# TERMINATION AND ADOPTION: IT AIN'T OVER TILL IT'S OVER

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Chapter 24

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## PROFESSIONAL ASSOCIATIONS

American Board of Trial Advocates-Associate
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Member, Family Law Council -term expires 2005
Member of Capital Area Trial Lawyers Association
Member of Williamson County Bar Association
President, American Academy of Matrimonial Lawyers-Texas Chapter
President of Travis County Family Law Advocates 1999-2000
State Bar of Texas -Family Law Section -Appellate Section
Texas Academy of Family Law Specialists
Travis County Bar Association-Family Law Section-Appellate Section
Treasure, Travis County Family Law Advocates-Political Action Committee 1999-2002
Texas Trail Lawyers Association
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## HONORS

Americas Top Lawyers 2001-2002- Family Law Section
Listed -The Best Lawyers in America- Family Law 1999-2002
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## COMMITTEES & RESPONSIBILITIES

Planning Committee for 1994, 2000, 2001,2002 Advanced Family Law Seminar
Planning Committee for 1998, 2001,2002 New Frontiers in Marital Property Law Seminar
Chair, Interdisciplinary Relations on Mental Health Committee- 1997, 1998, 1999, 2000,2001 - American Academy of Matrimonial Lawyers
Member of Newsletter Committee - American Academy of Matrimonial Lawyers
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Planning Committee Marriage Dissolution - 1998,1999,2000,2002

Chair Texas Association of Family Law Specialists Legislative Oversight Committee -1999
Co-Course Director, Family Law on the Front Lines Conference 2001, 2002
Course Director- Ultimate Trial Notebook Family Law-2000
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Membership Committee-Family Law Council 2001-2002
Co-Chair of Amicus Curiae Committee-Family Law Council 2001-2002
Course Director-American Academy of Matrimonial Lawyers, Texas Chapter, Survival Retreat-2001
Chapter Leader Conference November 2001, American Academy of Matrimonial Lawyers
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## CLE ACTIVITY- SPEECHES, PANELS, & ARTICLES

### INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS

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

### AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

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

"Issues Unique to Early-Stage Companies: Property and Support Conundrum,"American Institute of Certified Public Accountants/American Academy of Matrimonial Lawyers National Conference, Las Vegas, Nevada, May 2002.

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

"Mental Health Professionals and the Legal System Including Ethical Issues," American Academy of Matrimonial Lawyers, Chicago, Illinois, November 1998.

"Relocation: Moving Forward, or Moving Backward?," American Academy of Matrimonial Lawyers Annual Conference, Chicago, Illinois, November 1996.

### NEW FRONTIER'S MARITAL PROPERTY LAW

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

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

"Strategic Use of Law Beyond the Family Code", New Frontiers in Marital Property Law, San Diego, California, October 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 Multiple and/or Conflicting Duties," New Frontiers in Marital Property Law, Santa Fe, New Mexico, October 1998.

"Dealing With Special Problems Relevant to Evaluation & Division of Professional Practices," Second Annual New Frontiers in Marital Property Law, San Diego, California, October 1997.

### ADVANCED FAMILY LAW:

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

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

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

"Breach of Fiduciary Duty and Nonphysical Tort Claims," Annual Advanced Family Law Course, San Antonio, Texas, August 1998.

"The Ab(use) of the Rules of Evidence and Privileges," Advanced Family Law Course, San Antonio, Texas, August 1997.

"Reporting Child Abuse: Counterpoint - A Lawyer has a Duty to Report Child Abuse," State Bar of Texas Annual Meeting, Houston, Texas, June, 1997 and Advanced Family Law Course, San Antonio, Texas, August 1997.

"Piercing Claims of Immunity in Family Law Litigation," Advanced Family Law Course, San Antonio, Texas, 1994.

"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.

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

"Breach of Fiduciary Duty and Nonphysical Tort Claims," Annual Advanced Family Law Course, San Antonio, Texas, August 1998.

"Recent Development in Custody Law", State Bar of Texas, Advanced Family Law Seminar, March 1997.

"Whose Kids are They Anyway? Reporting Child Abuse: Counterpoint - A Lawyer has a Duty to Report Child Abuse," State Bar of Texas Annual Meeting, Houston, Texas, June, 1997 and Advanced Family Law Course, San Antonio, Texas, August 1997.

"The Ab(use) of the Rules of Evidence and Privileges," Advanced Family Law Course, San Antonio, Texas, August 1997.

"Piercing Claims of Immunity in Family Law Litigation," Advanced Family Law Course, San Antonio, Texas, 1994.

"Getting and Characterizing Punitive Damages in Family Law Litigation," Advanced Family Law Course, San Antonio, Texas, August 1994.

**ADVANCED CIVIL APPELLATE**

"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.

**MARRIAGE DISSOLUTION**

"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.

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

"Bill of Review," 23rd Annual Marriage Dissolution Seminar, Fort Worth, Texas, May 2000.

"Sex and Lies: A Daubert Challenge, Techniques for Presenting the Child's Testimony to the Trial Court in a Child Abuse Case," 23rd Annual Marriage Dissolution Seminar, Fort Worth, Texas, May 2000.

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

"Litigating Marital Agreements: "You can't always get what you want....",22nd Annual Marriage Dissolution Institute, San Antonio, Texas, May 1999.
"Handling the Divorce Involving a Medical Practice," Marriage Dissolution Conference, Austin, Texas, May, 1998.

"Scratches on the Heart: Non-Physical Tort Claims," Marriage Dissolution Conference, Dallas, Texas, May, 1997.

"The Effective Use of the New Conservator Rights Responsibilities and Duties in a Custody Case," Marriage Dissolution Conference, South Padre Island, Texas, 1994.

**TEXAS ACADEMY OF FAMILY LAW SPECIALISTS**

"Presenting the Child's Perspective: Techniques for Presenting the Child's Preference of Conservator to the Trial Court," Texas Academy of Family Law Specialists, Las Vegas, Nevada, February 2000.

**TEXAS TRIAL LAWYERS ASSOCIATION**

"Conflicts Between Personal Injury and Family Law," Texas Trial Lawyers Association, Austin, Texas, February 1999.

