reimbursement complaints on appeal); *see also*, *Alma Investments, Inc. v. Bahia Mar Co-Owners Ass'n*, 999 S.W.2d 820, 822 (Tex.App.–Corpus Christi 1999, pet. denied) (party asserting an independent ground of recovery or an affirmative defense in a trial before the court must request findings in support thereof in order to avoid waiver; if the findings filed by the trial court do not include any element of the ground of recovery or defense asserted, failure to request additional findings relevant thereto effects a waiver of the ground or defense).

In *Keith v. Keith*, 763 S.W.2d 950, 951 (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. *Id*. at 952. 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. *Id.* He challenged the trial court's failure to make those findings on appeal. *Id*. at 952-953. The Fort Worth Court of Appeals affirmed the trial court's judgment, noting that the failure to request additional findings constitutes a waiver on appeal. *Id*. at 953; *see also*, *Robles*, 965 S.W.2d at 611 (the failure to request additional findings of fact and conclusions of law constitutes a waiver on appeal of the trial court's lack of such findings and conclusions).

g. Effect of Premature Request

TEX.R.CIV.P. 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. *See, Fleming v. Taylor*, 814 S.W.2d 89, 90 (Tex.App.–Corpus Christi 1991, no writ).

5. What Form Is Required?

a. No Specific Form

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. *Roberts*, 999 S.W.2d at 440. 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. *See, e.g., Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120, 124 (Tex.App.–Corpus Christi 1986, no writ); *see also, Guzman v. Guzman*, 827 S.W.2d 445, 447, n. 2 (Tex.App.–Corpus Christi 1992, writ denied) (although the record contained a letter from the trial jugge Judge to the parties indicating that the court did not apportion the husband's goodwill between the parties, because it did not exist independently from his professional ability, the husband did not argue that the letter conditutted proper TRCP 297 findings and conclusions, and thus the appellate court did not address the issue); *Schlobohm v. Schapiro*, 759 S.W.2d 470, 474 (Tex.App.–Dallas 1988), *reversed*, 784 S.W.2d 355 (Tex.1990) (the fact that findings are contained within a letter does not affect their validity, as long as they are filed with the clerk and become a part of the record).

At least two Texas appellate courts have held that a trial court's memorandum of decision does not constitute formal findings. *Texas Const. Group, Inc. v. City of Pasadena*, 663 S.W.2d 102, 105 (Tex.App.--ouston [14th Dist.] 1983, writ dism'd); *see also, Roberts*, 999 S.W.2d at 446 (memorandum of decision that pre-dated final decree of divorce did not amount to formal findings, such that its filing triggered ten-period within which either party could request specified additional or amended findings or conclusions, and thus, by timely filing both initial and reminder requests for findings of fact and conclusions of law following divorce decree, husband preserved error for trial court's failure to enter such findings).

Remember, also, 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. *See, e.g., Rutledge v. Staner*, 9 S.W.3d 469, 470 (Tex.App.–Tyler 1999, pet. denied) (it is well-settled that an appellate court

cannot construe comments the trial judge may have made at the conclusion of the bench trial as findings of fact and conclusions of law); *Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co.*, 3 S.W.3d 112, 127 (Tex.App.–Corpus Christi 1999, pet. denied) (the comments made by the trial judge during the motion for new trial hearing were not relevant to the court's findings because oral comments do not constitute findings of fact and conclusions of law).

In *Nagy v. First National Gun Banque Corporation*, 684 S.W.2d 114, 115-116 (Tex. App.–Dallas 1984, writ ref'd n.r.e.), at the close of the trial, the trial judge informed the parties what his decision would be and the reasons therefor; the trial judge's statements, and the discussion thereon, were recorded in the statement of facts. In response toa request, the trial judge filed a document entitled "Findings of Fact and Conclusions of Law," in which he made no findings or conclusions, and simply referred to that portion of the statement of facts wherein he announced his ruling and the reasons therefor. *Id*. at 116. The Dallas Court of Appeals expressly disapproved of the trial judge's actions. *Id*.

Moreover, the Texas Supreme Court ruled in *Black v. Dallas County Child Welfare*, 835 S.W.2d 626, 630 (Tex. 1992) that Texas appellate courts must give effect to the **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.

b. Findings Separate From Judgment

Formerly, it was common practice to insert various "findings" into the trial court's order. However, in 1990, the Texas Supreme Court enacted TEX.R.CIV.P. 299a, which provides:

> 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.

As a result of the rule change, findings of fact that are recited in a judgment cannot form the basis of a claim on appeal. *Roberts,* 999 S.W.2d at 441. However, the 1990 change to Rule 299a has engendered some conflict among Texas courts of appeals. *See, Id*.

On the one hand, in *Hill v. Hill*, 971 S.W.2d 153 (Tex.App.–Amarillo 1998, no pet.), the issue was whether findings contained in a judgment could be used to support a claim on appeal, although the trial court had made separate, formal findings at the request of a party. The Amarillo appellate court determined that, if there was no conflict between separate findings of fact and findings contained in the judgment, those contained in the judgment should be given effect. *Id*. at 155-56.

On the other, in *Frommer v. Frommer*, 981 S.W.2d 811, 814 (Tex.App.–Houston [1st Dist.] 1998, no pet.), the Houston First Court of Appeals concluded:

> While we neither approve or disprove of the reasoning in *Hill*, we 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." (Citations omitted).

The strict construction of TRCP 299a, as embodied in *Frommer*, appears to be the majority position in Texas. *See, e.g., Salinas v. Beaudrie*, 960 S.W.2d 314, 317 (Tex.App.–Corpus Christi 1997, no writ) ("...we cannot consider the trial court's findings that are contained within the body of the judgment); *R.S. v. B.J.J.*, 883 S.W.2d 711, 715, n. 5 (Tex.App.–Dallas 1994, no writ) (findings contained in the body of the judgment may not be considered on appeal); *Sutherland v. Cobern*, 843 S.W.2d 127, 131 n. 7 (Tex.App.–Texarkana 1992, writ denied) (findings of fact contained in the body of a judgment may not be considered on appeal).

