POST JUDGMENT ISSUES: SOMETIMES ITS HEAVEN, SOMETIMES ITS HELL, AND SOMETIMES YOU DON'T EVEN KNOW

JIMMY VAUGHT
JANET McCULLAR VAVRA
McCullar ✯ Vaught, P.C.
3200 Steck Avenue, Suite 300
Austin, Texas 78757
(512) 342-9933
Fax: (512) 342-9996
E-Mail: jimmy@mccullarvaught.com

The author thanks Justice Ann Crawford McClure and Richard R. Orsinger for permission to use substantial portions of "Is Divorce Ever 'Appealing'?" 21st Annual Marriage Dissolution Institute (May 1998).

STATE BAR OF TEXAS
33rd ANNUAL ADVANCED FAMILY LAW COURSE
August 6-9, 2007
CHAPTER 25

JAMES A. VAUGHT

McCullar ✯ Vaught, P.C.
3200 Steck Avenue, Suite 300
Austin, Texas 78757
(512) 342-9933 (512) 342-9996 facsimile
e-mail jimmy@mccullarvaught.com
www.mccullarvaught.com

The firm's practice includes family law, divorce, child custody, collaborative law, mediation and civil appeals

PROFESSIONAL ACTIVITIES

Shareholder, McCullar ✯ Vaught, P.C.

Board Certified, Civil Appellate Law (1988-present)
Board Certified, Family Law (2000-present)
Texas Board of Legal Specialization

LICENSED TO PRACTICE

The Supreme Court of Texas
The Supreme Court of the United States
The United States Courts of Appeals for the Fifth and Eighth Circuits
United States Federal District Court for the Western District of Texas

PROFESSIONAL MEMBERSHIPS & HONORS

Martindale-Hubbell - "AV" rating
Martingale-Hubbell Bar Register of Preeminent Lawyers

Texas Super Lawyer 2003, 2004 & 2006 Family Law (Texas Monthly and Law & Politics magazine)

Fellow, American Academy of Matrimonial Lawyers

Member, Council, State Bar Family Law Section 2006-2011

McCullar ✯ Vaught, P. C. included in 2004 SEAK, Inc. National Directory of Physicians' Counsel (one of only two Texas family law firms included in the publication)

Member, The Collaborative Law Institute of Texas

Member, Professionals for Collaborative Family Law

Co-Chair, Family Law on the Front Lines (University of Texas 2003, 2004, 2005, 2006 and 2007)

Associate Chair, Family Law on the Front Lines (University of Texas 2002)

Member, Planning Committee, Advanced Family Law Course (2003 & 2007)

Member, Planning Committee, Family Law on the Front Lines (University of Texas 2001-2007)

Member, Planning Committee, The Ultimate Trial Notebook - Family Law (2000)

Member, Planning Committee, Fifth, Sixth, Ninth, Tenth, Eleventh and Thirteenth Annual Advanced Civil Appellate Practice Courses (1991-92, 1995-97, 1999)

Member, Editorial Board, APPELLATE ADVOCATE, State Bar Appellate Practice & Advocacy Section 1994-97

Member, Council, State Bar Appellate Practice & Advocacy Section 1995-1998

Member, Task Force on Staff Diversity, Texas Commission on Judicial Efficiency 1995-96

Chair, Civil Appellate Law Section, Travis County Bar Association November 1991-1993, 1995-1997

Member, Austin Bar Association Board of Directors November 1991-1993, 1995-1997, 2006-2007

Texas Academy of Family Law Specialists

Member, Travis County Family Law Advocates; President (2002-2003), Secretary/Treasurer (2001-2002)
Public Service Award, The Women's Advocacy Project (2003)

Member, Family Law Section Board of Directors, Austin Bar Association (2003-); Treasurer (2004-2005); President Elect (2005-2006); President (2006-2007)

Member, Planning Committee, Primer for Handling Civil Appeals, Travis County Bar Association, Austin 1995, 1996

Staff Attorney, Hon. Jack Hightower, Justice The Supreme Court of Texas 1989-1995

EDUCATION

Baylor University School of Law J.D., *cum laude* 1980

University of Texas B.A. 1974

SELECTED LAW RELATED PUBLICATIONS & PRESENTATIONS

"Issues in ADR,"30th Marriage Dissolution Seminar, El Paso, Texas, May 2007.

"Marital Property Agreements: Still Crazy After All These Years," 32nd Annual Advanced Family Law Course, San Antonio, Texas, August 2006.

"Temporary Orders: Yes, It's Really a Trial - How to Get Prepared," 32nd Annual Advanced Family Law Course, San Antonio, Texas, August 2006.

"Should the Abuse of Discretion Standard in Child Custody Cases Be Re-Examined?,The Appellate Advocate, State Bar Appellate Practice & Advocacy Section Vol. XVIII, No. 5 (Summer 2006)

"Witness Preparation," Family Law on the Front Lines, Galveston, Texas, June 2006.

"The 10 Biggest Mistakes Physicians Make in a Divorce", THE BIGGEST LEGAL MISTAKES THAT PHYSICIANS MAKE AND HOW TO AVOID THEM (SEAK, Inc. 2005).

"Family Law Case Update," 20th Annual Texas Association of Domestic Relations Offices Conference, Austin 2004.

"Appeals and Mandamus - How to Repair Your Case and Prevent the Need for Repairs (or What to Do When Your Case is in the Ditch)", 29th Annual Advanced Family Law Course, San Antonio, Texas, August 2003.

"Early Stage Companies," Family Advocate, Vol. 25, No. 3, American Bar Association Winter 2003.

Obtaining and Retaining the Benefit of the Bargain- Premarital and Martial Agreements," New Frontiers in Marital Property Law, San Antonio, Texas October 2002.

"Business Interests: Characterization as Separate or Community Interests,"Expert Witness Manual, Volume I, Chapter 2-9, State Bar of Texas August 2002.

"Contesting and Defending Premarital Agreements", 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.

"High Tech Evidence: How to Find It, Retrieve It and Get It In", 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.

"Termination and Adoption: It Ain't Over Till It's Over", 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.

"Early-Stage Company Valuation"American Institute of Certified Public Accountants/American Academy of Matrimonial Lawyers National Conference, Las Vegas, Nevada, May 2002.

"Summary Judgments and Declaratory Judgments in Divorce", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Termination and Adoption: It Ain't Over Till It's Over", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Child Support Collection: A Practical Guide to the Opportunities and Pitfalls in Enforcing and Defending Child Support Obligations," Family Law on the Front Lines, Galveston, Texas, April 2002.

"Valuation of Law Practice in Divorce," American Academy of Matrimonial Lawyers, Sanibel, Florida March 2002.

"Valuation, Characterization and Division of Unusual Assets", New Frontiers in Marital Property Law, Santa Fe, New Mexico, October 2001.

"Professional Partings: Valuing Medical/Legal Professional Practices", 27th Annual Advanced Family Law Course, San Antonio, Texas, August 2001.

"Valuing and Dividing the Community Business, Marriage Dissolution Seminar, Corpus Christi, Texas, May 2001.

"Interaction of Probate Court and Family Law," Family Law on the Front Lines, Galveston, Texas, April 2001.

"Bottom Line Appellate Issues," Ultimate Trial Notebook: Family Law, New Orleans, Louisiana, December 2000.

"Pretrial and Trial Strategies for the Complex Property Case", Santa Fe, New Mexico, October 2000.

"Representing the High Tech Entrepreneur: IPO's, Venture Capitalists and Beyond", 26th Annual Advanced Family Law Course, San Antonio, Texas, August 2000.

"Family Law Court v. Probate Court: What Every Family Lawyer Should Know", 26th Annual Advanced Family Law Course, San Antonio, Texas, August 2000.

"Bill of Review", 23rd Annual Marriage Dissolution Institute, Ft.Worth, Texas, May 2000

"Appellate Tips: Judges Panel", 23rd Annual Marriage Dissolution Institute, Ft.Worth, Texas, May 2000

"Fiduciary Duties of Spouses and Non-Physical Torts", International Academy of Matrimonial Lawyers, Palm Beach, Florida, March 2000.

Internal Procedures in the Texas Supreme Court Revisited: The Impact of the Petition for Review and Other Changes, 31 TEX. TECH L. REV. 63 (2000)

"Strategic Use of Law Beyond the Family Code", New Frontiers in Marital Property Law, San Diego, California, October 1999.

"Trends in Preservation of Error (At Trial, Charge, and Post Verdict)", 13th Annual Advanced Civil Appellate Practice Course, State Bar of Texas, Austin, Texas, October 1999.

"The Appellate Process-the Good, the Bad, and the Ugly", 25th Annual Advanced Family Law Course, Dallas, Texas, August 1999.

"Litigating Marital Agreements: "You can't always get what you want....",22nd Annual Marriage Dissolution Institute, San Antonio, Texas, May 1999.

"Fiduciary Duties of Spouses, Effective Use of the Remedy of the Constructive Trust, Recoveries for Violations of These Duties, and Issues Presented When Spouses are under Conflicting Fiduciary Duties," New Frontiers in Marital Property Law, Sante Fe, New Mexico October 1998

"Appeal of the Coverage Suit," Third Annual Insurance Law Institute (University of Texas School of Law, October 1998) (panelist/speaker and co-author);

"The New Appellate Rules -- At Last!" Eleventh Annual Advanced Civil Appellate Practice Course, Dallas September 1997 (speaker and author);

GUIDE TO THE NEW RULES OF APPELLATE PROCEDURE (State Bar of Texas 1997) (contributing author);

Motion Practice in the Texas Supreme Court, 59 TEX. B. J. 846 (October 1996)

"Factual and Legal Sufficiency in the Texas Supreme Court," Tenth Annual Advanced Civil Appellate Practice Course, Austin 1996 (co-author)

"Inside the Texas Supreme Court," Ninth Annual Advanced Civil Appellate Practice Course, San Antonio 1995 (moderator and author)

Internal Procedures in the Texas Supreme Court, 26 TEX. TECH L. REV. 935 (1995)

"Internal Procedures and Motion Practice in the Supreme Court," Seventh Annual Advanced Civil Appellate Practice Course, Austin 1993 (speaker and author)

TABLE OF CONTENTS

POST-JUDGMENT ISSUES: SOMETIMES ITS HEAVEN, SOMETIMES ITS HELL, AND SOMETIMES YOU DON'T EVEN KNOW

I. SCOPE OF ARTICLE

This Article is intended to address the appeal of a family law case. By far, most appeals of a family law case arise from a non-jury trial. Effective September 1, 1997, the Texas Rules of Appellate Procedure were amended extensively to remove many of the traps and pitfalls which previously existed. Effective January 1, 2003, the Texas Rules of Appellate Procedure were amended to fine tune the appellate rules, to remove some of the remaining traps and pitfalls and to substantively change some of the appellate rules. This Article will attempt to steer practitioners around many of the traps and pitfalls in a family law appeal. Throughout this Article, the Texas Rules of Civil Procedure are referred to as "TRCP," and the Texas Rules of Appellate Procedure are referred to as "TRAP."