"How Much Is Your Law Practice Worth? Valuing Personal Injury Law Practices for Purposes of Divorce," Texas Trial Lawyers Association, Dynamic Advocacy Seminar, Whitefish Montana, July, 1998.

"Discussion of Texas Supreme Court Cases Involving Tort Claims of Emotional Distress," joint meeting of Travis County Trial Lawyers and Travis County Women's Bar, Austin, Texas, 1994.

"Divorce & Emotional Distress :Custer's Last Stand,"1992.

**UNIVERSITY OF TEXAS COURSES**

"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.

"District Judges Panel: 10 Bad Things that Good Lawyers Do," Family Law on the Front Lines, Galveston, Texas, April 2002.

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

"Daubert: Experts & Admissibility" Family Law on the Front Lines, The University of Texas School of Law, April 2001.

**STATE BAR OF TEXAS COURSES**

"Playing By the Rules," Winning Techniques in Family Law Litigation: Mastering the Challenge, Houston, Texas, December 1998.

"Emerging Issues in Custody Litigation," 1997 State Bar of Texas Legal Assistant Division Advanced Family Law Seminar, Austin, Texas, March, 1997.

"Changes in Texas Family Law," The College of the State Bar of Texas, Austin, Texas, 1994.

"Sharpening Negotiating Skills - Your Key to Success," State Bar of Texas, Women's Law Section, Austin, Texas, 1990.

"Mothers Without Custody," San Francisco, California, 1987.

"Child Abuse - The Quiet Crime," State Bar of Texas, San Antonio, Texas, 1985.

"Post Divorce, Modification of Conservatorship and Support Orders in Divorce," 1984: Division of Property and Decisions on Children, El Paso, Texas 1984.

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

The Ultimate Trial Notebook - Family Law, 1994, State Bar of Texas, Austin, Texas, "The Social Worker: Learning from Your Expert What to Ask."

**ASSOCIATION OF FAMILY AND CONCILIATION COURTS**

"Parental Relocation Disputes: An Interdisciplinary Approach to Resolution," Second World Congress on Family Law and the Rights of Children and Youth with the 1997 Annual Conference of the Association of Family and Conciliation Courts, San Francisco, California, June, 1997.

"Gender Issues in Domestic Torts," Association of Family and Conciliation Courts, Montreal, Canada, May 1995.

**SPEAKER/AUTHOR VARIOUS COURSES**

"Grandparents Rights after Troxel" Capital Area Paralegal Association, Austin, Texas, January 2002.

Summary of the 1999 amendments to the Texas Family Code," Legal Assistant U, San Antonio, Texas, September 1999.

"Domestic Tort Liability and Characterization of Damages," First Annual Texas Marital Property Institute, Austin, Texas, October, 1997.

"Trying Jury Cases Under the Amendments to the Texas Family Code and the New Texas Pattern Jury Charge," Travis County Family Law Section Meeting, April 1996.

"What Attorneys Expect from an Appraiser in a Divorce Situation," American Society of Appraisers, Austin, Texas, November 1995.

"Complex Family Law Litigation, Interspousal Tort Claims," Texas College of Advanced Judicial Studies, 1993.

"Changes in the Family Code," Travis County Family Law Section Meeting, Austin, Texas, 1993.

Travis County Bar Association Third Annual Jury Selection Seminar, Family Law Voir Dire Demonstration, 1993.

"Issues Particular to the Appeal of Family Law Cases in Texas," Civil Appellate Seminar, Austin, Texas, April, 1994.

Travis County Bar Association Second Annual Jury Selection Seminar, Family Law Voir Dire Demonstration, 1992.

Travis County Domestic Relations Division - Child Custody Litigation, 1990.

"Child Custody Litigation," Tarrant County Bar Association, Fort Worth, Texas, 1990.

**VARIOUS PUBLICATIONS**

"Overview of the New Uniform Child Custody Jurisdiction Enforcement Act," The Newsletter of the American Academy of Matrimonial Lawyers, Winter 2000.

"Targeted by the Opposing Party; The Tort of Negligent Misrepresentation Applied to Divorce Lawyers," Texas Lawyer, December 1999.

"Relocation: Moving Forward or Moving Backward?", 15 Journal of American Academy of Matrimonial Lawyers 701 (Spring 1999).

"The Fiduciary Duty Between Spouses, A Look at "Fraud on the Community," Texas Lawyer, October, 1998.

"Torts in Texas the New Frontier," Texas Trial Lawyers Forum, 1992.

"Infliction of Emotional Distress: No Justice in the Middle Ground," Texas Trial Lawyers Forum, 1992.

"Evaluation and Division of Professional Goodwill and Professional Degrees During Marriage," Texas Trial Lawyers Forum, 1985.

Co-Author with Dan Price, "Post Divorce, Modification of Conservatorship and Support Orders in Divorce," Division of Property and Decisions on Children, 1984.

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

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Member, Planning Committee, University of Texas School of Law, First, Second and Third Annual Insurance Law Institutes (1996-98)

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

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Secretary/Treasurer, Travis County Family Law Advocates 2001-

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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

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

University of Texas B.A. 1974

**SELECTED LAW RELATED PUBLICATIONS & PRESENTATIONS**

"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.

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

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"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)

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## EDUCATION

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Board Certified, Family Law, 1996
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Board Certified, Civil Appellate Law, 1993
Board Certified, Civil Trial Law, 1991

## PROFESSIONAL AFFILIATIONS

Texas Academy of Family Law Specialists, Travis County Bar Association, Texas Bar Association, College of the State Bar, San Antonio Bar Association, San Antonio Family Law Association, Texas Bar Foundation

## SELECTED LAW RELATED PUBLICATIONS & PRESENTATIONS

"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.

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"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.

"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.

Co-Author, Bill of Review", 23rd Annual Marriage Dissolution Seminar, Fort Worth, Texas, May 2000.

Co-Author, "Sex and Lies: A Daubert Challenge, Techniques for Presenting the Child's Testimony to the Trial Court in a Child Abuse Case, 23rd Annual Marriage Dissolution Seminar, Fort Worth, Texas, May 2000.