However, the El Paso Court of Appeals recently held that the "invalidity" of findings included in a judgment is an issue which may be waived. In *Tate v. Tate,* 08-99-00006-CV, 2000 WL 1060537, *7 (Tex.App.–El Paso August 3, 2000, no pet.), the wife's attorney drafted the decree, including specific findings on characterization and valuation. She also filed a formal motion requesting that the trial court sign the decree, as drafted. *Id.* Consequently, the El Paso appellate court found that the wife waived any complaint she had about the findings, and considered the findings in its analysis on appeal. *Id.*

6. What Findings Are Available in Divorces?

There is a developing debate among Texas courts of appeals concerning what findings are available in the divorce context. In *Roberts*, Justice Ann McClure of the Eighth Court of Appeals addressed the controversy in some detail.

According to Justice McClure, Texas courts of appeals are not consistent in their discussions of what findings are available to an appellant, particularly in a divorce context. *Roberts,* 999 S.W.2d at 434. Certainly, the trial 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. *Id.*; *see also, Coke v. Coke*, 802 S.W.2d 270, 273 (Tex.App.–Dallas 1990, writ denied) (the trial court's findings of fact and conclusions of law sufficiently disposed of the subject matter, venue, jurisdiction, parties, and issues in the case, and thus, although they were not as complete as the father desired, they were dispositive of each of the ultimate controlling issues to be decided by the trial court).

In *Roberts*, Justice McClure noted that special problems arise in divorce appeals. *Roberts,* 999 S.W.2d at 434. In a divorce case, for example, the ultimate issue concerning property is whether the marital estate was divided in a just and right manner. *Id.*; *see also, e.g., Rafferty v. Finstad*, 903 S.W.2d 374, 376 (Tex.App.–Houston [1st Dist.] 1995, writ denied) (in matters of property division, the ultimate or controlling issue is whether the division was just and right). However, argued Justice McClure, any question that can properly be submitted to a jury should be worthy of a finding by the judge in a bench trial. *Id.* Moreover, since jury findings as to both characterization of property and valuation are binding upon the trial court, findings should be available on characterization of property and value. *Id.*; *cf.*, *Jones v. Jones*, 699 S.W.2d 583 (Tex.App.–Texarkana 1985, no writ) (the Texarkana appellate court determined that it was the husband's 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, thereby assuming that the husband was entitled to obtain findings on the values of assets).

Justice McClure in *Roberts* asserted that if conflicting evidence introduced by the parties establishes a wide range of value, it would virtually impossible to determine the overall fairness of the eventual property division without knowing what value the trial court assigned to the asset; indeed, there would be no way to determine that the court assigned a value within that range at all. *Roberts* 999 S.W.2d at 435. Further, if the trial court is not required to state what factors it considered in dividing the property, the appellant will be 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 and burden may be virtually impossible to overcome. *Id.*

Thus, in *Roberts*, Justice McClure stated:

> [b]ecause 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.

Id. at 435; *see also*, *Joseph v. Joseph*, 731 S.W.2d 597, 598 (Tex.App.–Houston [14th Dist.] 1987, no writ) (the trial court's failure to file findings placed the appellant in an unjust and harmful position of guessing at the valuation methods used when attacking the property division, requiring that the case be reversed and remanded for a new trial).

Recently, *In re Marriage of Morris*, 12 S.W.3d 877, 886 (Tex.App.–Texarkana 2000, no pet.), the Texarkana Court of Appeals found that the trial court's valuation of a $180,000.00 cash award to the wife was a controlling issue that had a direct effect on the judgment. Moreover, stated the Texarkana appellate court, without specific findings as to what values were considered in arriving at that sum, there was no way to know if the court awarded half the fair market value of a particular property, or if the court was simply reimbursing the wife for her time, toil, and labor in enhancing the value of husband's separate property, and, if so, in what amounts. *Id.* According to the Texarkana Court of Appeals, such findings were necessary to give the husband adequate information for the preparation of his appeal. *Id.*

Despite *Roberts*, *Joseph* and *Morris*, there is substantial Texas authority holding that the trial court is not required to make specific valuation findings in divorces, as acknowledged by Justice McClure in *Roberts*. *Roberts* 999 S.W.2d at 434. In *Lettieri v. Lettieri*, 654 S.W.2d 554, 557 (Tex.App.–Fort Worth 1983, writ dism'd), for example, the Fort Worth Court of Appeals - 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. Similarly, the Houston First Court of Appeals has repeatedly held that that the value of specific property is not an ultimate issue, and therefore need not be set out in findings of fact. *See, e.g., Finch v. Finch*, 825 S.W.2d 218, 221 (Tex.App.–Houston [1st Dist.] 1992, no writ) *Wallace v. Wallace*, 623 S.W.2d 723, 725 (Tex.App.–Houston [1st Dist.] 1992, no writ); *see also*, *Rafferty v. Finstad,* 903 S.W.2d 374, 379 (Tex. App.–Houston [1st Dist.] 1995, writ denied) (issues such as whether the husband conveyed certain items of property, the relative earning capacities of the parties, whether the wife invested her separate property in the community residence, or whether the husband was cruel, were issues which the trial court was entitled to consider, but which were merely evidentiary and would not have determined the ultimate, controlling issue of whether the partition was 'just and right').

It should be noted that one First Court of Appeals justice, who joined in the *Finch* opinion, has now changed her mind. In *Rafferty*, 903 S.W.2d at 379 (O'Connor, J, dissenting), Justice O'Connor wrote:

> I recognize we held in *Finch* that it is not necessary for the trial court to make specific findings in a divorce on the characterization and value of the property. Even though I was a member of that panel, I now believe that decision was wrong. In a case like this, with complicated complaints regarding the separate and community assets and claims of reimbursement, it is not possible to show error without specific findings. The trial court's scant findings are of no assistance to our review. (Citations omitted).