II. APPELLATE REVIEW

A. Abuse of Discretion

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

1. Definition

The term "abuse of discretion" is not susceptible to rigid definition. As pointed out in Wendell Hall's article, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 360-61 (1998), the term "abuse of discretion" is not easily defined. "[J]udicial attempts to define the concept almost routinely take the form of merely substituting other terms that are equally unrefined, variable, subjective and conclusory." *Id.* at 360-61, citing *Landon v. Jean-Paul Budinger, Inc.*, 724 S.W.2d 931, 934 (Tex. App..--Austin 1987, no writ). Combining the terms and phraseology used in various appellate opinions, Wendell suggests that "[t]he test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. Rather, a trial court abuses its discretion if its decision is arbitrary, unreasonable, and without reference to any guiding rules and principles." *Id.* at 362 [footnotes omitted]. However, "[t]here are at least two instances in which a perceived error does not constitute an abuse of discretion. First, a mere error of judgment is not an abuse of discretion. Second, a trial court does not abuse its discretion if it reaches the right result for the wrong reason." *Id.* at 363 [footnotes omitted].

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

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

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

2. When Does Abuse of Discretion Standard Apply?

The abuse of discretion standard applies to the following trial court decisions: plea in abatement, special exceptions, temporary and permanent injunctions, severance and joinder, striking intervention, amendment of responses to requested admissions, and deeming them admitted,

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

3. Applying an Erroneous Rule of Law

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

4. Is There a Different Standard of Evidentiary Review?

In recent years, some courts have said that when the trial court's ruling on the merits is reviewed under an abuse of discretion standard, the normal "sufficiency of the evidence" review is part of the "abuse of discretion" review and not an independent ground for reversal. *Crawford v. Hope*, 898 S.W.2d 937, 940-41 (Tex. App..--Amarillo 1995, writ denied) (when standard of review is abuse of discretion, factual and legal sufficiency are not independent grounds of error); *accord*, *Thomas v. Thomas*, 895 S.W.2d 895, 898 (Tex. App..--Waco 1995, writ denied); *In re Marriage of Driver*, 895 S.W.2d 875, 877 (Tex. App..--Texarkana 1995, no writ); *Wood v. O'Donnell*, 895 S.W.2d 555, 556 (Tex. App..--Fort Worth 1995, no writ); *In re Pecht*, 874 S.W.2d 797, 800 (Tex. App..--Texarkana 1994, no writ); *but see Matthiessen v. Schaefer*, 897 S.W.2d 825, 828 (Tex. App..--San Antonio 1994) (Duncan, J., dissenting) (appellate court should review award of attorney's fees by normal sufficiency of evidence standard, and not subsume sufficiency of evidence into abuse of discretion standard), *rev'd on other grounds*, 915 S.W.2d 479 (Tex. 1995).

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

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

Overlapping Standards in the Family Law Context

An appeal directed toward demonstrating an abuse of discretion is one of the tougher appellate propositions. Most of the

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

Lindsey, 965 S.W.2d at 592-93 (footnote and citations omitted). *See Echols v. Olivarez*, 85 S.W.3d 475, 477-48 (Tex. App. – Austin 2002, no pet.).

Consider the following hypothetical from *Lindsey*. Suppose the parties dispute the value of Husband's business which is operated as a sole proprietorship. Wife contends it has a value of $30,000 while Husband values it at $10,000. For purposes of this example, we will assume that Wife's valuation expert improperly includes personal goodwill. We will also assume that the trial court erroneously overrules Husband's objection and makes a specific fact finding that the business has a value of $30,000. On appeal, Husband contends that the trial court erred in admitting Wife's expert's testimony, and had it been properly excluded, there was no evidence to support a valuation finding of $30,000. While an appellate court would likely agree, that is merely the first hurdle. Husband must still demonstrate that the trial court abused its discretion in dividing the community estate. Even if the evidence is insufficient to support the court's value of $30,000, that valuation error may not constitute an abuse of discretion in the ultimate distribution of a $300,000 estate [the error representing ten percent of the total community estate], but it may well constitute an abuse of discretion in the division of a $100,000 estate [the error representing nearly a third of the community estate], depending upon the equities justifying a disproportionate division. *Lindsey*, 965 S.W.2d at 592 n. 3.

B. Should the Abuse of Discretion Standard in Child Custody Cases Be Re-Examined?

This section is reprinted from "Should the Abuse of Discretion Standard in Child Custody Cases Be Re-Examined?," The Appellate Advocate, State Bar Appellate Practice & Advocacy Section Vol. XVIII, No. 5, 11-13 (Summer 2006)

Should the standards currently used in making and reviewing orders that have the effect of limiting a parent's assess to his or her children be re-examined? The current standards are contrary to the legislative mandate regarding parental access and fail to adequately address the potential to profoundly impair the fundamental interests of parents and children in the parent-child relationship. The abuse of discretion standard should be altered so that trial courts are required to justify any deviation from maximum feasible time with both parents by clear and convincing evidence and make factual findings so that appellate courts may carefully review and scrutinize those findings. *See In re J.R.D.*, 169 S.W.3d 740 (Tex. App. – Austin 2005, pet. denied) (Puryear, J., concurring); *see also In re L.M.M.*, 2005 WL 2094758 (Tex. App. – Austin 2005, no pet.) (Puryear, J., concurring). The author has extracted liberally from Judge Puryear's concurring opinion in *In re J.R.D.*

The current standard of review of a trial court's determination of conservatorship, possession of and access to a child, and child support is 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 without reference to any guiding rules or principles, i.e., whether it acted arbitrarily and unreasonably. *Worford*, 801 S.W.2d at 109. Under the abuse of discretion standard, the legal and factual sufficiency of the evidence are not independent grounds of error, but are merely relevant factors in assessing whether the trial court abused its discretion. *Doyle v. Doyle*, 955 S.W.2d 478, 479 (Tex. App. – Austin 1997, no pet).

Undoubtedly, custody and possession determinations can severely limit the parent-child relationship and have the potential to profoundly impair the fundamental liberty interest of parents and children in the parent-child relationship. The abuse of discretion standard allows a trial court ruling severely curtailing parental rights to stand so long as there is some evidence upon which to base its findings and an appellant does not show that the trial court failed to follow any guiding rules or principles. This standard is inconsistent with the constitutional nature and weighty import of the rights and interests of parents, children and the State, as well as the legislature's mandate concerning parental access and presents a significant risk of erroneous deprivation of the liberty interests of parents and children.

Constitutional Dimensions of Parent-Child Relationship

The right to the companionship, care, custody, and control of one's own child is a fundamental liberty interest far more precious than any property right. *In re M.S.,* 115 S.W.3d 534, 547-48 (Tex.2003). Thus, "the relationship between parent and child is constitutionally protected." *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 2060-2061 (2000) (citing *Quilloin v. Walcott,* 434 U.S. 246, 255, 98 S.Ct. 549 (1978)). *See Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (The natural right existing between parents and their children is of constitutional dimensions.). Parents have the responsibility and the right to direct the upbringing and education of their children.. *Troxel,* 530 U.S. 57, 65-66, 120 S.Ct. 2054, 2060. In fact, "[i]t is cardinal...that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442 (1944).

It has been firmly established that the Due Process Clause of the Fourteenth Amendment to the United States Constitution protects the fundamental rights of parents to make decisions concerning the care, custody, and control of their children. *Troxel,* 530 U.S. 57, 66, 120 S.Ct. 2054, 2060. "[T]he Due Process Clause does not permit States to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 72-73, 120 S.Ct. at 2064.

Children also have a substantial interest in the proceedings that determine their custody and the direction of their lives. *See M.S.,* 115 S.W.3d at 547. Both parent and child have a weighty interest in the accuracy and justice of a decision affecting their ability to have a relationship with one another. *Id.* The State also has an interest in protecting the welfare of its children, which "must initially manifest itself by working toward *preserving* the familial bond" between a parent and child unless that parent will not provide a safe, stable environment. *Id.* at 548 (citing *Santosky v. Kramer,* 455 U.S. 745, 766-67, 102 S.Ct. 1388 (1982)).

While the grant of custody to another or the limitation of a parent's access to a child is not tantamount to absolute termination of parental rights, the State must tread very carefully when it infringes upon a parent's ability to participate in child rearing. *See Troxel,* 530 U.S. at 72-73, 120 S.Ct. 2054. Even when it does not terminate rights, a court that infringes on a parent's ability to rear his or her children may also violate the United States Constitution. *Id.* at 67, 120 S.Ct. 2054. In addition, the Texas Supreme Court has recognized that custody determinations between fit parents can risk a significant deprivation similar to termination of the relationship. *See Lewelling v. Lewelling,* 796 S.W.2d 164, 168 n. 8 (Tex.1990). The weighty interests of parents, children, and the State in a just and accurate decision mandate that "*any* significant risk of erroneous deprivation is unacceptable." *M.S.,* 115 S.W.3d at 549 (emphasis added). Our government respects fit parents' abilities to act in the best interests of their children by applying a presumption that they do so. *Troxel,* 530 U.S. at 68, 120 S.Ct. 2054. The United States Supreme Court has recognized that, in accord with this presumption, so long as a parent is "fit," there is normally no reason for the State to inject itself between parent and child or disturb that parent's rearing of his or her children. *Id.* at 68-69, 120 S.Ct. 2054. In other words, court interference with

the right of a fit parent to bring up his or her own child potentially impacts a fundamental right and may violate the Due Process Clause.