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

Co-Author, "Presenting the Child's Perspective: Techniques for Presenting the Child's Preference of Conservator to the Trial Court", Texas Academy of Family Law Specialists, Las Vegas, Nevada, February 2000.

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

Co-Author, "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.

Co-Author, "Summary of the 1999 amendments to the Texas Family Code", Legal Assistant U, San Antonio, Texas, September 1999.

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

Co-Author, "Malpractice", Advanced Family Law Course, State Bar of Texas, San Antonio, Texas, 1992.

Co-Author, "Malpractice, Advanced Family Law Course, State Bar of Texas, San Antonio, Texas, 1991.

Co-Author, "Expert Witnesses", Advanced Family Law Course, State Bar of Texas, San Antonio, Texas, 1990.

## TABLE OF CONTENTS

# TERMINATION AND ADOPTION: IT AIN'T OVER TILL IT'S OVER

## I. SCOPE OF ARTICLE

This article first addresses general appellate principals and procedures, and then turns to more specific issues concerning termination and adoption decrees. It will also attempt to steer practitioners around many of the traps and pitfalls in a family law appeal. It will be recalled that, in 1997, the Texas Rules of Appellate Procedure were extensively amended.

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. GENERAL APPELLATE PRINCIPALS AND PROCEDURES

### A. Appellate Review

1. Preservation of Error in the Trial Court

In family law appeals, as in all other cases, you will probably not prevail unless the error complained of in the appellate court is first sufficiently preserved in the trial court. The caveat "probably" is included in the preceding sentence because of the current conflict among Texas courts of appeals concerning the necessary requisites for preservation of "core" issues in termination cases. Such conflict is addresses herein immediately below, following a brief discussion of general preservation rules.

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

All that said, there is, as already mentioned, a conflict among Texas courts of appeals regarding preservation of error issues in a termination suit.

In *In the Interest of A.P.*, 42 S.W.3d 248, 256 (Tex.App.–Waco 2001, no pet. history), the Waco Court of Appeals held that, in involuntary termination cases decided by a jury, the proper approach is to review the merits of the sufficiency complaints regarding "core issues, " *i.e.*, the Tex.Fam.Code §161.001(1) violations of a predicate act and whether termination is in the best interest of the child, even if they have not been preserved procedurally. Thus, according to the Waco appellate court, when either of these two core issues is challenged on appeal for sufficiency of the evidence, and no motion or objection was made at the trial court which would have preserved the complaint for appellate review under ordinary civil-review standards, the complaint will nevertheless be reviewed. *Id.*

In *A.P.*, the Waco Court of Appeals explained its rationale as follows:

> [w]e are not persuaded that application of Rule 33.1 an involuntary-termination-of-parental-rights case to preclude review of the sufficiency of the evidence affords the parent due process. To terminate parental rights when there is insufficient evidence only because the complaint was not preserved in the trial court does not adhere to Fourteenth Amendment procedural due process. There is no "strict scrutiny" in such an approach..... even without the constitutional imperative of due process, review of the sufficiency of the evidence in termination cases regardless of preservation of the issue is a logical extension

> of the rule in criminal cases because there is an elevated burden of proof.

*Id*. at 255-256.

The Corpus Christi Court of Appeals, however, has expressly declined to follow the holding of the Waco appellate court in *A.P. In re I.V.,* 61 S.W.3d 789, 794, n. 3 (Tex.App.-Corpus Christi 2001, no pet. history), *citing*, *In re J.M.S.*, 43 S.W.3d 60, 62 (Tex.App.–Houston [1st Dist.] 2001, no pet.) (sufficiency issues must be properly preserved in a termination of parental rights case just as in any other civil case).

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

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

2. The "Harmless Error Rule"

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

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

In substance, TRAP 44.1 is unchanged from former TRAP 81(b)(1). "The harmless error rule, as expressed in former Rule 81, applies to all errors, even those involving the violation of procedural rules couched in mandatory language." *Lone Star Steel Co. v. Scott*, 759 S.W.2d 144, 147 (Tex.App.–Texarkana 1988, writ denied). The test of whether error is reversible or harmless is not a "but for" test; it is instead a matter of probability of harm. The appellate court must determine whether it is more likely than not that the error led to an improper judgment. *King v. Skelly*, 452 S.W.2d 691, 696 (Tex. 1970). If so, the judgment is reversed; if not, the judgment is affirmed.

3. Procedure and Evidence

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

a. Procedural Errors

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

b. Evidence Errors

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

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

There is some authority in the courts of appeals that a case is reversible on wrongful admission or exclusion of evidence only if the entire case turns on the particular evidence. *Litton v. Hanley*, 823 S.W.2d 428, 429-30 (Tex.App.—Houston [1st Dist.] 1992, no writ); *LaCoure v. LaCoure,* 820 S.W.2d 228, 235 (Tex.App.–El Paso 1991, writ denied); *Dudley v. Humana Hosp.,* 817 S.W.2d 124, 126 (Tex.App.–Houston [14th Dist.] 1991, no writ); *Rawhide Oil Co. v. Maxus Exploration Co.,* 766 S.W.2d 264, 279 (Tex.App.–Amarillo 1988, writ denied). Other courts of appeals combine the "entire case turns" language with former Rule 81(b)(1) language. *See, e.g., Service Lloyds Ins. Co. v. Martin,* 855 S.W.2d 816 (Tex.App.–Dallas 1993, no writ); *Riggs v. Sentry Ins. Co.,* 821 S.W.2d 701, 708-709 (Tex.App.–Houston [14th Dist.] 1991, writ denied).