7. Effect of Court's Filing

TEX.R.CIV.P. 299, in pertinent part, provides:

> [w]hen 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.

Note initially that the TRCP 299 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, 238 (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. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). When they are supported by competent evidence, they are generally binding on the appellate court. *McPherren v. McPherren*, 967 S.W.2d 485, 489 (Tex.App–El Paso 1998, no pet.); *see also, Atascosa County Appraisal Dist. v. Tymrak*, 815 S.W.2d 364, 367 (Tex.App.–San Antonio 1991, no writ), *aff'd*, 858 S.W.2d 335 (Tex. 1993). 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. *McPherren*, 967 S.W.2d at 489*; see also, Vickery*, 5 S.W.3d at 252 (in a case tried before the court without a jury, in which there are findings of fact and conclusions of law, the reviewing court will indulge every reasonable presumption in favor of the findings and the judgment of the trial court, and no presumption will be indulged against the validity of the judgment).

In contrast, as already mentioned, when no reporter's record is presented, the court of appeals must presume that competent evidence supported the trial court's findings and the judgment thereon. *See, Bryant v. United Shortline Inc. Assur. Servs., N.A.*, 972 S.W.2d 26, 31 (Tex. 1998). Further, in the absence of a record, the appellate court presumes that the 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, 859 (Tex.App.–Beaumont 1986, no writ).

Practice Tip. Consequently, it is critical in every appeal to bring forward a record.

8. 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. *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 841 (Tex.App.–Texarkana 1996, writ denied). If, however, they are not reconcilable, they will not support the judgment. *Zieba v. Martin*, 928 S.W.2d 782, 791 (Tex.App.–Houston [14th Dist.] 1996, no writ). When Rule 296 findings appear to conflict with findings recited in the judgment, the Rule 296 findings control for purposes of appeal. TEX.R.CIV.P. 299a.

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 San Antonio 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. *Id*. at 326.

Note also that if there are conflicts between statements made by the trial judge on the record, and the findings of fact and conclusions of law actually prepared, the formal findings will be deemed controlling. *Ikard v. Ikard*, 819 S.W.2d 644, 647 (Tex.App.–El Paso 1991, no writ).

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? Traditionally, appellate courts hold that a successor judge has full authority to sign the findings, which in most cases, have been prepared by counsel for the prevailing party and not by the trier of fact in any event. *Roberts,* 999 S.W.2d at 430, n.5; *Ikard*, 819 S.W.2d at 651. In other words, once filed, the findings then become those of the trial court, regardless of who prepared them.

FDIC v. Morris, 782 S.W.2d 521 523-524 (Tex.App.–Dallas 1989, no writ) has been mentioned by at least one Texas appellate court as reversing the trial court for a lack of findings because the trial judge was no longer on the bench. *See*, *Puri v. Mansukhani*, 973 S.W.2d 701, 707 (Tex.App.–Houston [14th Dist.] 1998, no pet.). However, a close reading of *FDIC* reveals that what Dallas Court of Appeals really held was that a remand for a new trial, rather than an abatement of the appeal, was required, where several grounds for recovery were alleged, several defenses to liability were urged, the recitations in judgment did not satisfy the proper request for findings of fact and conclusions of law, and the original trial judge was no longer on the court, and, consequently, no longer available to respond to order to enter findings of fact and conclusions of law. *Id*. at 524. Thus, there were several factors involved in the Dallas appellate court's decision, not simply the unavailability of the trial judge.

In *Anzaldua v. Anzaldua*, 742 S.W.2d 782, 783 (Tex.App.—Corpus Christi 1987, writ denied), after the trial court failed to make findings, the Corpus Christi Court of Appeals held that abatement of the appeal was not an available option because the trial judge no longer presiding over the court. The Corpus Christi appellate court was "unable" to instruct the old presiding judge to file findings of fact and conclusions of law in the case, and the new presiding judge had not participated in the proceedings. *Id; cf., Cherne Industries, Inc. v. Juan Magallanes*, 763 S.W.2d 768, 773 (Tex. 1989) (because the trial judge continued to serve on the district court, the error in the case was remediable).

10. Effect of Court's Failure to File

a. Must Complain in Brief

When findings and conclusions are properly requested, but never filed by the trial court, and the trial court is 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); *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, 178 S.W.2d 117, 199 (1944); *Martinez v. Molinar*, 953 S.W.2d 399, 400-01 (Tex.App.–El Paso 1997, no writ). There is a presumption of harmful error unless the contrary appears on the face of the record. *Martinez*, 953 S.W.2d at 401. 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. *Chandler v. Chandler*, 991 S.W.2d 367, 389 (Tex.App.–El Paso 1999, pet. denied); *see also*, *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. *Roberts*, 999 S.W.2d at 437; *Sheldon Pollack Corp. v. Pioneer Concrete*, 765 S.W.2d 843, 845 (Tex.App.–Dallas 1989, writ denied); *see also*, *Chandler*, 991 S.W.2d at 389 (the El Paso appellate court did not need to guess as to the reason the trial judge ruled against the complaining party in the motion to recuse, since the order (both oral and again as written) clearly stated that the motion was denied on the basis that the complaining party failed to present sufficient evidence in support thereof, and therefore the order of the trial court properly identified the basis of its ruling and it was not error for the trial court to refuse to file separate findings of fact and conclusions of law). The issue is whether there are disputed facts to be determined. *See, FDIC*, 782 S.W.2d at 523; *cf., Kuo Kung Ko v. Pin Ya Chin*, 934 S.W.2d 839, 842 (Tex.App.–Houston [14th Dist.] 1996, no writ) (there were only two disputed issues–did the constable use due diligence and was there unencumbered property to levy on–upon which no factual issues existed because the evidence pertinent to such issues was uncontradicted, and the trial judge commented to the parties that he thought the deputy used due diligence and thought the property became encumbered; thus, unlike other cases involving complex and/or disputed facts, the appellant needed no guesswork to determine why the judge ruled as he did, and was told why the judge ruled as he did, and therefore, the appellant was not harmed by the failure to make findings)