Public Policy To Encourage Frequent Contact Between a Child and Each Parent

It is undisputed that the policy of the State of Texas is "to encourage frequent contact between a child and each parent for periods of possession that optimize the development of a close and continuing relationship between each parent and child." TEXAS FAMILY CODE § 153.251(b); *see* TEXAS FAMILY CODE § 153.001(a). The legislature has implemented this policy by directing courts that "[t]he terms of an order that denies possession of a child to a parent or imposes restrictions or limitations on a parent's right to possession of or access to a child *may not exceed* those that are *required* to protect the best interest of the child." TEXAS FAMILY CODE § 153.193 (emphasis added).

In order to protect children's abilities to have a meaningful relationship with their parents, the legislature determined that the standard possession order would set a presumptive *minimum* amount of time for possession of a child by a joint managing conservator parent. TEXAS FAMILY CODE § 153.137 (emphasis added). Thus, the legislature has determined that it is in the child's best interest to have the minimum amount of time with *any* reasonably safe parent, and it makes no sense, nor is it authorized, to blindly apply that same minimum amount of time to a parent who is not merely safe but is an interested and active influence in his or her child's life without regard to the degree of emotional engagement or bonding between the parent and child. Whatever latitude courts have in setting possession periods, they do not have the discretion to automatically adopt the minimum amount of time and ignore the legislature's explicit directive in section 153.193 to allow maximum feasible time with both parents unless doing otherwise would impair the children's interests.

Unfortunately, it is not uncommon for trial courts to automatically adopt the minimum amount of time outlined in the standard possession order without considering whether that order will impose limits upon possession and access in excess of those necessary to protect the best interests of the children. Courts have a responsibility to do more than automatically adopt a standard minimum amount of time.

The Abuse of Discretion Standard Falls Short and Should Be Re-Examined

The abuse of discretion standard allows a trial court ruling severely curtailing parental rights to stand so long as there is some evidence upon which to base its findings and an appellant does not show that the trial court failed to follow any guiding rules or principles. This standard is inconsistent with the constitutional nature and weighty import of the rights and interests of parents, children and the State, as well as the legislative mandate regarding parental access and presents a significant risk of erroneous deprivation of the liberty interests of parents and children.

The abuse of discretion standard falls short of showing proper respect to the legislature's deliberate policy decisions commanding Texas courts to support and cultivate relationships between children and their parents so long as those parents are fit and to implement maximum parent-child contact to actively preserve parent-child relationships. Considering the importance of and the risk to the fundamental rights and interests of parents, children and the State and the legislature's clear mandates that courts take measures to protect this most sacred of relationships, the standards by which decisions that limit a parent's access to or possession of a child are made and reviewed need to be carefully re-examined. The abuse of discretion standard should be altered so that trial courts are required to justify any deviation from maximum feasible time with both parents by clear and convincing evidence and make factual findings, and so that appellate courts may carefully review and scrutinize those findings.

III. TEMPORARY ORDERS PENDING APPEAL

Section 6.709 of the Texas Family Code, entitled Temporary Orders Pending Appeal, provides as follows:

> (a) Not later than the 30th day after the date an appeal is perfected, on the motion of a party or on the court's own motion, after notice and hearing, the trial court may render a temporary order necessary for the preservation of the property and for the protection of the parties during the appeal, including an order to:
>
> (1) require the support of either spouse;
> (2) require the payment of reasonable attorney's fees and expenses;

> (3) appoint a receiver for the preservation and protection of the property of the parties; or
> (4) award one spouse exclusive occupancy of the parties' residence pending the appeal.
>
> (b) The trial court retains jurisdiction to enforce a temporary order under this section unless the appellate court, on a proper showing, supersedes the trial court's order.

Section 109.001 of the Texas Family Code, entitled Temporary Orders During Pendency of Appeal, provides as follows:

> (a) Not later than the 30th day after the date an appeal is perfected, on the motion of any party or on the court's own motion and after notice and hearing, the court may make any order necessary to preserve and protect the safety and welfare of the child during the pendency of the appeal as the court may deem necessary and equitable. In addition to other matters, an order may:
>
> (1) appoint temporary conservators for the child and provide for possession of the child;
> (2) require the temporary support of the child by a party;
> (3) restrain a party from molesting or disturbing the peace of the child or another party;
> (4) prohibit a person from removing the child beyond a geographical area identified by the court;
> (5) require payment of reasonable attorney's fees and expenses; or
> (6) suspend the operation of the order or judgment that is being appealed.
>
> (b) A court retains jurisdiction to enforce its orders rendered under this section unless the appellate court, on a proper showing, supersedes the court's order.
>
> (c) A temporary order rendered under this section is not subject to interlocutory appeal.
>
> (d) The court may not suspend under Subsection (a)(6) the operation of an order or judgment terminating the parent-child relationship in a suit brought by the state or a political subdivision of the state permitted by law to bring the suit.

The clear intent of this section it to extend the power of the trial court to enter temporary orders after an appeal has been perfected to preserve and protect the safety and welfare of the child, preserve the community property and protect the parties, when such relief has not been ordered in the decree. *See In re Boyd*, 34 S.W.3d 708, 710-11 (Tex. App. – Fort Worth 2000, orig. proceeding). The breath of these sections is broad including but not limited to such relief as temporary spousal support and attorney's fees. *See In re Marriage of Joiner*, 755 S.W.2d 496, 499 (Tex. App. – Amarillo 1988, no writ); *Love v. Bailey-Love*, 217 S.W.3d 33, 36 (Tex. App. – Houston [1st Dist.] 2006, no pet.); *Griffith v. Case*, No. 03-06-007220CV (Tex. App. – Austin May 22, 2007, no pet. history) (mem. op.).

A. Thirty Day Deadline is Absolute

The trial court's authority to render such temporary orders derives exclusively from section 6.709 which requires that all such orders be entered within 30 days of the perfection of a party's appeal. *See In re Boyd*, 34 S.W.3d at 711; *Love v. Bailey-Love*, 217 S.W.3d at 36. Because the 30 day deadline stated in sections 6.709 and 109.001 is absolute, orders that have attempted to grant temporary relief pending appeal which were signed more than 30 days after an appeal has been perfected have been declared void. *See Bass v. Bass*, 106 S.W.3d 311, 315 (Tex. App. – Houston [1st Dist.] 2003, no pet.); *In re Boyd*, 34 S.W.3d at 711.

The 30 day deadline is truly absolute. Even though a trial court has plenary power until 30 days after the date the judgment was signed or after an appropriate post-judgment motion was overruled, to vacate, modify, correct or reform the judgment or to grant a new trial, this plenary power does not extend the trial court's power or the time to sign a temporary order pending appeal beyond 30 days after an appeal has been perfected . *See In re Boyd*, 34 S.W.3d at 711; *Love v. Bailey-Love*, 217 S.W.3d at 36.

B. Attorney's Fees on Appeal

The trial court has the discretion to order one spouse to pay the other spouse attorney's fees pending appeal. *See Love v. Bailey-Love*, 217 S.W.3d at 36 (the trial court signed an order which required Robert to pay Sophia $5,000 for appeal).In addition, the trial court has the

discretion to order the appealing spouse to deposit funds into the registry of the court as attorney's fees which would be returned to the appealing party should he prevail on appeal. *Griffith v. Case*, No. 03-06-007220CV (Tex. App. – Austin May 22, 2007, no pet. history) (mem. op.). In *Griffith v. Case*, the Temporary Orders Pending Appeal stated in part:

> It is ORDERED that Respondent, [HUSBAND] shall pay $18,000,00 into the registry of the Court as and for attorney's fees and expenses incurred by [WIFE] in connection with the appeal of this cause initiated by [HUSBAND].
>
> It is further ORDERED that the Clerk of the Court shall remit to [WIFE] all or part of amount ordered herein to be paid into the registry of the Court immediately upon the issuance of the mandate in connection with the appeal of this cause following the rendition of an opinion affirming in whole or in part the Final Decree of Divorce rendered by the Court, said amount to be that amount of attorney's fees actually incurred by [WIFE] in connection with the appeal.
>
> It is further ORDERED that the Clerk of the Court shall remit to [HUSBAND] the entire amount ordered herein to be paid into the registry of the Court immediately upon the issuance of the mandate in connection with the appeal of this cause following the rendition of an opinion reversing the entire Final Decree of Divorce rendered by the Court.
>
> In the event [WIFE] does not receive the entire amount deposited in the registry, any remaining amount shall be remitted to [HUSBAND].

When the appealing party, the husband, failed to deposit the funds into the registry of the court, the wife filed a motion to dismiss the appeal. The wife requested that the Court of Appeals grant her Motion to Dismiss Appeal, or in the alternative, abate the appeal for a limited period of time (but no more than 14 days) so that the husband could deposit the $18,000.00 into the registry of the Court as ordered by the trial court and if he fails to do so, dismiss the appeal. On April 5, 2007, the Court of Appeals abated the appeal until April 18, 2007 to allow the husband to comply with the trial court's order. On May 22, 2007, when the husband had still not deposited the funds into the registry of the court, the Court of Appeals dismissed the appeal.

C. Acceptance of Benefits

In *McAlister v. McAlister*, 75 S.W.3d 481 (Tex. App. – San Antonio 2002, pet. denied), section 6.709 was applied in the context of the acceptance of the benefits doctrine. Prior to submission, the husband filed a motion to dismiss the appeal filed by the wife, seeking a dismissal under the acceptance of benefits doctrine which holds that a litigant cannot treat a judgment as both right and wrong. Under this doctrine, if the wife voluntarily accepted the benefits of the divorce decree, she would be estopped from prosecuting an appeal from that divorce decree.

The wife responded that the doctrine did not apply because the trial court entered post-judgment temporary orders pursuant to section 6.709 stating that "The funds received by [WIFE] from [HUSBAND] under the terms of the Final Divorce Decree shall continue to be received as temporary child and spousal support during the pendency of appeal." *Id*. at 483.

The husband argued that section 6.709 did not authorize the court to make such orders retroactive to the date of the decree. However, the Court of Appeals found no such limitation in section 6.709, stating, "Such an interpretation could hamstring both the court and the appellant during the time of post-decree hearings and the appeal thereby abrogating the legislature's intent to maintain the status quo and provide for spousal and child support, as necessary, during the appeal." The Court found that the trial court had authority under section 6.709 to issue post-judgment temporary orders retroactive to the decree. The Court of Appeals determined that when such orders are in place, the acceptance of the benefits doctrine did not apply. *Id.* at 483-84.