However, the "entire case turns" language has been questioned in recent opinions. *Durbin v. Dal-Briar Corp.,* 871 S.W.2d at 267; *Castro v. Sebesta,* 808 S. W. 2d 189, 192 n. 1 (Tex.App.–Houston [1st Dist.] 1991, no writ). The state of the law with regard to this language is unclear. If it is viewed as a separate standard, the Texas Supreme Court has not developed it in a harmful error analysis in more recent cases. *See, e.g., City of Brownsville v. Alvarado, 897* S.W.2d 750 (Tex. 1995). If it is viewed as a permutation of the "but for" standard, then it should be viewed as disapproved by *McCraw*; if it is a higher standard than "but for," it is most certainly disapproved by *McCraw.* Perhaps the language is only a variation of the other language often present in this area of the law, that the evidence must be controlling on a material issue in the case. *See, Gee v. Liberty Mutual Fire Ins. Co.,* 765 S.W.2d 394, 396 (Tex. 1989).

Other factors also play in the harmless error arena. If the evidence complained of is only cumulative of other evidence admitted, then error with regard to admission or exclusion is harmless. *Id.; Hyundai Motor Co. v. Chandler,* 882 S.W.2d 606, 620 (Tex.App.–Corpus Christi 1994, writ denied). Furthermore, the evidence must concern an issue material to the case. *Durbin.,* 871 S.W.2d at 271.

The Supreme Court rejected a variation in this area in *Williams Distributing Co. v. Franklin,* 898 S.W.2d 816 (Tex. 1995). *Williams* involved expert testimony excluded due to a party's failure to supplement its discovery designation of expert witnesses. Another expert had been properly designated by the party to testify on the same issue. Without determining if the exclusion were erroneous, the Dallas Court of Appeals held that harmful error was not shown because there was no showing the party "was unavailable to testify or *would not give controlling evidence* himself" (emphasis added). *Williams Dist. Co. v. Franklin,* 884 S.W.2d 503, 510 (Tex.App.–Dallas 1994), *rev'd,* 898 S.W.2d 816, (Tex. 1995).

The Texas Supreme Court, however, attacked the emphasized language, holding that it put a party to an unpleasant election between offering "weaker" testimony and abandoning the exclusion complaint, or disparaging the "weaker" testimony as not controlling. The Court also held that it amounted to an impermissible intrusion into a party's trial strategy regarding whether or not to call a witness and determining what evidence is best to put to the jury.

4. Factual Disputes

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

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

5. Applying Substantive Law

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

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

*MJR Corp.*, 760 S.W.2d at 10.

6. 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.

a. 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) [hereinafter referred to as "Hall"], 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, Mr. Hall suggests that the 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." Hall at 362. However, according to Mr. Hall, there are at least two instances in which a perceived error does not constitute an abuse of discretion: (1) a mere error of judgment is not an abuse of discretion; and (2) a trial court does not abuse its discretion if it reaches the right result for the wrong reason. *Id.* at 363.

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

> [t]he 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. Another way of stating the test is whether the act was arbitrary or unreasonable. 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 238, 241-242 (Tex. 1985) (citations omitted).

b. 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. Hall, at 372-430, 437, 446-48.

c. 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.

d. Is There a Different Standard of Evidentiary Review?

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

of error); *see also*, *Thomas v. Thomas*, 895 S.W.2d 895, 898 (Tex.App.–Waco 1995, writ denied); *In re Marriage of Driver*, 895 S.W.2d 875, 877 (Tex.App.–Texarkana 1995, no writ); *Wood v. O'Donnell*, 895 S.W.2d 555, 556 (Tex.App.–Fort Worth 1995, no writ); *In re Pecht*, 874 S.W.2d 797, 800 (Tex.App.–Texarkana 1994, no writ); *but see, Matthiessen v. Schaefer*, 897 S.W.2d 825, 828 (Tex.App.–San Antonio 1994) (Duncan, J., dissenting), *rev'd on other grounds*, 915 S.W.2d 479 (Tex. 1995) (appellate court should review award of attorney's fees by normal sufficiency of evidence standard, and not subsume sufficiency of evidence into abuse of discretion standard).

The El Paso Court of Appeals has agreed with Justice Duncan's dissenting opinion in *Matthiessen.* In *Lindsey v. Lindsey,* 965 S.W.2d 589, 592-593 (Tex App.–El Paso 1998, no pet.), the El Paso appellate court acknowledged the recent Texas 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, but refused to adopt such a position; instead, the El Paso appellate court held 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?

**B. The Appellate Timetable**

1. Court Can Suspend Deadlines

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

2. Computation of Time

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

3. Filing by Mail

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

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

4. Deadline for Perfecting Appeal

The new TRAPs continue the same deadlines for perfecting appeal.

a. 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.

b. 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).

c. 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).

d. 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).

e. Extending the Deadline

The appellate court can extend the time for perfecting appeal if the appeal is perfected within 15 days after the deadline, and within that same period, a motion is filed in the appellate court reasonably explaining the need for the extension, as required by TRAP 10.5(b). Under TRAP 26.3, the deadline for perfecting may be extended in all appeals, including accelerated appeals. However, the Supreme Court recently "liberalized" the deadlines in *Verburgt v. Dorner*, 959 S.W.2d 615 (Tex. 1997). *Verburgt* held that a motion for extension of time to file a cost bond (now notice of appeal) is implied when a party, acting in good faith, files a cost bond within the 15 day period in which former TRAP 41(a)(2)(now TRAP 26.3) permits parties to file a motion to extend the time for filing the cost bond. 959 S.W.2d at 617. But there still must be a reasonable explanation to support the late filing. *Boyd v. American Indem. Co.*, 958 S.W.2d 379, 380 (Tex. 1997); *Harlan v. Howe State Bank*, 958 S.W.2d 380, 381 (Tex. 1997). An "implied motion for extension of time" may be overruled if no reasonable explanation or good cause exists or is shown. *Weik v. Second Baptist Church of Houston*, 988 S.W.2d 437, 439 (Tex.App.–Houston [1st Dist.] 1999, pet. denied); *see also, Jones v. City of Houston*, 976 S.W.2d 676 (Tex. 1998) (applying *Verburgt* to untimely filed affidavit of indigency in lieu of cost bond). "A reasonable explanation means 'any plausible statement of circumstances indicating that failure to file within the [required] period was not deliberate or intentional, but was the result of inadvertence, mistake or mischance.'" *Weik*, 988 S.W.2d at 439.

f. No Notice of Trial Court's Judgment

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

5. Deadline for Requesting the Record

a. 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.

b. The Reporter's Record

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

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

court of appeals denied the Utleys' motion for extension of time and the reporter's record was not filed.