c. Failure to Make Additional Findings

With regard to the failure to make 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. *Vickery*, 5 S.W.3d at 257, n. 10; *ASAI v. Vanco Insulation Abatement, Inc*., 932 S.W.2d 118, 122 (Tex.App.–El Paso 1996, no writ) (the 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). The failure to make additional findings is not prejudicial to the appellant if the refusal does not prevent an adequate presentation on appeal. *See, International Ins. Agency, Inc. v. Railroad Comm'n*, 893 S.W.2d 204, 210 (Tex.App.–Austin 1995, writ denied).

Additionally, the trial court's refusal to make a requested finding is reviewable on appeal if error has been preserved. TEX.R.CIV.P. 299.

d. 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*, 731 S.W.2d at 598. However, more recent cases have abated the appeal and ordered the trial judge to file findings of fact and conclusions of law. *See, e.g., Cherne Industries*, 763 S.W.2d at 773; *Zieba*, 928 S.W.2d at 842. As succinctly stated by the El Paso Court of Appeals in *Brooks v. Housing Authority of the City of El Paso*, 926 S.W.2d 316, 321 (Tex.App.–El Paso 1996, no writ):

> ...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.

Recall, however, the discussion above concerning the propriety of an abatement if the original trial judge is no longer available.

11. Deemed Findings

a. Omitted, Unrequested Findings

TEX.R.CIV.P. 299 provides that 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 an appeal, "deemed" findings can be the goose that laid the golden egg–for the appellee–but also the resounding note of doom–for the appellant.

Recall that, after judgment is rendered in a bench trial, either party may request findings of fact and conclusions of law. *See, Vickery*, 5 S.W.3d at 253. However, because findings of fact can provide a basis for overcoming the presumption of validity and demonstrating error on appeal, they are normally requested by the losing party. *Id*. When this occurs, the trial court, as a matter of practice, usually invites the prevailing party to prepare proposed findings and conclusions based upon its rulings. *See, Grossnickle*, 935 S.W.2d at 837, n. 1. Thus, while the appellant will often make a general request for findings of fact and conclusions of law under TRCP 296, the request is global in nature; it is the appellee who drafts a detailed proposal "requesting" a finding on specific elements necessary to support the court's judgment. *Vickery*, 5 S.W.3d at 253. Consequently, in *Vickery*, the Houston Fourteenth appellate court held that it is in just this sense, *i.e.,* an appellee proposing "detailed" findings–that TRCP 299 makes reference to "omitted unrequested elements." *Id* [Note: it has been the Author's experience that appellants often–out of necessity, resulting primarily out of a fear of waiver–propose detailed findings on specific elements of the trial court's judgment.]

Practice Tip. Thus, it is the appellant's duty to attack ***both the express and implied findings***. The utter and absolute necessity of avoiding implied findings, or at least identifying and challenging them, cannot be overstated.

Omitted findings are, however, only supplied if they are necessary to the judgment. *In re Doe*, 19 S.W.3d 346, 357 (Tex. 2000). Implied findings of fact, like the trial court's findings, may be challenged for legal and factual sufficiency. *See, e.g., Wade v. Commission for Lawyer Discipline*, 961 S.W.2d 366, 374 (Tex.App–Houston [1st Dist.] 1997, no pet.).

In *Vickery*, the Houston Fourteenth Court of Appeals distinguished between a deliberately omitted finding, and an inadvertently omitted finding. According to the Houston appellate court, when a court makes findings of fact, but inadvertently omits an essential element of a ground of recovery or defense, the presumption of the validity of the judgment will supply the omitted element by implication. 5 S.W.3d at 252. However, if the record demonstrates that the trial judge deliberately omitted the element, the presumption is refuted and the element cannot logically be supplied by implication. *Id*. Thus, when an essential element in support of the trial court's judgment is omitted from the court's findings, an issue is presented as to whether or not the omission was deliberate or inadvertent. *Id*.

If a ground of recovery or defense is entirely omitted, *i.e*., if the trial court omits every element of the particular ground of recovery or defense, the omission constitutes some evidence that the trial court did not rely on the ground or defense in reaching its decision. *Id*. In such a case, stated the Fourteenth Court of Appeals, the omission is deemed to be deliberate. *Id*.

Moreover, if the appellee drafts proposed findings of fact and conclusions of law that set forth every element of his ground of recovery or defense, and the trial court deletes one of the elements, the omitted element cannot later be supplied on appeal by implication. *Id*. at 253. In other words, in such a situation, it is apparent from the record that the omission was deliberate; the element was indeed "requested," but refused. *Id*.

However, continued the Houston appellate court in *Vickery*, when the trial court specifically finds one or more elements of a ground of recovery or defense, such fact constitutes some evidence the trial court relied upon the ground or defense in reaching its

decision, and therefore the omission of some of the elements of a ground of recovery or defense is deemed to be inadvertent. *Id.*

Additionally, if the trial court omits an element that has been "requested," the trial court's action may suggest the omission was deliberate, rather than inadvertent. *Id.* In other words, when the trial court has been specifically requested to make a particular finding in support of its judgment and it fails to do so, the failure is tantamount to a refusal and therefore the presumption of validity will not supply by implication a missing element that has been specifically "requested." *Id.*

b. The Effect of Negative Findings

Vickery provides a wonderful example of how technical the issue of "deemed" findings can become in the context of an appeal. In *Vickery*, the trial court concluded that the defendant violated section 4.02(a) of the Texas Disciplinary Rules of Professional Conduct, and, in support thereof, made the following finding of fact:

> In November 1992, [the defendant] induced a friend and colleague of his, Allyn Hoaglund, to contact Helen Vickery [the defendant's wife], knowing she was represented by counsel, and to set up a meeting with her to discuss the case.