IV. THE APPELLATE TIMETABLE

A. Computation of Time

Under TRAP 4.1(a), if the last day of a period for filing a document ends on a Saturday, Sunday or legal holiday, the filing deadline is extended to the next business day which is not a legal holiday. TRAP 4.1(b) also extends the deadline when the court clerk's office in which the document is to be filed is closed or inaccessible during regular hours on the last day for filing.

TRAP 4.1(b). Inaccessibility can be proved by certificate of the clerk or counsel, by a party's affidavit, or other satisfactory proof, and can be contested in like manner. TRAP 4.1(b).

B. Filing by Mail

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

However, don't try this method of filing with Federal Express or UPS -- your document absolutely, positively will not be timely. *See, e.g., Carpenter v. Town and Country Bank*, 806 S.W.2d 959, 960 (Tex. App. -- Eastland 1991, writ denied) (UPS); *Fountain Parkway, Ltd. v. Tarrant Appraisal Dist.*, 920 S.W.2d 799, 802-03 (Tex. App. -- Fort Worth 1996, writ denied) (Federal Express). A court of appeals by local rules may also permit documents to be filed, signed or verified by electronic means. TRAP 9.2(c).

C. Deadline 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). In addition to the normal requirements of TRAP 25.1(d), the notice of appeal in an accelerated appeal must state that the appeal is accelerated. TRAP 25.1(d)(6).

Section 109.002(a) of the Texas Family Code provides that "[t]he procedures for an accelerated appeal under the Texas Rules of Appellate Procedure apply to an appeal in which the termination of the parent-child relationship is in issue." In other words, if the termination of a parent-child relationship is in issue even in the context of a divorce, the appeal must be perfected within 20 days after the judgment or appealable interlocutory order is signed.

In addition, a final order terminating the parent-child relationship and appointing the Texas Department of Family and Protective Services as permanent managing conservator is an order governed by the procedures in chapter 263 of the Texas Family Code. *See In re R.C. and R.C.C.*, ___ S.W.3d ___, 2007 WL 1219046 (Tex. App. – Amarillo April 25, 2007, no pet. history). Section 263.405(a) provides that the procedures for an accelerated appeal under the Texas Rules of Appellate Procedure apply to an appeal from a final order terminating the parent-child relationship and appointing the Texas Department of Family and Protective Services as permanent managing conservator. Section 263.405(b) requires a party intending to appeal a final order rendered under Subchapter E to file with the trial court, no later than fifteen days after the final order is signed, a statement of points on which the party intends to appeal. The statement of points may be filed separately or it may be combined with a motion for new trial. The failure to timely file a statement of points does not deprive the appellate court of jurisdiction over the appeal; however, it is necessary to preserve a point for review on appeal *See In re R.C. and R.C.C.*, 2007 WL 1219046 at *1. In 2005, the Texas Legislature enacted section 263.405(i), effective for appeals filed after September 1, 2005, which provides:

> The appellate court may not consider any issue that was not specifically presented to the trial court in a timely filed statement of the points on which the party intends to appeal or in a statement combined with a motion for new trial. For purposes of this subsection, a claim that a judicial decision is contrary to the evidence or that the evidence is factually or legally insufficient is not sufficiently specific to preserve an

issue for appeal.

Every appellate court which has addressed this question has agreed that the statute prohibits appellate courts from considering points not properly preserved by the timely filing of a statement of points. *In re R.C. and R.C.C.*, 2007 WL 1219046 at *2 fn. 6.

Further, an appeal from a final order in a proceeding under the UCCJEA is an accelerated appeal and the appeal must be perfected within 20 days after the final order. TEX. FAMILY CODE § 152.314. *See In the Interest of K.L.V. and K.J.V.*, 109 S.W.3d 61 (Tex. App. – Fort Worth 2003, pet. denied) (appeal dismissed because notice of appeal filed more than 20 days after the final order).

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). However, the appellee must be careful because if the appellant files its notice of appeal late, the appellee's notice of appeal will not be timely if filed within 14 days of the appellant's late filed notice of appeal. *See Bixby v. Bice*, 992 S.W.2d 615, 616 (Tex. App. – Waco 1999, no pet.); *Grondona v. Sutton*, 991 S.W.2d 90, 93 (Tex. App. – Austin 1998, pet. denied).

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). However, the appealing party does not have to concede that its notice of appeal was untimely in order to satisfy the reasonable explanation requirement. *Hone v. Hanafin*, 104 S.W.3d 884 (Tex. 2003). "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. Any conduct short of deliberate or intentional noncompliance qualifies as inadvertence, mistake or mischance - even if that conduct can be characterized as professional negligence.*"Garcia v. Kastner Farms, Inc.,* 774 S.W.2d 668, 669-70 (Tex. 1998). *See Weik*, 988 S.W.2d at 439. There is a conflict whether the inability to obtain funds to hire appellate counsel is a reasonable explanation for failing to timely file a notice of appeal. *Compare Smith v. Houston Lighting & Power Co.*, 7 S.W.3d 287, 289 (Tex. App. Houston [1st Dist.] 1999, no pet.) *with Hykonnen v. Baker Hughes Business Support Services*, 93 S.W.3d 562, 563-64 (Tex. App. – Houston [14th Dist.] 2002, no pet.).

6. No Notice of Trial Court's Judgment

TRAP 4.2 addresses 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.

D. 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). *See Marriage of Spiegel*, 6 S.W.3d 643, 646 (Tex. App. – Amarillo 1999, no pet.).

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); *Carter v. Carter*, ___ S.W.3d ___, 2006 WL 2457115 (Tex. App. – El Paso 2006, no pet.). In *Utley*, the court of appeals denied the Utleys' motion for extension of time and the reporter's record was not filed.

E. 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.

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, 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 TRAPS.

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

Under 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 312, 312-313 (Tex. 2000) (timely filed post-judgment motion seeking to add an award of sanctions to an existing judgment extends the appellate timetable).

G. Bankruptcy

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

1. Notice of Bankruptcy

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

2. Automatic Stay

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

appeal and all periods from the date when the bankruptcy petition is filed.

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

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

3. Calculation of Time Periods

TRAP 8 also clarifies the calculation of time periods. A time period that began to run but had not expired when the appeal was suspended by bankruptcy begins over when the appellate court reinstates or severs the appeal. For example, during the ninety day period for filing the notice of appeal after the judgment and the filing of a motion for new trial, the defendant files a bankruptcy petition which suspends the appeal. The ninety day period for filing the notice of appeal "starts over" or "begins anew" when the court reinstates the appeal (when, for example, the bankruptcy court lifts the bankruptcy stay) or severs the bankrupt party. TRAP 8.2. *See*, *Costilla Energy, Inc. v. GNK, Inc.*, 15 S.W.3d 579, 580 (Tex.App.–Waco 2000, no pet.); *Holdampf v. H. E. Butt Grocery Co.*, 2003 WL 549966 (Tex. App. -- El Paso 2003, no pet.).

4. Motions to Sever And Reinstate

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

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

V. MOTIONS FOR NEW TRIAL

The use of a motion for new trial in a non-jury appeal is similar to a jury appeal, except that it is not necessary to challenge either the legal or factual sufficiency of the evidence in a motion for new trial after a non-jury trial. TRCP 324(a) and (b).

A. Errors Made in Rendering Judgment

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

B. Timetable For Filing - Rule 329b TRCP

The motion for new trial shall be filed within 30 days after judgment is signed by the court. The trial court is prohibited from extending the time to file a motion for new trial and any amended motion for new trial must also be filed within 30 days after the judgment is signed by the court. TRCP 329b. If the motion is not determined by **written** order, it shall be deemed overruled by operation of law 75 days after judgment is entered. *Balazik v. Balazik*, 632 S.W.2d 939 (Tex. App..--Fort Worth 1982, no writ); Faulkner v. Culver, 851 S.W.2d 187 (Tex. 1993). Mere reference in an order that a hearing was held on the motion for new trial without specifically granting the motion will not suffice. The overruling by operation of law of a motion for new trial preserves error unless the taking of evidence was necessary to present the complaint in the trial court. TRAP 33.1(b). The automatic overruling of a motion for new trial on which there has been no trial court's ruling is constitutional. *Texaco, Inc. v. Pennzoil Company*, 729 S.W.2d 768 (Tex. App.. - Houston [1st Dist.] 1987, writ ref'd n.r.e.).

1. Plenary Power of Trial Court

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

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

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

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

The subject was revisited in 1996 by the Supreme Court in *L.M. Healthcare, Inc., v. Childs*, 929 S.W.2d 442 (Tex. 1996). Judgment was rendered against the plaintiff on January 28, 1994 and on February 7, 1994 the plaintiff filed a motion for new trial. At a March 3rd hearing, the trial court signed a judgment on the January 28th pronouncement and an order denying the motion for new trial. On April 4th, the plaintiff filed a motion to modify judgment, requesting that the court include in its judgment a recitation that the dismissal was without prejudice to the plaintiff's refiling its suit. Hearing on this motion was held on May 11th and on May 17th, the trial court granted the relief requested and signed a modified judgment. The defendant alleged that the trial court signed the modified judgment after the expiration of its plenary power. The court of appeals concluded that a motion to modify judgment, although filed timely, cannot extend plenary power if it is filed after the trial court overrules a motion for new trial. As a result, the appellate court held that the trial court lacked jurisdiction to modify the judgment. The Supreme Court disagreed. The rules provide that a motion to modify judgment shall be filed within the same time constraints as a motion for new trial, which must be filed no later than the 30th day after judgment is signed. TRCP 329b(b) and (g). "That the trial court overruled Longmeadow's motion for new trial does not shorten the trial court's plenary power to resolve a motion to modify judgment." *Id.* at 443. The Court concluded that the rules provide that a timely filed motion to modify judgment extends plenary power separate and apart from a motion for new trial.