6. Deadline for Filing Record

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

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

Under the old rules, there was some doubt as to whether *all* appellate deadlines were extended by a timely motion to modify judgment, motion to reinstate, or request for findings of fact. Under the TRAPs, the only surviving variable deadline is the time for perfecting appeal. Under new TRAP 26.1(a), a motion for new trial, a motion to modify judgment, a motion to reinstate, and a request for findings of fact (when appropriate), all extend the deadline for perfecting appeal. In addition, a timely filed post-judgment motion that seeks a substantive change in an existing judgment qualifies as a motion to modify under Rule 329b(g), and extends the appellate timetable. *Lane Bank Equipment Co. v. Smith Southern Equipment, Inc.* , 10 S.W.3d 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).

8. Bankruptcy

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

a. 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.

b. 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 San Antonio 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.),a probate-related case, the San Antonio appellate court interpreted held that TRAP 8.2 required the imposition of the automatic stay if any party files a bankruptcy petition and declined to follow its former opinion in *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. Consequently, 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.).

c. Calculation of Time Periods

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

d. 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 also, Greenberg v. Fincher & Son Real Estate, Inc.*, 753 S.W.2d 506, 507 (Tex.App.–Houston [1st Dist.] 1988, no writ).

**C. Perfecting the Appeal**

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

1. Notice of Appeal

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

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

2. 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...[t]he appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause." TRAP 25.1(c). The appellee can no longer "piggy-back" on the appellant's perfection of an appeal. If an appellee wishes to make changes to the judgment that only affect cross-appellees, the appellee must perfect its own appeal. If several parties perfect an appeal,

each such party is an appellant, and will be filing an appellant's brief and an appellee's brief. However, if the appellee has perfected his own appeal, placing cross-points in his appellee's brief may be an acceptable way of presenting those issues to the appellate court. *Scott v. Sebree*, 986 S.W.2d 364, 367 n.3 (Tex.App. –Austin 1999, pet. denied). This is a significant change in the law.

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

3. 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.

4. 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).

5. Time for Perfecting Appeal

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

**D. Clerk's Record**

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

1. What's Automatically Included

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

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

(2) the court's docket sheet;

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

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

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

(6) the notice of appeal;

(7) any formal bill of exception;

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

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

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

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

TRAP 34.5(a)

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

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

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

2. Additional Items to Include in Family Law Appeals

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

a. Requested Admissions

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

b. Divorce Inventories and Custody Social Studies

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

c. Written Stipulations

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

d. Child's Written Election of Managing Conservator

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

3. Timely Request

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

4. Duty to File

It is no longer the duty of the appellant to see that the clerk's record is timely filed in the court of appeals. TRAP 35.3 provides that the trial court clerk has this responsibility. Thus, appellate counsel will no longer need to seek extensions from the appellate court to permit additional time for the clerk's record to be filed. TRAP 35, *Notes and Comments*.

5. Time for Filing

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

> (1) if a timely motion for new trial, motion to modify judgment, motion to reinstate, or valid request for findings and conclusions is filed, then the clerk's record is due 120 days after the judgment is signed;
>
> (2) in an accelerated appeal, the clerk's record is due 10 days after the notice of appeal is filed; or
>
> (3) in a restricted appeal, the clerk's record is due 30 days after the notice of appeal is filed.

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

6. Cost of Excessive Portions

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

7. Paying the Cost

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

8. Defects/Inaccuracies

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

9. Supplementation

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

**E. Reporter's Record**

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

1. Duty to File

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

However, if the party responsible for paying for the preparation of the reporter's record (and presumably the clerk's record) does not pay for, or make satisfactory arrangements to pay the fee for, preparation of the reporter's record, the reporter's duty to prepare and timely file the reporter's record does not arise. *See*, *Utley,* 958 S.W.2d at 961 (motion to extend time to file reporter's record denied). In *Spiegel v. Spiegel*, 6 S.W.3d 643 (Tex.App.–Amarillo 1999, no pet.), the husband appealed from the trial court's denial of his request for a temporary injunction. The orders denying the application for temporary injunction contained the following language: "[t]he specific reason for the Court's decision is: on record." *Id.* at 645. However, the husband expressly did not request a reporter's record.

On appeal, the appellate court stated that the reporter's responsibility to prepare and file the reporter's record is expressly conditioned upon the appellant filing a notice

of appeal, requesting that the reporter's record be prepared, and paying for or making arrangements to pay for the reporter's record. *Id.* at 646. The appellate court went on to decide that if the reporter's record is absent because the appellant did not satisfy the above requirements, the court would not only continue to presume that the missing record supports the trial court's determination but also would forego reviewing the dispute as authorized under Rule 37.3(c) of the Rules of Appellate Procedure (which directs the court to address those issues that do not need the reporter's record for decision). *Id.*

2. Time for Filing

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

> (1) if a timely motion for new trial, motion to modify judgment, motion to reinstate, or valid request for findings and conclusions is filed, then the reporter's record is due 120 days after the judgment is signed;
>
> (2) in an accelerated appeal, the reporter's record is due 10 days after the notice of appeal is filed;
>
> (3) in a restricted appeal, the reporter's record is due 30 days after the notice of appeal is filed.

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

3. Cost

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

4. Partial Reporter's Record

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

a. *Englander Co. v. Kennedy* Overruled

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

However, when the reporter's record is not properly requested by filing and serving a request for a partial reporter's record which states the points of error or issues to be presented on appeal, the presumption that the partial reporter's record constitutes the entire record for purposes of reviewing the stated points or issues does not apply. *See*, *Jaramillo v. Atchison, Topeka & Santa Fe Railway Co.*, 986 S.W.2d 701, 702 (Tex.App.–Eastland 1998, no pet.); *CMM Grain Co., Inc. v. Ozgunduz*, 991 S.W.2d 437 (Tex.App.–Fort Worth 1999, no pet.).

b. Who Pays for Additional Portions?