5 S.W.3d at 250. On appeal, the defendant contended that the trial court's finding did not support the judgment because the trial court failed to make findings on two elements of Rule 4.02(a), namely, that at the time the communication was made, the defendant (1) was representing a client, and (2) did not have the consent of Helen's lawyer. *Id.* In response, the plaintiff conceded that the trial court made no findings regarding such elements, but claimed that such findings may be implied under TRCP 299.

Undaunted, the defendant argued that no implied findings in support of the judgment could be made because only "omitted, unrequested elements" could be implied on appeal. *Id.* He argued [and not uncleverly] that, after the trial court made findings of fact, he requested additional, albeit negative, findings on the omitted elements, *i.e.,* he asked the trial court to find that the communication was ***not*** made in the context of representing a client or without the consent of Helen's attorney. *Id* Because the court made no additional findings, and because TRCP 298 states that "[n]o findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings or conclusions," the defendant contended that the appellate court was expressly prohibited by both TRCP 298 and TRCP 299 from presuming the trial court made any implied findings in support of its judgment. *Id.* at 250-51.

The Houston appellate court acknowledged that an appellant may request additional findings on omitted elements to prevent them from being deemed on appeal. *Id.* at 254. However, held the Fourteenth Court of Appeals, before the failure to grant additional findings will impede an appellate court from presuming implied findings, the omission must be made manifest to the trial court. *Id.* If the trial court is not specifically made aware of the missing element, the omission is presumed to be inadvertent. *Id.* Moreover, and critically in *Vickery*, the Houston appellate court stated that a request for negative findings will rarely apprise the trial court that it has omitted an essential element in its original findings. *Id.*

For example, in *Vickery*, nothing in the defendant's request for additional findings alerted the trial court that it had omitted two essential elements in its original findings. *Id.* Rather, the defendant submitted his requests for findings on the two omitted elements negatively, in the manner least likely to be approved by the trial court. *Id.* Additionally, the two elements were then "buried" in a voluminous request for other findings that were largely immaterial and frequently repugnant to the judgment. *Id.* In short, concluded the Fourteenth Court of Appeals, the defendant did nothing to alert the trial court to the significance of his requests; on the contrary, it appeared to the Houston appellate court that the defendant sought to protect himself from

subsequent implied findings without alerting the trial judge to any need thereof. *Id.* at 255.

While the primary purpose for findings of fact is to assist the losing party in narrowing his issues on appeal by ascertaining the true basis for the trial court's decision, rather than ascertaining the true basis for the trial court's holding, the defendant sought to convert the rule into a method for ambushing the trial judge. *Id.* When an appellant makes a request for a negative finding, as the defendant did in *Vickery*, the trial court's failure to make such a finding is consistent with its judgment; in other words, the presumption of validity was not logically rebutted by the court's failure to make findings contrary to its judgment. *Id.* at 256.

Accordingly, held the appellate court, a request for negative findings contrary to a court's judgment has no logical or legal significance toward rebutting the presumption of validity unless the trial court is specifically alerted to the real issue, *i.e.*, one or more necessary elements have been omitted in the court's original findings. *Id.* at 256. Thus, the defendant did not meet the requirements of TRCP 298 because he failed to apprise the trial court of the specific omissions of which he complained on appeal. *Id.*

All that said, the Houston Fourteenth Court of Appeals deemed the missing findings, and the defendant's continuing string of miserable bad fortune continued.

12. Peculiarities of Conclusions of Law

Conclusions of law are generally lumped in with 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 is reviewable when attacked as a matter of law: for example, 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, 500 (Tex.App.–Dallas 1994, no writ). On appeal, 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). Thus, conclusions of law 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).

Erroneous conclusions of law are not binding on an appellate court, but 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, 702 (Tex.App.–El Paso 1993, no writ). Similarly, 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. *See, e.g.*, *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).

13. Challenges on Appeal

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

As already mentioned, the trial court's failure to make findings upon a timely request must be attacked by a point of error or issue presented on appeal or the complaint is waived. *See, e.g., Perry v. Brooks*, 808 S.W.2d 227, 229-30 (Tex.App.–Houston [14th Dist.] 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*).

Frequently, trial courts include disclaimers to the effect that "any finding of fact may be considered a conclusion of law, if applicable," or 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. *See, e.g., Associated Telephone Directory Publishers, Inc. v. Five D's Publishing Co.*, 849 S.W.2d 894, 897 (Tex.App.–Austin 1993, no writ). Conclusions of law, on the other hand, should be attacked on the ground that the law was incorrectly applied. *See, e.g., Zieben*, 786 S.W.2d at 801-02.

Sometimes, however, findings of fact are mislabeled as conclusions of law. However, the trial court's designation is not controlling on appeal, and although a finding appears among conclusions of law, the appellate court may treat it as a finding of fact. *See e.g*,, *Des Champ v. Featherston*, 886 S.W.2d 536, 542, n. 4 (Tex.App.–Austin 1994, no writ)*; see also, In re King*, 15 S.W.3d 272, 274, n. 1 (Tex.App.–Texarkana 2000, pet. denied) (the trial court's mislabeled conclusions of law were findings of fact necessary to support the trial court's conclusion that the party's parental rights should be terminated, reviewable for legal and factual evidentiary support); *Lucas v. Texas Dep't of Protective and Regulatory Servs*., 949 S.W.2d 500, 502 (Tex.App.-Waco 1997, pet. denied) (the court's conclusion that, "[the party] engaged in conduct which endangered the physical and emotional well-being of [the children] when he sexually abused [the children]," was actually a finding of fact necessary to support the court's conclusion that the party's parental rights be terminated, but was not supported by legally or factually sufficient evidence).