In *Lane Bank Equip. Co. v. Smith Southern Equip. Co.,* 10 S.W.3d 308 (Tex.2000), the Texas Supreme Court held that a timely filed post-judgment motion that seeks a substantive change in an existing judgment constitutes a "motion to

modify, correct, or reform" and thus extends a trial court's plenary power and the appellate timetables. *Id.* at 314. The "substantive change" at issue in *Lane Bank* was a motion to add sanctions and for rendition of a new final judgment. The Supreme Court held that because appellee had explicitly requested "rendition of a new final judgment," a proper motion to modify had been made according to rule 329b(g). *Id.*

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

Note that TRAP 26.1(a) 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 (if properly filed). TRAP 26.1(a)

2. Amended or Supplemental Motions

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

3. Citation by Publication

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

C. Grounds For New Trial

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

1. Newly Discovered Evidence

Generally speaking, a new trial based upon newly discovered evidence in a civil proceeding will not be granted unless: (i) admissible competent evidence is introduced showing the existence of the newly discovered evidence relied upon; (ii) the party seeking the new trial demonstrates that there was no knowledge of the evidence prior to trial; (iii) that due diligence had been used to procure the evidence prior to trial; (iv) that the evidence is not cumulative to that already given and does not tend to impeach the testimony of the adversary; and (v) that the evidence would probably produce a different result if a new trial were granted. *Jackson v.Van Winkle*, 660 S.W.2d 807, 809 (Tex. 1983); *Dankowski v. Dankowski*, 922 S.W.2d 298, 305 (Tex. App. – Fort Worth 1996, writ denied). Each of these elements must be established by affidavit and it would also be

prudent to verify the motion for new trial. *Brown v. Hopkins*, 921 S.W.2s 306, 310-11 (Tex. App. – Corpus Christi 1996, no writ); *Hibler v. Puckett*, 2005 WL 1405748 at *5 (Tex. App. – Eastland 2005, no pet.).

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

2. Default Judgments

New trials are routinely granted and default judgments set aside upon demonstration that the failure of the respondent to appear before judgment was not intentional or the result of conscious indifference but was due instead to mistake or accident. The motion for new trial must also raise a meritorious defense and there must be no delay or injury to the opposing party. *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124 (1939); *In re R.R.*, 209 S.W.3d 112, 114-15 (Tex. 2006). Although in *Craddock* the default judgment was taken because the defendant failed to answer, the same requirements apply to a post-answer default judgment. *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex.1987); *Grissom v. Watson*, 704 S.W.2d 325, 326 (Tex.1986). When there is defective service of process, however, there is no requirement that a litigant establish a meritorious defense. Such a requirement violates due process rights under the Fourteenth Amendment to the federal constitution. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988); *Lopez v. Lopez*, 757 S.W.2d 751 (Tex. 1988). In addition, if a defendant alleges that granting a new trial will not injure the plaintiff, the burden shifts to the plaintiff to present proof of injury. *In re R.R.*, 209 S.W.3d at 116.

As with a motion for new trial based upon newly discovered evidence, a motion for new trial concerning a default judgment should include affidavits to support the factual allegations in the motion. *See In re R.R. and S.J.S.*, 209 S.W.3d 112, 114-15 (Tex. 2006); *Old Republic Insurance Company v. Scott,* 873 S.W.2d 381, 382 (Tex.1994).

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

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

> In the usual case, the defendant who fails to file an answer is said to confess to the facts properly pleaded in the petition. Stoner v. Thompson, 578 S.W.2d 679 (Tex. 1979). In such a case, the non-answering defendant cannot mount an evidentiary attack against the judgment on motion for new trial or on appeal.
>
> In a divorce case, however, the petition is not taken as confessed for want of an answer. TEX. FAM. CODE §3.53 [now §6.701]. Even if the respondent fails to file an answer, the petitioner must adduce proof to support the material allegations in the petition. Accordingly, the judgment of divorce is subject to an evidentiary attack

> on motion for new trial and appeal.
>
> This Court knows of no Family Code provision relating to modification of prior orders that is comparable to §3.53. Reason suggests, nonetheless, that the same policy considerations underlying §3.53, applicable to original divorce judgments appointing conservators and setting support for and access to children, should also obtain in §14.08 [now Chapter 156 *et. seq*.] proceedings to modify like provisions in prior orders. . . As a result, in a case of default by the respondent, the movant must prove up the required allegations of the motion to modify.

726 S.W.2d at 254. *See Armstrong v. Armstrong*, 601 S.W.2d 724 (Tex.Civ.App.--Beaumont 1980, no writ); *Agraz v.Carnley*, 143 S.W.3d 547, 552-53 (Tex. App. – Dallas 2004, no pet.) (the petitioner must offer proof to support the material allegations in the petition to modify); *Williams v. Williams*, 150 S.W.3d 436, 446-47 (Tex. App. – Austin 2004, pet. denied) (the traditional rule, that evidenced is unnecessary to support a default judgment, does not apply to involuntary termination of parental rights proceedings).

3. Mistakes Made at Trial

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

4. No Reporter's Record Available

Section 105.003(c) of the Family Code provides that a record shall be made in all suits affecting the parent-child relationship, unless expressly waived by the parties with the consent of the court. TRAP 34.6(f) provides that the inability to obtain the reporter's record in order to pursue an appeal will entitle the complaining party to a new trial (i) if the party has timely requested a reporter's record; (ii) if, without that party's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed; (iii) if that exhibit or portion of the record is necessary to the appeal's resolution; and (iv) if the parties cannot agree on a complete record. TRAP 34.6(f) requires the appellant to show the missing portion is necessary to the appeal before the trial court can grant a new trial based on a missing portion of the reporter's record, i.e., the court applies a harm analysis. *See Issac v. State*, 982 S.W.2d 96 (Tex. App. -- Houston [1st Dist.] 1998), aff'd, 989 S.W.2d 754 (Tex. Crim. App. 1999) (in which the courts compared TRAP 34.6(f) and former TRAP 50(e), determined that TRAP 34.6(f) applied, and applied a harm analysis).

5. Sufficiency of The Evidence

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

a. "No Evidence" Points

A motion for new trial is not required in order to complain of legal sufficiency of the evidence [a "no evidence" point] in a non-jury trial. A "no evidence" or legal insufficiency point is a question of law which challenges the legal sufficiency of the evidence to support a particular fact finding. Prior to 2005, the standard of review required a determination by the appellate court as to whether, considering only the evidence and inferences that support a factual finding in favor of the party having the burden of proof in a light most favorable to such findings and disregarding all evidence and inferences to the contrary, there is any probative evidence which supports the finding. *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965);*In re J.F.C.*, 96 S.W.3d 256 (Tex. 2003). However, in 2005, the Texas Supreme Court clarified the standard of review concerning legal sufficiency review. *See City of Keller v. Wilson*, 168 S.W.2d 802 (Tex. 2005).

This change is clearly described by Justice Ann McClure in *El Paso I.S.D. v. Pabon*, 214 S.W.3d 37, 41 (Tex. App. – El Paso 2006, no pet.):

> An appellate court will sustain a legal sufficiency or "no-evidence" challenge if the record shows: (1) the complete absence of a vital fact, (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence establishes

> conclusively the opposite of the vital fact. *City of Keller,* 168 S.W.3d at 810, *citing* Robert W. Calvert, "No Evidence" & "Insufficient Evidence" Points of Error, 38 Tex. L.Rev. 361, 362-63 (1960). EPISD's argument falls within the fourth circumstance which necessarily precludes us from automatically disregarding contrary evidence in its legal sufficiency review. *See City of Keller,* 168 S.W.3d at 810-11 (stating that contrary evidence may not be disregarded in sufficiency reviews under the first, second, and fourth circumstances).
>
> In conducting our review, we consider the evidence in the light most favorable to the verdict and indulge every reasonable inference that would support it. *Id.* at 822. Even if evidence is undisputed, it is the province of the jury to draw from it whatever inferences they wish so long as more than one inference is possible. *Id.* at 821. But if the evidence allows only one inference, neither jurors nor the reviewing court may disregard it. *Id.* We are also mindful that jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony. *Id.* at 819. When there is conflicting evidence, it is the province of the jury to resolve such conflicts. *Id.* at 820. In every circumstance in which reasonable jurors could resolve conflicting evidence either way, the reviewing court must presume they did so in favor of the prevailing party, and disregard the conflicting evidence in its sufficiency review. *Id.* at 821. If the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, then jurors must be allowed to do so. *Id.* at 822. So long as the evidence falls within this zone of reasonable disagreement, we may not substitute our judgment for that of the trier-of-fact. *Id.* The ultimate test for legal sufficiency is whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. *Id.* at 827.

There are basically two separate "no evidence" claims. When the party having the burden of proof suffers an unfavorable finding, the point of error or issue presented challenging the legal sufficiency of the evidence should be that the fact or issue was established as "a matter of law." When the party without the burden of proof suffers an unfavorable finding, the challenge on appeal is one of "no evidence to support the finding." *See Kimsey v. Kimsey*, 965 S.W.2d 690, 699-700 (Tex. App. -- El Paso 1998, pet. denied).

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

b. "Insufficient Evidence"

"Insufficient evidence" or factual insufficiency involves a finding that is so against the great weight and preponderance of the evidence as to be manifestly wrong. The test for factual insufficiency is set forth in *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951). When reviewing a challenge to the factual sufficiency of the evidence, the appellate court must consider and weigh all of the evidence in the record, not just that evidence which supports the verdict. *Maritime Overseas Corp. v. Ellis,* 971 S.W.2d 402, 406-07 (Tex.1998). The appellate court will set aside the verdict if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *Id.* at 407. In conducting this review, the appellate court does not pass upon the witnesses' credibility or substitute our judgment for

that of the jury, even if the evidence would clearly support a different result. *Id.*

The realm of insufficient evidence exists in an area in which there is some evidence of a fact in issue sufficient that a jury question is warranted, but that evidence won't support a finding in favor of the proponent of that fact in issue. The terminology used by the courts of appeals is that such a finding "shocks the conscience" or that it is "manifestly unjust" limited by such phrases as "the jury's determination is usually regarded as conclusive when the evidence is conflicting," "we cannot substitute our conclusions for those of the jury," and "it is the province of the jury to pass on the weight or credibility of a witness's testimony." *See, e.g., Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994); *Beall v. Ditmore*, 867 S.W.2d 791, 795 (Tex. App..--El Paso 1993, writ denied). *See In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002) (Under traditional factual sufficiency standards, a court determines if a finding is so against the great weight and preponderance of the evidence that it is manifestly unjust, shocks the conscience, or clearly demonstrates bias.).

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

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

(1) Jury Vs. Non-Jury Trials

Having established that the standard of review is the same for affirmative jury findings as it is for the jury's failure to make findings, it must also be noted that the test for determining factual sufficiency of the evidence is the same in a jury and non-jury trial. *Tucker v. Tucker*, 908 S.W.2d 530, 532 (Tex. 1995); *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (findings of fact are review able for factual sufficiency of the evidence to support them by the same standards as are applied in reviewing the factual sufficiency of the evidence supporting jury findings).