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

5. 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:

> (1) certified copies of all tapes or other audio-storage devices on which the proceedings were recorded;
>
> (2) any exhibits that the parties designate; and
>
> (3) certified copies of the original logs prepared by the court recorder pursuant to TRAP 13.2.

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

6. Inaccuracies

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

7. Lost or Destroyed Records

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

## F. Bills of Exception

1. Informal Bills of Exception and Offers of Proof

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

2. Deadline for Formal Bills of Exception

Under former TRAP 52(c)(11), formal bills of exception were due 60 days after the judgment is signed, or 90 days if a motion for new trial were timely filed. Under TRAP 33.2(c)(1), the time for filing formal bills of exception in civil cases is always 30 days after the filing party perfects the appeal. The deadline does *not* vary depending on timely filing of a motion for new trial, etc. The deadline can be extended upon a proper motion to extend the deadline, filed within 15 days after the deadline. TRAP 33.2(e)(3).

## G. 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.

1. 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.

a. 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, as often occurs in a termination case, 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.

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.

In the context of a termination case tried to the bench, it is critical to request the trial court to specifically find which of the statutory grounds for termination were proven by the evidence.

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:

> (1) 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);
>
> (2) when the cause is withdrawn from the jury by directed verdict due to the general rule that the trial court can grant an instructed verdict only when there are no fact issues to be resolved by the jury. *Spiller v. Spiller*, 535 S.W.2d 683 (Tex.Civ.App.–Tyler 1976, writ dism'd); *Yarbrough v. Phillips Petroleum Co.*, 670 S.W.2d 270 (Tex.App.–Houston [1st Dist.] 1983, writ ref'd n.r.e.);
>
> (3) when a judgment notwithstanding the jury verdict is entered. *Fancher v. Cadwell*, 159 Tex. 8, 314 S.W.2d 820 (1958);
>
> (4) when a summary judgment is granted. *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994); *Chavez v. El Paso Housing Authority,* 897 S.W.2d 523 (Tex.App.–El Paso 1995, writ denied);
>
> (5) 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.);
>
> (6) when a default judgment is granted. *Harmon v. Harmon*, 879 S.W.2d 213 (Tex.App.–Houston [14th Dist] 1994, writ denied); or
>
> (7) 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).

b. 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. Such 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.

c. 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"); s*ee 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); *see also, 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 a divorce case tried to a jury, a request for findings of fact and conclusions of law did not extend the appellate timetable even though the trial judge was not bound by some of the jury's answers).

d. Sequence for Obtaining Findings

(1) Initial Request

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

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

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

(2) Presentment Not Necessary

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

TRCP 296 now provides that the request shall be filed with the clerk of the court "who shall immediately call such request to the attention of the judge who tried the case." Notice to the opposing party of the filing of the request is

still required under the rule. Presentment to the trial judge is no longer required.

(3) 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.

(4) Untimely Filing by Court

In *Morrison v. Morrison*, 713 S.W.2d 377 (Tex.App.–Dallas 1986, no writ), the husband appealed the property division in a divorce and requested findings and conclusions. In the original findings, the court stated that the marriage had become insupportable. The wife requested additional findings on the issues of cruelty, adultery and desertion. The judge made the additional findings noting that the husband was at fault in the breakup of the lengthy marriage due to his drinking, adultery and spending community assets on other women. The husband attempted to have the additional findings disregarded because they were filed untimely. The appellate court determined that the only issue raised by the late filing was that of injury to the appellant, not the trial court's jurisdiction to make the findings. The court also noted that the husband had not demonstrated any harm which he suffered because of the late filing. *See also, Narisi v. Legend Diversified Investments*, 715 S.W.2d 49, 50 n. 2 (Tex.App.–Dallas 1986, writ ref'd n.r.e.) (court of appeals considered allegedly late filed supplemental findings and conclusions because appellant neither filed a motion to strike nor shown that she was harmed by the delay in the filing.); *Summit Bank v. The Creative Cook*, 730 S.W.2d 343 (Tex.App.–San Antonio 1987, no writ) (the reviewing court will consider late filed findings of facts and conclusions of law when there has been no motion to strike).

If the appellant has been prejudiced in his/her appeal because of the late filing, (s)he should consider filing a motion to strike, but (s)he must also be prepared to demonstrate injury. Note also that if the findings and conclusions are filed too far past the deadline, the appellate court may disregard them. *Stefek v. Helvey,* 601 S.W.2d 168 (Tex.Civ.App.–Corpus Christi 1980, writ ref'd n.r.e.). In *Labar v. Cox*, 635 S.W.2d 801 (Tex.App.–Corpus Christi 1982, writ ref'd n.r.e.), the court determined a late filing to be reversible error because it prevented the appellant from requesting additional findings. The court declined to permit the trial court to correct its procedural errors as permitted by old TRCP 434 because other errors existed which required a reversal.

(5) Reminder Notice

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

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

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

(6) 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.

(a) Failure to Request

When a party fails to timely request additional findings of fact and conclusions of law, (s)he is deemed to have waived his/her right to complain on appeal of the court's failure to enter additional findings. *Briargrove Park Property Owners, Inc. v. Riner*, 867 S.W.2d 58, 62 (Tex.App.–Texarkana 1993, writ denied); *Cities Services Co. v. Ellison*, 698 S.W.2d 387, 390 (Tex. App–Houston [14th Dist.] 1985, writ ref'd n.r.e.). Further, when the original findings omit a finding of a specific ground of recovery which is crucial to the appeal, failure to request an additional finding will constitute a waiver of the issue. *Poulter v. Poulter*, 565 S.W.2d 107 (Tex.Civ.App.–Tyler 1978, no writ) (the failure to request a specific finding on reimbursement waived any reimbursement complaints on appeal).

In *Keith v. Keith*, 763 S.W.2d 950 (Tex.App.–Fort Worth 1989, no writ), the trial court refused to set aside the husband's personal good will in a community partnership business as the husband's separate property. The findings of

fact and conclusions of law found the value of the businesses to be $262,400. The husband made no request for additional findings as to whether the partnership had any good will or whether any such good will was professional good will attributable to him personally as distinguished from commercial good will. He challenged the trial court's failure to make those findings on appeal. The court of appeals affirmed, noting that the failure to request additional findings constitutes a waiver on appeal.