Likewise, sometimes a trial court will designate a finding of fact as a conclusion of law. Again, the trial court's designation is not controlling on appeal and the appellate court can treat them as conclusions of law. *See, Nikolai v. Strate*, 922 S.W.2d 229, 238 (Tex.App.–Fort Worth 1996, writ denied). Findings and conclusions are sometimes also "mixed." *See, e.g., Northwest Park Homeowners Ass'n, Inc. v. Brundrett*, 970 S.W.2d 700, 704, n. 4 (Tex.App.–Amarillo 1998, pet. denied) (some of the findings and conclusions may have constituted findings of mixed questions of law and fact).

The distinction between a finding of fact and a conclusion of law, however labeled, is crucial. In *Posner v. Dallas County Child Welfare*, 784 S.W.2d 585, 586 (Tex.App.–Eastland 1990, writ denied), for example, the ultimate and controlling findings of fact were erroneously labeled as conclusions of law, and, instead of challenging such "conclusions," the appellant challenged immaterial evidentiary matters which were included in the findings of fact. The Eastland appellate court found that the appellant was bound by the unchallenged findings, which constituted undisputed facts, even though they were mislabeled as conclusions of law. *Id*. at 587. 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.

Practice Tip. Findings of fact are sometimes ***intentionally*** labeled as conclusions of law, in other words, "hidden" among conclusions, in hopes that the opposing attorney will not challenge them as findings of fact. Findings and conclusions must be carefully examined to determine if indeed they are findings, or conclusions, or both.

B. Findings In Child Support Orders

Section 154.130 of the Family Code provides that, without regard to TRCP 296 through TRCP 299, in all cases in which child support is contested, and the amount of child support ordered by the court varies from the statutory guidelines, the trial court shall make particular findings in the child support order.

1. Request

Section 154.130(a)(1) 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. §154.130(a)(2). *See, Hatteberg v. Hatteberg,* 933 S.W.2d 522, 528 (Tex.App.–Houston [1st Dist.] 1994, no writ) (the wife's request that the trial court make specific child support findings was not timely made pursuant to provisions of Family Code, when the wife did not make an oral request for such findings at the hearing contesting amount of support at which court announced its judgment, or a written request within ten days from that hearing).

The Family Code's requirement that the trial court file findings of fact if the support order varies from the guidelines is waived if no request for findings is made. *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996).

Practice Tip. Clearly, an oral request for child support findings 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, 109 (Tex. 1990). The test for abuse of discretion is whether the trial court acted in an arbitrary or unreasonable manner. *Id*. Findings are critical to the process of demonstrating an abuse of discretion.

It should be noted that the requirements of section 154.130 apply only to original orders setting the amount of child support, and not to orders denying a motion to modify child support that effectively ordered the continued payment of child support as set in the original order. *Terry v. Terry*, 920 S.W.2d 423, 425 (Tex.App.–Houston [1st Dist.] 1996, no writ); *MacCallum v. MacCallum*, 801 S.W.2d 579, 585 (Tex.App.–Corpus Christi 1990, writ denied).

2. Purpose

The purposes of section 154.130's factfinding requirement are to assist the obligor in challenging the trial court's order on appeal and to enable the appellate court to conduct a meaningful review. *See, Tenery*, 932 S.W.2d at 30 (Tex. 1996). It would also appear that the section 154.130 findings establish in the decree a point of reference for a later modification action. If child support findings are utilized properly, the formal findings and conclusions contemplated by TRCP 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. *See, Haney v. Haney*, 834 S.W.2d 490, 491 (Tex.App.–Houston [14th Dist.) 1992, pet. denied) (the information required by section 154.130 addressing findings in child support order is mandatory). Although this requirement conflicts with TRCP 299a, the Texas Family Code provides that the requirement applies notwithstanding TRCP 296 through TRCP 299. The provisions of section 154.130 do not preclude the trial 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, when child support is the only issue, what then?

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

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

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

• If the trial court fails to include the section 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 TRCP 296. In this instance, two separate findings may be filed. If the specific elements of section 154.130 are included in the

general findings, the error in failing to include findings in child support orders may also 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, 410 (Tex.App.–San Antonio 1996, no writ). Additionally, another Texas appellate 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).

Practice Tip. Insertion of the findings into the support order will be helpful down the road if a modification is necessary. Such 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.

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_____.

Practice Tip. 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 ,* 933 S.W.2d at 528, the wife argued that the trial court's findings of fact wre not sufficient because the findings regarding child support did not state the exact amount of the obligor's monthly resources–instead stating only that such resources exceeded $4000–and that no reasons were given for the variance in the amount of child support from the amount required by the Family Code's guidelines. The First Court of Appeals found that there was no variance, since the trial court had indeed awarded support in accordance with the presumptive award required under the guidelines. *Id*. at 529. The Houston appellate court further held that former section 14.057 did 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. *Id.; see also, Roosth v. Roosth,* 889 S.W.2d 445, 452-

453 (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).

Practice Tip. Arguably, an obligor could request specific findings under TRCP 296 *et seq.* as to what the demonstrated needs of the children were. If you represent the obligor, don't accept merely the section 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. Remember that if you don't ask for additional findings, you won't be able to complain later about their absence, or, later on appeal, make much hay on appeal on the issues involved.