(2) Court of Appeals Is the Final Arbiter of Factual Sufficiency

A claim of insufficient evidence raises a question of fact rather than law and only the court of appeals can review the issue. The Supreme Court has no jurisdiction to consider questions of fact, *Vallone v. Vallone*, 644 S.W.2d 655 (Tex. 1983), and it may not consider a point of error or issue presented challenging factual insufficiency of the evidence. *Dyson v. Olin*, 692 S.W.2d 456 (Tex. 1985). The Supreme Court does have jurisdiction, however, to determine whether the court of appeals used the correct rules of law in reaching its conclusion on an insufficient evidence point. *Harmon v. Sohio Pipeline Co.*, 623 S.W.2d 314, 315 (Tex. 1981).

(3) Findings of Fact and Conclusions of Law Not Required to Raise Sufficiency

A request for findings of fact and conclusions of law is not required in order to raise the issue of sufficiency of the evidence. *Pruet v. Coastal States Trading Company*, 715 S.W.2d 702 (Tex. App..--Houston [1st Dist.] 1986, no writ).

(4) Appellate Remedy

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

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

In addition to findings of fact and conclusions of law under TRCP 296, courts have also started giving findings of fact in the area of discovery sanctions. Also, the Family Code contains a procedure for obtaining specific findings in property divisions [§ 6.711 of the Code], child support orders [§154.130 of the Code] and findings in visitation orders [§153.258 of the Code].

A. TRCP 296 Findings and Conclusions

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

1. Entitlement

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

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

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

Given the assumption that findings and conclusions are appropriate in a bench trial but not in a jury trial, what happens when the two are combined? Perhaps the suit involves domestic torts and the jury will determine the personal injury or fraud issues while the judge will decide the ultimate division of property. Also, it is not unusual for the court to permit separate trials on the issues of property and custody, with a jury deciding issues of conservatorship and the judge deciding issues of possession and access, child support, conservator rights, as well as the characterization, valuation and

division of property. If one party chooses to appeal from the property division, is (s)he entitled to findings and conclusions? If the jury and non-jury portions of the case are conducted via separate trials, findings and conclusions are available in the non-jury trial. *Roberts v. Roberts*, 999 S.W.2d at 433; *Shenandoah Associates v. J & K Properties, Inc.*, 741 S.W.2d 470, 484 (Tex. App..--Dallas 1987, writ denied). *See Heafner & Associates v. Koecher*, 851 S.W.2d 309, 312-13 (Tex. App..--Houston [1st Dist.] 1992, no writ).

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

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

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

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

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

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

- When a judgment notwithstanding the jury verdict is entered, *Fancher v. Cadwell*, 314 S.W.2d 820 (1958), or judgment after directed verdict, *Ditto v. Ditto Investment Co.,* 158 Tex. 104, 309 S.W.2d 219, 220 (1958); *IKB Industries (Nigeria) Ltd. v. Pro-Line Corp*., 938 S.W.2d 440, 442 (Tex. 1997).

- When a summary judgment is granted. *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994); *IKB Industries (Nigeria) Ltd. v. Pro-Line Corp*., 938 S.W.2d 440, 442 (Tex. 1997); *Chavez v. El Paso Housing Authority,* 897 S.W.2d 523 (Tex. App..--El Paso 1995, writ denied).

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

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

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

TRAP 28.1 provides for an option on the part of the trial judge in appeals from interlocutory orders. The court is not required to file findings and conclusions, but it may do so within 30 days after the judgment is signed. *Smith Barney Shearson, Inc. v. Finstad*, 888 S.W.2d 111 (Tex. App..--Houston [1st Dist.] 1994, no writ) (involving interlocutory appeal of denial of motion for arbitration). One court of appeals has admonished trial courts to give findings and conclusions to aid the appellate court in reviewing class certification decisions. *Franklin v. Donoho*, 774 S.W.2d 308, 311 (Tex. App..--Austin 1989, no writ). However, even though findings of fact and conclusions of law filed may be "helpful" in determining if the trial court exercised its discretion in a reasonable and principled fashion, they do not carry the same weight on appeal as findings made under rule 299. *Doran v. ClubCorp USA, Inc.*, 174 S.W.3d 883, 887 (Tex. App. – Dallas 2005, no pet.).

2. Importance of Obtaining

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

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

3. Impact of Filing Request on Appellate Deadlines

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

The foregoing rules regarding the extension of *some* appellate deadlines by filing a timely request for findings and conclusions do not apply when findings and conclusions cannot properly be requested. For example, findings of fact are not available on appeal from a summary judgment. When a party appeals from the granting of a summary judgment, files a request for findings of fact and conclusions of law, but files no motion for new trial, the filing of the request for findings will not extend the appellate timetable. *Linwood v. NCNB of Texas*, 885 S.W.2d 102, 103 (Tex. 1994) ("the language 'tried without a jury' in rule 41(a)(1) does not include a summary judgment proceeding"). *See also Chavez v. El Paso Housing Authority,* 897 S.W.2d 523 (Tex. App..--El Paso 1995, writ denied). Another case holds that a suit which is dismissed for lack of subject matter jurisdiction, or in which there has been no evidentiary hearing, has not been "tried without a jury" as used in the rule, so that a request for findings does not extend the 30-day deadline for perfecting appeal. *Zimmerman v. Robinson*, 862 S.W.2d 162 (Tex. App..--Amarillo 1993, no writ). *Accord*, *O'Donnell v. McDaniel*, 914 S.W.2d 209 (Tex. App..--Fort Worth 1995, writ denied) (when appeal is from dismissal rendered without evidentiary hearing, a request for findings of fact and conclusions of law does not extend any applicable deadlines); *Smith v. Smith*, 835 S.W.2d 187, 190 (Tex. App..--Tyler 1992, no writ) (in divorce case tried to jury, request for findings of fact and conclusions of law did not extend appellate timetable even though the trial judge was not bound by some of the jury's answers). *See Hone v. Hanafin*, 104 S.W.3d 884 (Tex. 2003) (courts and scholars disagree about whether filing a request for findings of fact and conclusions of law extends the deadline for perfecting an appeal when the appeal is accelerated).

4. Sequence For Obtaining Findings

a. Initial Request

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

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

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

b. Response by Court

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

c. Reminder Notice

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

The rules require that the reminder be specifically entitled "Notice of Past Due Findings of Fact and Conclusions of Law". The current version of TRCP 297 specifically provides that the filing of the reminder notice "shall be immediately called to the attention of the court by the clerk".

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.

d. Additional or Amended Findings

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

(1) Failure to Request

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

(2) Court's Failure to Respond

A trial court's failure to make additional findings upon request is not reversible error if the requested finding is covered by and directly

contrary to the original findings filed. *San Antonio Villa Del Sol Homeowners Association v. Miller*, 761 S.W.2d 460 (Tex. App..--San Antonio 1988, no writ).

5. Effect of Court's Failure to File

a. Must Complain in Brief

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

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

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

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

c. Remedy: Remand vs. Abatement

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

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

926 S.W.2d at 321.

6. Effect of Court's Filing

TRCP 299 provides that when findings of fact are filed by the trial court, they shall form the basis of the judgment upon all grounds of recovery. The judgment may not be supported on appeal by a presumption or finding upon any ground of recovery no element of which has been found by the trial court. When one or more of the elements have been found by the court, however, any omitted unrequested elements, if supported by the

evidence, will be supplied by presumption in support of the judgment. This presumption does not apply when the omitted finding was requested by the party and refused by the trial court. *Chapa v. Reilly*, 733 S.W.2d 236 (Tex. App..--Corpus Christi 1987, writ ref'd n.r.e.).

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

7. Deemed Findings

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

8. Challenges on Appeal

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

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

b. Challenging Findings and Conclusions on Appeal

Unless the trial court's findings of fact are challenged by point of error or issue presented in the brief, the findings are binding on the appellate court. *S&L Restaurant Corp. v. Leal*, 883 S.W.2d 221, 225 (Tex. App..--San Antonio 1994), *rev'd on other grounds*, 892 S.W.2d 855 (Tex. 1995) (*per curiam*); *Wade v. Anderson*, 602 S.W.2d 347, 349 (Tex. Civ. App.--Beaumont 1980, writ ref'd n.r.e.). *See* 6 McDONALD, TEXAS CIVIL APPELLATE PRACTICE § 18:12 n. 120 (1992).

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

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

B. Findings in Divorce Decrees Concerning Property

Section 6.711 of the Family Code provides that in a suit for dissolution of marriage in which the court renders a judgment dividing the estate of the parties, upon request of a party, the court shall state in writing findings of fact and conclusions of law regarding (1) the characterization of each party's assets, liabilities, claims, and offsets on which disputed evidence has been presented, and (2) the value or amount of the community estate's assets, liabilities, claims, and offsets on which disputed evidence has been presented. A request for findings of fact and conclusions of law under this section must conform to the Texas Rules of Civil Procedure.

C. Findings in Child Support Orders

Section 154.130 of the Family Code provides that, without regard to TRCP 296 through 299, in all cases in which child support is contested and the amount of child support ordered by the court varies from statutory guidelines, the trial court shall make findings in the child support order if properly requested by the complaining party. TEX. FAM. CODE § 154.130.

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

D. Findings in Visitation Orders

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

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

Under Section 153.258, 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 299 applies. Thus it appears that the requested findings must be specified in the order, be it a decree of divorce or a modification order. It also would appear that compliance with this rule would not preclude the court from making other findings and conclusions in compliance with the Rules of Civil Procedure, particularly when issues other than visitation are involved.

VII. PERFECTING THE APPEAL

A. Notice of Appeal

Under TRAP 25, an appeal is perfected by filing the original of a notice of appeal with the clerk of the trial court. The appellant must file a copy of the notice of appeal with the appellate court clerk. If the original notice is mistakenly filed in the appellate court, the notice is deemed to have been filed that same day with the trial court clerk, and the appellate court clerk must send a copy of the notice to the trial court clerk. TRAP 25.1(e).

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

appellant's brief is filed, the notice of appeal can be amended only upon leave of court, and on terms prescribed by the court. TRAP 25.1(f).