(b) 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).

(c) Bill of Exceptions

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

(7) Effect of Premature Request

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

e. What Form Is Required?

Findings of fact and conclusions of law need not be in any particular form as long as they are in writing and are filed of record. *Hamlet v. Silliman*, 605 S.W.2d 663 (Tex.App.–Houston [1st Dist.] 1980, no writ). It is permissible for the trial court to list its findings in a letter to the respective attorneys, as long as the letter is filed of record. *Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120 (Tex.App.–Corpus Christi 1986, no writ). Remember, however, that oral statements by the trial court on the record as to its findings will not be accepted as findings of fact and conclusions of law. *In re W.E.R.*, 669 S.W.2d 716 (Tex. 1984); *Stevens v. Snyder*, 874 S.W.2d 241 (Tex.App.–Dallas 1994, writ denied). Nor may the court have those statements prepared as a reporter's record and filed of record as findings of fact and conclusions of law. *Nagy v. First National Gun Banque Corporation*, 684 S.W.2d 114 (Tex.App.–Dallas 1984, writ ref'd n.r.e.).

The Texas Supreme Court ruled in one case, however, that appellate courts must give effect to **intended** findings of the trial court, even when the specific findings made do not quite get the job done, provided they are supported by the evidence, the record and the judgment. See *Black v. Dallas County Child Welfare*, 835 S.W.2d 626 (Tex. 1992).

(1) Predecessor Rules

Formerly, it was common practice to insert various "findings" into the court's order. The Texas Family Code requires visitation and child support orders to contain certain findings of fact. *See*, TEX. FAMILY CODE §§ 153.258, 154.130. Contempt orders must contain specific findings as to the exact violations which have occurred and what actions, if any, will permit the contemnor to purge himself. Orders granting injunctions are required to set forth the reasons for issuance. Decrees make specific findings in matters of military retirement benefits to comply with the Soldiers and Sailors Relief Act and still other findings in order to qualify as a Qualified Domestic Relations Order.

There was a divergence of opinions as to whether specific findings of fact and conclusions of law which were contained within a decree, such as specific factors considered with regard to a disproportionate division of the estate or specific findings as to values, qualified as formal findings of fact and conclusions of law. *See Cottle v. Knapper*, 571 S.W.2d 59 (Tex.Civ.App.–Tyler 1978, no writ) (findings contained within the decree are valid, despite the fact that they are not contained in a separate document). The inclusion of the findings in the order did not preclude a request for separate findings and conclusions. *See also*, *A-- v. Dallas County Child Welfare*, 726 S.W.2d 241 (Tex.App.–Dallas 1986, no writ) (when findings and conclusions are incorporated into a judgment, even when no request has been made, they are treated as findings of fact and conclusions of law filed in accordance with Rule 296); *but see and cf., Jones v. Jones*, 641 S.W.2d 342 (Tex.App.–Corpus Christi 1982, no writ); *City of Houston v. Houston Chronicle*, 673 S.W.2d 316 (Tex.App.–Houston [1st Dist.] 1984, no writ); and *Gonzales v. Cavazos*, 601 S.W.2d 202 (Tex.Civ.App.–Corpus Christi 1980, no writ) (all holding that recitations in the judgment cannot be considered as a substitute for separately filed

findings and conclusions; thus, they provide no basis for attack by a losing party on appeal).

(2) TRCP 299a

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

> [f]indings of fact shall not be recited in a judgment. If there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes.
>
> Findings of fact shall be filed with the clerk of the court as a document or documents separate and apart from the judgment.

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

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

f. Conflicting Findings and Findings at Variance with the Judgment

When the findings of fact appear to conflict with each other, they will be reconciled if possible. If, however, they are not reconcilable, they will not support the judgment. *Yates Ford, Inc. v. Benevides*, 684 S.W.2d 736 (Tex. App.–Corpus Christi 1984, writ ref'd n.r.e.). When Rule 296 findings appear to conflict with findings recited in the judgment, the Rule 296 findings control for purposes of appeal. TRCP 299a. This rule is in accord with the practice of the appellate courts, even before TRCP 299a was adopted. *See*, *Southwest Craft Center v. Heilner*, 670 S.W.2d 651 (Tex.App.–San Antonio 1984, writ ref'd n.r.e.); *Law v. Law*, 517 S.W.2d 379, 383 (Tex.Civ.App.–Austin 1974, writ dism'd); *Keith*, 763 S.W.2d 950.

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

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

g. Conflict Between Findings and Admissions

The Supreme Court has considered whether a reviewing court is bound by admissions of parties as to matters of fact when the record shows that the admissions were not truthful and that the opposite of the admissions was in fact true. In *Marshall v. Vise*, 767 S.W.2d 699 (Tex. 1989), the plaintiff submitted requests for admissions which were never answered. Prior to the non-jury trial, the court granted the plaintiff's motion that his requests for admissions be deemed admitted. Nevertheless, the defendant presented testimony in direct contravention of the deemed admissions. Plaintiff, who had filed no motion for summary judgment, failed to urge a motion in limine, failed to object to the evidence when offered and failed to request a directed verdict. The court rendered judgment contrary to the facts deemed admitted and made findings of fact and conclusions of law contrary to the facts deemed admitted.

The court of appeals concluded that the trial court's findings were directly contrary to the deemed admissions and were so against the great weight and preponderance of the evidence as to be manifestly erroneous. The Supreme Court concluded that unanswered requests for admission are in fact automatically deemed admitted unless the court permits them to be withdrawn or amended. An admission, once admitted, is a judicial admission such that a party may not introduce testimony to contradict it. In *Marshall*, however, the plaintiff had failed to object; in fact he elicited much of the controverting testimony himself. Thus, he was found to have waived his right to rely on the admissions which were controverted by testimony admitted at trial without objection.

h. Which Judge Makes the Findings?