5. What's Your Remedy?

In *Tenery,* 932 S.W.2d 29, the Texas Supreme appears to have a settled a conflict among intermediate Texas appellate courts concerning the appropriate remedy for the failure to file the required statutory child support findings. *See and cf., Hanna v. Hanna,* 813 S.W.2d 626, 628 (Tex.App.–Houston [1st Dist.] 1991, no writ) (the failure to make findings in a child support order upon proper request is reversible error, requiring remand); *Morris v. Morris.* 757 S.W.2d 466, 467 (Tex.App.–Houston [14th ist.] 1988, writ denied) (in which trial court failed to make required child support findings, case was reversed);*Chamberlain v. Chamberlain,* 788 S.W.2d 455, 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); *In the Interest of Valadez*, 980 S.W.2d 910, 913 (Tex.App.–Corpus Christi 1998, no pet.) (the failure to make appropriate findings requires reversal or abatement)

In *Tenery,* at the time of trial, the father's net resources were limited to $980 per month. 932 S.W.2d at 29. The trial court set child support at $550 per month, when application of the guidelines would have resulted in support of $196 per month. *Id*. at 30. After the trial, the father filed a timely request for findings of fact and conclusions of law under TRCP 296, and later submitted a notice of past due findings and conclusions and requested additional or amended findings and conclusions. *Id*. at 29-30. In his request for additional or amended findings, the father asked for findings explaining why the amount of child support per month ordered by the court varied from the amount computed under the Texas Family Code guidelines. *Id*. at 30.

On the father's appeal, the Texas Supreme Court noted 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. *Id*. Error, according to the Texas Supreme Texas, is harmful if it prevents an appellant from properly presenting a case to the appellate court. *Id.* The Texas Supreme 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 the father from effectively contesting the child support order on appeal, and therefore reversed and remanded the cause to the court of appeals with instructions to direct the trial court to correct its error. *Id*.

Thus, it appears that the Texas Supreme Court has opted for abatement *a la Chamberlain* as the preferred remedy for the failure to file required child support findings.

C. Findings In Visitation Orders

Section 153.258 of the Family Code provides that, without regard to TRCP 296 through TRCP 299, 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.

1. Request

Section 153.258 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. *Id*.

Practice Tip. As with an oral request for child support findings, an oral request for section 153.258 findings 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 TRCP 299a, the disclaimer that the provision be applied notwithstanding TRCP 296 through TRCP 299 applies. Thus, the requested findings must be specified in the order, be it a decree of divorce or modification order. *Gray v. Gray*, 971 S.W.2d 212, 217 (Tex.App.–Beaumont 1998, no writ) ("[a]s we appreciate the language of §153.258, the trial court is directed to include, in the modification order itself, its reasons for deviating from standard possession order language); *Jacobs v. Dobrei*, 991 S.W.2d 462, 464 (Tex.App.–Dallas 1999, no pet.) (on timely request, a trial court's order must state its specific reason for varying from the standard possession).

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 when issues other than visitation are involved. Conversely, compliance by the trial court with the Rules of Civil Procedure regarding "regular" findings of fact may forgive noncompliance with the statutory requirements of section 153.258.

In *Gray,* 971 S.W.2d at 216, a modification suit, the mother complained that, although the trial court filed written findings of fact, it did not make the required section 153.258 findings in that it did not state the reasons for the variance from the standard possession order. On appeal, the Beaumont appellate court noted that written findings of fact were indeed present in the record, albeit not in the order itself, and that the trial judge provided the parties with a lengthy verbal explanation for ruling as he did. *Id*. The Beaumont Court of Appeals, analogizing to the situtation in which the trial court fails to make findings of fact, conducted a "harm" analysis. *Id*.. Since the trial court's written findings and verbal explanation combined to eliminate any "guessing game" on the part of either party with regard to reasons for deviating from the standard possession order, the Beaumont appellate court held that any error in not specifying such reasons in the modification order itself was entirely harmless. *Id*. at 217.

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

In pertinent part, TRCP 13 provides:

> [n]o sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order.

The imposition of TRCP 13 sanctions involves a two-part test: (1) the party moving for sanctions must demonstrate that the opposing party's filings are groundless; and (2) the party moving for sanctions mush show that the pleadings were filed either in bad faith or for the purposes of harassment. *See, e.g.*, *GTE Communications v. Tanner*, 856 S.W.2d 725, 730-731 (Tex. 1993) (orig proceeding). The imposition of TRCP 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).

The TRCP 13 findings enable an appellate court to review the order in light of the facts found by the trial court; without the findings required by TRCP 13, effective review of the sanctions is unavailable because the sanctioned party would be unable to overcome the presumption that the trial court found necessary facts in support of its judgment. *GTE Communications Sys. Corp. v. Curry*, 819 S.W.2d 652, 653-54 (Tex.App.–San Antonio 1991, orig. proceeding).

a. Particularity

Several recent appellate decisions have considered the language of TRCP 13 and determined that its requirements are mandatory. *See, Keever v. Finlan,* 988 S.W.2d 300, 312 (Tex.App.–Dallas 1999, pet. dism'd); *Thomas v. Thomas,* 917 S.W.2d 425, 432 (Tex.App.–Waco 1996, no writ). Requiring a trial court to enunciate its reasons in the TRCP 13 sanction order serves two purposes: (1) it invites the trial court to reflect on the order before sanctions are imposed; and (2) it informs the party of the offensive conduct in order to prevent its recurrence. *Keever,* 988 S.W.2d at 312.

In *GTE Communications Systems Corp,* 819 S.W.2d at 654, the San Antonio appellate court noted that the trial court must enumerate the particulars of the existing "good cause" in the sanction order and that this requirement of the rule is mandatory. Accordingly, the San Antonio Court of Appeals found the sanctions order sadly deficient:

> The order in this case is defective in that it fails to comply with the mandatory requirements of [TRCP] 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.; *see also*, *Kahn v. Garcia,* 816 S.W.2d 131, 133 (Tex.App.–Houston [1st Dist.] 1991, orig. proceeding) (the sanctions order stated that the motions for sanctions were "meritorious," and contained no specific mention of what conduct was good cause for imposition of sanctions).