B. Who Must Perfect?

This question is at once simpler and more difficult than one would think and is probably the biggest malpractice trap in the TRAPs. "A party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal... The appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause." TRAP 25.1(c). The appellee can no longer "piggy-back" on the appellant's perfection of an appeal. If an appellee wishes to make changes to the judgment that only affect cross-appellees, the appellee must perfect its own appeal. If several parties perfect an appeal, each such party is an appellant, and will be filing an appellant's brief and an appellee's brief. However, if the appellee has perfected his own appeal, placing cross-points in his appellee's brief may be an acceptable way of presenting those issues to the appellate court. *See Scott v. Sebree*, 986 S.W.2d 364, 367 n.3 (Tex. App. -- Austin 1999, pet. denied) (citing John Hill Cayce, Jr., Anne Gardner, & Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 BAYLOR L.REV. 867, 962-65 (1997)); *Gore v. Scotland Golf, Inc.*,136 S.W.3d 26,34 (Tex. App. -- San Antonio 2003, pet. denied) (because cross-point seeks to alter the trial court's judgment, appellee was required to file a notice of appeal in order for the court of appeals to have jurisdiction to consider the complaint); *Helton v. Railroad Comm'n*, 126 S.W.3d 111, 119-20 (Tex. App. – Houston [1st Dist.] 2003, pet denied).

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

C. Errors in the Notice of Appeal

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

D. Effect on Judgment

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

E. Time for Perfecting Appeal

TRAP 26.1 still requires that an appeal from a final judgment be perfected within 30 days of signing the judgment, or in the event of a timely motion for new trial, motion to modify, motion to reinstate, or request for findings of fact (when appropriate), then appeal must be perfected within 90 days after the judgment is signed by the court. A prematurely-filed notice of appeal is effective. TRAP 27.1(a). In an accelerated appeal, appeal must be perfected by the 20th day after the appealable order or judgment is signed. TRAP 26.1(b). In addition to the normal requirements of TRAP 25.1(d), the notice of appeal in an accelerated appeal must state that the appeal is accelerated. TRAP 25.1(d). In a restricted appeal (formerly writ of error appeal), perfection must be accomplished within 6 months after judgment. TRAP 26.1(c).

F. Time for Perfecting Appeal in Termination Case

An appeal from an order terminating the parent-child relationship is accelerated and governed by the rules for accelerated appeals in civil cases. *See* Tex. Fam.Code §§ 109.002(a) and 263.405(a). Rule 26.1(b) of the Texas Rules of Appellate Procedure provides that in an accelerated appeal, the notice of appeal must be filed within 20 days after the order is signed. TRAP 26.1(b). Moreover, neither a motion for new trial, a request for findings of fact and conclusions of law, nor any other post-trial motion will extend the deadline for filing a notice of appeal under Rule 26.1(b). *In Re T.W.*, 89 S.W.3d 641, 641 (Tex. App. – Amarillo 2002, no pet.). *See* Tex. Fam.Code § 263.405(c).

VIII. MISCELLANEOUS

A. Partial Reporter's Record

TRAP 34.6(c)(1) permits a party to request a partial reporter's record while simultaneously including the points or issues to be presented on appeal. TRAP 34.6(c)(4) provides that when a partial reporter's record is properly designated,

"[t]he appellate court must presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues. This presumption applies even if the statement includes a point or issue complaining of the legal or factual sufficiency of the evidence to support a specific factual finding identified in that point or issue."

However, when the reporter's record is not properly requested by filing and serving a request for a partial reporter's record which states the points of error or issues to be presented on appeal, the presumption that the partial reporter's record constitutes the entire record for purposes of reviewing the stated points or issues does not apply. *See Jaramillo v. Atchison, Topeka & Santa Fe Railway Co.*, 986 S.W.2d 701, 702 (Tex. App. -- Eastland 1998, no pet.);*Richards v. Schion,* 969 S.W.2d 131, 133 (Tex.App.-Houston [1st Dist.] 1998, no pet.) ("When an appellant appeals with a partial reporter's record but does not provide the list of points as required by rule 34.6(c)(1), it creates the presumption that the omitted portions support the trial court's findings."); *CMM Grain Co., Inc. v. Ozgunduz*, 991 S.W.2d 437, 439 (Tex. App. -- Fort Worth 1999, no pet.).

Many courts of appeals require "strict compliance" with all of Rule 34.6's provisions to preserve appellate review. *See, e.g., Brown v. McGuyer Homebuilders, Inc.,* 58 S.W.3d 172, 175 (Tex.App.-Houston [14th. Dist.] 2001, pet. denied) (appellant's failure to file statement of points in compliance with Rule 34.6 required appellate court to presume record's omitted portions supported trial court's judgment); *In re R.C.,* 45 S.W.3d 146, 149 (Tex.App.-Fort Worth 2000, no pet.) (appellate court permitted to review only those issues properly designated in appellant's statement of points); *Hilton v. Hillman Distrib. Co.,* 12 S.W.3d 846, 847 (Tex.App.-Texarkana 2000, no pet.) (requiring both request for partial record and statement of points to be timely filed). However, the Supreme Court has adopted a more flexible approach in cases when a rigid application of Rule 34.6 would result in denying review on the merits, even though the appellee has not established any prejudice from a slight relaxation of the rule. *Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex. 2002).

In *Schafer v. Conner*, 813 S.W.2d 154, 155 (Tex. 1991). the Supreme Court rejected an interpretation of Rule 53(d)--Rule 34.6(c)'s predecessor--that would require an appellant to actually file its statement of points or issues "in" its request for the reporter's record. *See also Furr's Supermarkets, Inc. v. Bethune,* 53 S.W.3d 375, 377 (Tex.2001) (stating appellee's issue statement in its notice of appeal was sufficient to invoke the presumption that the partial reporter's record constituted the entire record for purposes of reviewing the stated issue). Then, in *Gallagher v. Fire Insurance Exchange,* 950 S.W.2d 370, 370-71 (Tex.1997), the Supreme Court reiterated its commitment to ensuring that courts do not unfairly apply the rules of appellate procedure to avoid addressing a party's meritorious claim. In *Gallagher*, the Supreme Court reversed a court of appeals' holding that the appellant waived review by failing to file a complete statement of facts in strict compliance with Rule 53(d). *Id.* at 371. The Court reasoned:

> The court of appeals was correct in holding that, absent a complete record on appeal, it must presume the omitted items supported the trial court's judgment. For the courts of appeals to affirm the trial court's judgment on the basis of omitted items after having denied pre-submission supplementation of those items without having determined that such would unreasonably delay disposition of the appeal, however, offends the spirit of [our appellate rules].

Id. (quoting *Crown Life Ins. Co. v. Estate of Gonzalez,* 820 S.W.2d 121, 122 (Tex.1991)).

The Supreme Court noted that the appellate rules are designed to further the resolution of appeals on the merits and that these rules will be interpreted, when possible, to achieve that aim. *Bennett v. Cochran*, 96 S.W.3d at 230. *See Gallagher,* 950 S.W.2d at 370-71. However, the Supreme Court warned that litigants should not view its relaxation of rules in a particular case as endorsing noncompliance - litigants who ignore the rules do so at the risk of forfeiting appellate relief. *Bennett v. Cochran*, 96 S.W.3d at 230.

In *Bennett*, the Supreme Court stated that the objective behind Rule 34.6(c)(1) was fully served. The appellee did not allege that he was deprived of an opportunity to designate additional portions of the reporter's record, nor did he assert that the appellant's delay otherwise prejudiced the preparation or presentation of his case. The Court held that under these circumstances, Rule 34.6 did not preclude appellate review of the appellant's

legal and factual sufficiency issues. *Bennett*, 96 S.W.3d at 230.

However, note that in an appeal from a final order terminating the parent-child relationship and appointing the Texas Department of Family and Protective Services as permanent managing conservator,

> The appellate court may not consider any issue that was not specifically presented to the trial court in a timely filed statement of the points on which the party intends to appeal or in a statement combined with a motion for new trial. For purposes of this subsection, a claim that a judicial decision is contrary to the evidence or that the evidence is factually or legally insufficient is not sufficiently specific to preserve an issue for appeal.

Section 263.405(i). As mentioned hereinabove, every appellate court which has addressed this question has agreed that the statute prohibits appellate courts from considering points not properly preserved by the timely filing of a statement of points. *In re R.C. and R.C.C.*, ___ S.W.3d ___, 2007 WL 1219046 at *2 fn. 6 (Tex. App. – Amarillo April 25, 2007, no pet. history).

B. Electronic Recording

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

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

- certified copies of all tapes or other audio-storage devices on which the proceedings were recorded;
- any exhibits that the parties designate; and
- certified copies of the original logs prepared by the court recorder pursuant to TRAP 13.2.

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

C. Inaccuracies in Reporter's Record

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

D. Lost or Destroyed Records - Reporter's Record

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

E. OPINIONS

Effective January 1, 2003, the rules were substantially changed concerning opinions of the appellate courts.

1. Memorandum Opinions

If the issues in a case are settled, the appellate court should write a brief memorandum opinion which is no longer than necessary to advise the parties of the court's decision and the basic reasons for the decision. TRAP 47.4. However, an opinion may not be designated a memorandum opinion if there is a concurrence or dissent and the author of the concurrence or dissent opposes the designation. In addition, an opinion must be designated a memorandum opinion unless it (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases, (2) involves issues of constitutional law or other legal issues important to the jurisprudence to Texas, (3)

criticizes existing law, or (4) resolves an apparent conflict of authority. TRAP 47.4.

2. Unpublished Opinions

Effective January 1, 2003, unpublished opinions, i.e., not designated for publication, under the current or prior rules may be cited with the notation, "(not designated for publication)." TRAP 47.7. The change apparently removes prospectively any prohibition against the citation of unpublished opinions as authority. However, even though unpublished opinions may be cited, they still have no precedential value. TRAP 47.7.

In *Carrillo v. State*, 98 S.W.3d 789 (Tex. App. – Amarillo 2003, pet. ref'd), the court of appeals stated that by stating that unpublished opinions may be cited but have no precedential value, the intent of the rule is that a court has no obligation to follow such opinions. The effect of the rule is to afford parties more flexibility in pointing out such opinions and the reasoning employed in them rather then simply arguing, without reference, that same reasoning. However, the court to whom an unpublished opinion is cited has no obligation to follow the opinion or to specifically distinguish such opinion. They may be cited merely as an aid in developing reasoning that may be employed by the reviewing court be it similar or different. *Id.* at 794. However, the court of appeals did not view Rule 47.7, or the former rule, as justifying unreasoned inconsistency on the part of an appellate court. *Id. See In re Marriage of Notash*, 118 S.W.3d 868, 871 (Tex. App. – Texarkana 2003, no pet.).