In *Zarsky v. Zurich Management, Inc.,* 829 S.W.2d 398, 400 (Tex.App.–Houston [14th Dist.] 1992, writ dism'd by agr.), the Houston Fourteenth Court of Appeals noted:

> The recitation here fails to satisfy the particularity requirements of [TRCP] 13. There is no statement or description of what was done in bad faith, or a description of how [the sanctioned party] 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. *See, e.g.*, *Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 895 (Tex.App.–Houston [14th Dist.] 2000, no pet.) (the sanctions order recites only the ultimate conclusions the court is required to make in assessing sanctions, and does not state any facts to support it); *cf.*, *Keever,* 988 S.W.2d at 312 (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); *Schexnider v. Scott & White Memorial Hospital,* 953 S.W.2d 439, 441 (Tex.App.–Austin, 1997, no pet.)(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).

b. Remedy

Texas courts of appeal are in conflict as to the appropriate remedy for a sanction order that fails to satisfy TRCP 13's good cause particularity requirements. *Murphy v. Friendswood Development Co.*, 965 S.W.2d 708, 710 (Tex.App.–Houston [1st Dist.] 1998, no pet.); Most Texas appellate courts have considered the deficient sanctions order to be unenforceable. *See, e.g.*, *Friedman & Assocs., P.C. v. Beltline Rd., Ltd.*, 861 S.W.2d 1, 3 (Tex.App.–Dallas 1993, writ dism'd by agr.) (reversed and rendered judgment that sanction order unenforceable); *Zarsky*, 829 S.W.2d at 400 (reversed and remanded "for proceedings consistent with this opinion"); *Thomas*, 917 S.W.2d at 439.

The El Paso Court of Appeals, however, has determined that a legitimate effort at obtaining findings requires an abatement, similar to that utilized in the area of traditional findings of fact, so that the trial court can file good cause particularities. *Campos v. Ysleta General Hospital, Inc. et al,* 879 S.W.2d 67, 71 (Tex.App.–El Paso 1994, writ denied); *cf., Murphy.*, 965 S.W.2d at 710 (abatement was not a practical remedy because the trial judge was no longer serving as a judge; thus, the interests of justice required a remand for a new sanctions hearing).

c. Waiver

Many Texas courts of appeals have held that the complaining parties may waive the particularity requirement of TRCP 13 if they fail to make a timely complaint, or that the trial court's failure to make particular findings in the order may constitute harmless error. *See, e.g., Alexander v. Alexander,* 956 S.W.2d 712, 714 (Tex.App.–Houston [14th Dist.] 1997, pet. denied); *Land v. AT & S Transp., Inc*., 947 S.W.2d 665, 667 (Tex.App.–Austin 1997, no pet.); *McCain v. NME Hosp., Inc*., 856 S.W.2d 751, 755 (Tex.App.–Dallas 1993, no writ)*; 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).

d. Effect of Traditional Findings

The Dallas Court of Appeals has held that TRCP 13's requirement that the trial court state the particulars of good cause in the sanction order is not satisfied by the trial court filing findings of facts and conclusions of law after the sanction order is entered and in effect. *See, Friedman & Assoc., P.C.*, 861 S.W.2d at 3. However, according to the Houston First Court of Appeals, a trial court's failure to make particular findings in a TRCP 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 TRCP 13. *Gorman v. Gorman*, 966 S.W.2d 858, 867-68 (Tex.App.–Houston [1st Dist.] 1998, pet. denied); *cf., Bloom*, 825 S.W.2d at 247 (the trial court's failure to specify good cause warranting sanctions was harmless where the record otherwise indicated good cause existed).

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

It is important to note that, under the express terms of TRCP 215, there is no requirement that the complaining party request or obtain formal findings of fact and conclusions of law with regard to the sanctions order. The Supreme Court has ruled that, to support TRCP 215 sanctions, formal findings are unnecessary. *See*, *e.g*., *IKB Indus. V. Pro-Line Corp.,* 938 S.W.2d 440, 442 (Tex. 1997); *Otis Elevator Company v. Parmlee*, 850 S.W.2d 179, 181 (Tex. 1993). However, the trial court may issue them if it so chooses. *Chrysler Corp. v. Blackmon,* 841 S.W.2d 844, 852 (Tex. 1992).

Because findings filed in a sanctions context are not accorded the same weight as findings made under TRCP 296 and TRCP 297, an appellate court is not limited to a review of the sufficiency of the evidence to support the findings made. *IKB Indus.,* 938 S.W.2d at 442. Such findings, unlike formal findings, are not binding on the reviewing court. *Jefa Company, Inc. v. Mustang Tractor and Equipment Company,* 868

S.W.2d 905, 910 (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, 672 (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. 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. *See, e.g., Chrysler Corp.*, 841 S.W.2d at 852.

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. *See, University of Texas at Arlington v. Bishop*, 997 S.W.2d 350, 355 (Tex. App.–Fort Worth 1999, pet. deneid). Sections 9.012 and 10.004 provide what the trial court shall consider and what sanctions are available. Significantly, section 10.005 of the Civil Practice and Remedies Code 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.

The use of the word "shall" in section 10.005 indicates that the requirement for particularity in the sanction order is mandatory. *University of Texas at Arlington* , 997 S.W.2d at 355. Thus, in *University of Texas at Arlington*, the trial court committed error where it did not state the underlying facts on which the trial court relied in imposing sanctions, and did not explain the reasons warranting the monetary sanctions imposed. *Id.*

In determining whether the trial court's error was reversible, the Fort Worth 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 [the party's] substantial rights or hinder its presentation of this appeal.

Id. at 356.

VI. THE APPELLATE TIMETABLE

A. 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 "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.

B. 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.

C. 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).

D. 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.* , 10 S.W.3d 308, 312-13 (Tex. 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).