F. Appellate Sanctions

1. Appeals and Petitions for Review

TRAPS 45 and 62 govern sanctions for petitions for review in the Supreme Court and appeals in the courts of appeal. Under these rules, the court can award a sanction if the "appeal is frivolous." The sanction is awarded to "each prevailing party" and there is no limit on the amount of the sanction. The rules do impose a requirement of "notice and a reasonable opportunity for response." TRAPS 45 & 62. Appellate sanctions will be imposed only if the record clearly shows the appellant has no reasonable expectation of reversal, and the appellant has not pursued the appeal in good faith. *See City of Houston v. Morua,* 982 S.W.2d 126, 131 (Tex. App.- Houston [1st Dist.] 1998, no writ) (relying on case law interpreting former Tex.R.App.P. 84 to construe new Rule 45). In deciding whether to impose sanctions under Rule 45, the appellate court looks at the record from the viewpoint of the advocate and determines whether it had reasonable grounds to believe the judgment should be reversed. *See James v. Hudgins,* 876 S.W.2d 418, 424 (Tex.A pp.- El Paso 1994, writ denied). The courts of appeals have recited four factors which tend to indicate that an appeal is frivolous: (1) the unexplained absence of a statement of facts; (2) the unexplained failure to file a motion for new trial when it is required to successfully assert factual sufficiency on appeal; (3) a poorly written brief raising no arguable points of error; and (4) the appellant's unexplained failure to appear at oral argument. *See Faddoul, Glasneen & Valles, P.C. v. Oaxaca*, 52 S.W.3d 209, 213 (Tex. App. – El Paso 2001, no pet.)*; In the Interest of S.R.M.*, 888 S.W.2d 267, 269 (Tex.App.-Houston [1st Dist.] 1994, no writ); *Baw v. Baw,* 949 S.W.2d 764, 768 (Tex.App.-Dallas 1997, no writ). In *Swate v. Crook*, 991 S.W.2d 450 (Tex. App. -- Houston [1st Dist.] 1999, pet. denied), the Court of Appeals sanctioned the appellant/father for bring a frivolous appeal and awarded appellee/mother $5,000.00 in attorney's fees as damages. In awarding sanctions, the Court explained that sanctions "will be imposed only if the record clearly shows the [appellant] father has no reasonable expectation of reversal, and the [appellant] father has not pursued the appeal in good faith. *Id.* at 455. However, bad faith is not required to impose sanctions. *Smith v. Brown*, 51 S.W.3d 376, 381 (Tex. App. – Houston [1st Dist.] 2001, pet. denied). In fact, bad faith is not dispositive or necessarily even material in deciding whether an appeal is frivolous although the presence of bad faith, of course, would be relevant. *Id.* at 381.

2. Original Proceedings

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

G. Estoppel to Appeal

This is also known as the "acceptance of benefits doctrine." A litigant cannot treat a judgment as both right and wrong. Thus, a party who has voluntarily accepted the benefits of a judgment cannot appeal from that judgment. *Carle v. Carle*, 234 S.W.2d 1002, 1004 (Tex. 1950). The "acceptance of benefits doctrine" applies in direct appeals, direct appeals by writ of error (now restricted appeals) and equitable bill of review proceedings. *See Carle v. Carle*, 234 S.W.2d at 1003 (direct appeal); *Bloom v. Bloom*, 935 S.W.2d 942, 946-47 (Tex. App. -- San Antonio 1996, no writ) (direct appeal by writ of error); *Newman v. Link*, 889 S.W.2d 288, 289 (Tex. 1994) (bill of review). In order to consider whether a party is estopped from appealing, the record must reflect the relevant facts showing voluntary acceptance of the benefits of the judgment. *Rogers v. Rogers*, 806 S.W.2d 886, 889 (Tex App. -- Corpus Christi 1991, no writ); *Miller v. Miller*, 569 S.W.2d 592, 593 (Tex. Civ. App. -- San Antonio 1978, no writ). The "acceptance of benefits doctrine" frequently arises in divorce cases because a spouse tends to take and use the property awarded to him or her in the divorce while appealing from the divorce judgment. *See, e.g., Roye v. Roye*, 531 S.W.2d 242, 244 (Tex.Civ. App. -- Tyler 1975, no writ); *Nixon v. Nixon*, 348 S.W.2d 434, 440-41 (Tex.Civ. App. -- Houston [1st Dist.] 1961, writ ref'd n.r.e.). However, even if an appealing party accepts a portion of a divorce judgment, the appealing party is not necessarily estopped from appealing the entire judgment. In *Roa v. Roa*, 970 S.W.2d 163, 166 (Tex. App. -- Fort Worth 1998, no pet.), the appellate court held that even though the appealing party had accepted the decree of divorce and division of property, she had not accepted those portions of the judgment addressing child custody, visitation, and support. The appellate court also recognized that issues related to the custody of children are severable from the remainder of a divorce decree. *Id.*

There are two narrow exceptions to the "acceptance of benefits doctrine" even when the appealing party accepts benefits under the judgment. First, the "entitlement exception" which applies when the appealing party accepts nothing more than what he or she would be entitled to receive on retrial. *Carle v. Carle*, 234 S.W.2d at 1004. *See Samara v. Samara*, 52 S.W.3d 455 (Tex. App. -- Houston [1st Dist.] 2001, pet. denied). Second, the "economic necessity exception" which applies when the acceptance of benefits is not voluntary because the appealing party is driven to accept benefits out of economic necessity. *See Carle v. Carle*, 234 S.W.2d at 1004; *Waite v. Waite*, 150 S.W.3d 797 (Tex. App. – Houston [14th Dist.] 2004, pet. denied); *McAlister v. McAlister*, 75 S.W.3d 481, 483 (Tex. App. – San Antonio 2002, pet. denied); *Cooper v. Bushong*, 10 S.W.3d 20, 23 (Tex. App. – Austin 1999, pet. denied); *Gonzalez v. Gonzalez*, 614 S.W.2d 203 (Tex. Civ. App. -- Eastland 1981, writ dism'd w.o.j.).

In *Waite v. Waite*, 150 S.W.3d 797 (Tex. App. – Houston [14th Dist.] 2004, pet. denied), Mr. Waite filed an affidavit in support of his economic necessity argument in which he stated that he needed the money he received from the registry of the Court pursuant to the divorce (1) to pay his daily living expenses and the costs of his appeal, and (2) to complete repairs on the family home awarded to him as his separate property. *Id.* at 805. His affidavit stated in pertinent part as follows:

> The funds I received from the registry of the Court pursuant to the final judgment were needed by me to pay my daily living expenses, including, but not limited to, food, utilities, clothing, rent, taxes, gasoline, auto and homeowners insurance, health insurance and other miscellaneous day to day living expenses. In addition, I needed the funds to pay the costs of my appeal including attorney's fees, court courts [sic], and the appeal bond, including the supercedeas bond. I have posted a supercedeas bond in the amount of $440,000.00 (nearly half the amount received). Without the use of these funds, I could not have paid all of the financial obligations set forth above and I could not have posted my supercedeas bond. I paid $144,000.00 for past due attorney's fees and appellant [sic] attorney's fees which were due and owing which I could not previously pay due to the restrictive orders of the Court. I also needed the funds to effectuate and complete repairs on the house and to pursue my employment as a remodeler. For these reasons the use of the funds I received from the registry of the Court was not voluntary.

Id. at 805 n. 7. The Court of Appeals, noting that the exception to the acceptance of the benefits doctrine is narrow and is to be applied stingily, granted Mrs. Waite's motion to dismiss the appeal on the basis of the acceptance of the benefits doctrine because Mr. Waite's evidence did not

show that he fell within the exception. *Id.* at 807-808.

In addition, Texas courts have declined to consider an appeal from a custody decree when the appealing party refuses to obey the adverse judgment. *See Baker v. Baker*, 588 S.W.2d 677 (Tex. Civ. App. -- Eastland 1979, writ ref'd n.r.e.). In *Baker*, after the case was filed by the wife and the husband had answered, the husband absconded from the state with the minor child and continued to withhold the child from the wife, the managing conservator. The husband did not personally appear at the hearing but appeared by attorney of record. Under these circumstances, the appellate court dismissed the husband's appeal. *Id.* at 678.

H. Interlocutory Appeals

Temporary orders, temporary restraining orders and temporary injunctions are not appealable orders. TEX. FAMILY CODE §§ 6.507, 109.001(c). *See Dancy v. Daggett*, 815 S.W.2d 548, 549 (Tex. 1991); *In re Derzapf*, 219 S.W.3d 327, 335 (Tex. 2007).. However, although they may not be appealable, temporary orders, temporary restraining orders and temporary injunctions may be challenged by mandamus. An order that appoints or modifies an existing conservatorship, that grants or denies a motion to terminate the parent-child relationship or that adjudicates paternity is appealable. *See In re Hidalgo*, 938 S.W.2d 492 (Tex. App. -- Texarkana 1996, no writ); *In re M.C.*, 917 S.W.2d 268 (Tex. 1996); *Dreyer v. Green*, 871 S.W.2d 697 (Tex. 1993).

I. Protective Orders

A protective order disposing of all parties and claims is a final, appealable order, while a protective order entered during the pendency of a divorce action is not. *See Bilyeu v. Bilyeu,* 86 S.W.3d 278, 280-81 (Tex.App.-Austin 2002, no pet.); *James v. Hubbard,* 985 S.W.2d 516, 518 (Tex.App.-San Antonio 1998, no pet.); *Ruiz v. Ruiz,* 946 S.W.2d 123, 124 (Tex.App.-El Paso 1997, no writ); *see also Cooke v. Cooke,* 65 S.W.3d 785, 786 (Tex.App.-Dallas 2001, no pet.) (The fact that a post-divorce protective order may be modified does not mean the trial court has not finally disposed of all issues); *In re Cummings,* 13 S.W.3d 472, 474-75 (Tex.App.-Corpus Christi 2000, no pet.) (post-divorce protective order disposed of all issues and parties and was final judgment). However, consideration should by given to challenging a protective order by mandamus.