Suppose a trial judge hears the evidence in a case and enters judgment but before (s)he is able to make findings of fact and conclusions of law, (s)he dies, or is disabled, or fails to win re-election? In *Ikard*, 819 S.W.2d 644, the family court master heard the evidence by referral with regard to a requested increase in child support. The master prepared a written report and the order was signed by the judge of the referring court. In the intervening time between trial and entry of the order, the court master won the November election to a district court bench, and left the master's bench. Findings of fact and conclusions of law were prepared following a timely request. Due to the absence of the court master who had heard the evidence, the findings were approved by another court master and signed by the referring judge, neither of whom had heard the evidence.

On appeal, Mr. Ikard claimed this procedure to have been reversible error. The appellate court disagreed, noting that a successor judge has full authority to sign the findings, which in most cases, has been prepared by counsel for the prevailing party and not by the trier of fact. The findings then become those of the trial court, regardless of who prepared them. *See also*, *Roberts*, 999 S.W.2d at 430, n.5; *Lykes Bros. Steamship Co., Inc. v. Benben*, 601 S.W.2d 418 (Tex.Civ.App.–Houston [14th Dist.] 1980, writ ref'd n.r.e.).

Some appellate courts have taken a different approach when the trial judge is no longer available. In *FDIC v. Morris*, 782 S.W.2d 521 (Tex.App.–Dallas 1989, no writ), for example, the appellate court noted that the trial judge was no longer on the bench and was unavailable to respond to the order to prepare findings. Citing *Anzaldua v. Anzaldua*, 742 S.W.2d 782, 783 (Tex.App.–Corpus Christi 1987, writ denied), the Dallas appellate court reversed the trial court's judgment.

i. Effect of Court's Failure to File

(1) 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); *Southwest Livestock & Trucking Co. v. Dooley*, 884 S.W.2d 805 (Tex.App.–San Antonio 1994, writ denied). *Owens v. Travelers Ins. Co.*, 607 S.W.2d 634, 637 (Tex.Civ.App.–Amarillo 1980, writ ref'd n.r.e.);

(2) 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.–HYouston [14th Dist.] 1990, writ denied); *see also*, *Landbase, Inc. v. T.E.C.*, 885 S.W.2d 499, 501-02 (Tex.App.–San Antonio 1994, writ denied) (failure to file findings and conclusions harmless when the basis for the court's ruling was apparent from the record).

The test for determining whether the complainant has suffered harm is whether the circumstances of the case would require an appellant to guess the reason or reasons that the judge has ruled against it. *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.

(3) Remedy: Remand vs. Abatement

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

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

926 S.W.2d at 321.

(4) Failure to Make Additional Findings

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

j. 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).

k. 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**.

l. Peculiarities of Conclusions of Law

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

The standard of review for legal conclusions is whether they are correct, *Zieben v. Platt*, 786 S.W.2d 797, 801-02 (Tex.App.–Houston [14th Dist.] 1990, no writ). They are reviewable de novo as a question of law. *Nelkin v. Panzer*, 833 S.W.2d 267, 268 (Tex.App.–Houston [1st Dist.] 1992, writ dism'd w.o.j.). In other words, the appellate court must independently evaluate conclusions of law to determine their correctness when they are attacked as a matter of law. *U.S. Postal Serv. v. Dallas Cty. App. D.*, 857 S.W.2d 892, 895-96 (Tex.App.–Dallas 1993, writ dism'd).

m. Challenges on Appeal

(1) 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).

(2) Challenging Findings and Conclusions on Appeal

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

Frequently, trial courts include disclaimers to the effect that "any finding of fact may be considered a conclusions of law, if applicable," and vice-versa. There is a difference, however, in the standard of review to be applied to each. Findings of fact are the equivalent of a jury finding and should be attacked on the basis of legal or factual sufficiency of the evidence. *Associated Telephone Directory Publishers, Inc. v. Five D's Publishing Co.*, 849 S.W.2d 894, 897 (Tex.App.–Austin 1993, no writ); *Exxon Corp. v. Tidwell*, 816 S.W.2d 455, 459 (Tex.App.–Dallas 1991, no writ). Conclusions of law, on the other hand, 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). In *Posner*, the ultimate and controlling findings of fact were erroneously labeled as conclusions of law, and instead of challenging the conclusions of law, 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.

**H. Motions for New Trial**

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

1. 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.

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

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

a. Plenary Power of Trial Court

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

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

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

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

The subject was revisited in 1996 by the Supreme Court in *L.M. Healthcare, Inc., v. Childs*, 920 S.W.2d 286 (Tex. 1996). Judgment was rendered against the plaintiff on January 28, 1994, and on February 7, 1994 the plaintiff filed a motion for new trial. At a March 3rd hearing, the trial court signed a judgment on the January 28th pronouncement and an order denying the

motion for new trial. On April 4th, the plaintiff filed a motion to modify judgment, requesting that the court include in its judgment a recitation that the dismissal was without prejudice to the plaintiff's refiling its suit. Hearing on this motion was held on May 11th, and on May 17th, the trial court granted the relief requested and signed a modified judgment. The defendant alleged that the trial court signed the modified judgment after the expiration of its plenary power. The court of appeals concluded that a motion to modify judgment, although filed timely, cannot extend plenary power if it is filed after the trial court overrules a motion for new trial. As a result, the appellate court held that the trial court lacked jurisdiction to modify the judgment.

The Supreme Court disagreed. The rules provide that a motion to modify judgment shall be filed within the same time constraints as a motion for new trial, which must be filed no later than the 30th day after judgment is signed. TRCP 329b(b) and (g). "That the trial court overruled Longmeadow's motion for new trial does not shorten the trial court's plenary power to resolve a motion to modify judgment". The Court concluded that the rules provide that a timely filed motion to modify judgment extends plenary power separate and apart from a motion for new trial.

The Dallas appellate court raised another issue in A.G. Solar & Co., Inc. v. Nordyke, 744 S.W.2d 647 (Tex.App.–Dallas 1988, no writ). In *A.G. Solar & Co.,* 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 appellate court held that the second judgment was a separate and new judgment. Since no motion for new trial was filed with regard to the second judgment, the cost bond was required to be filed 30 days later, *i.e*., by July 30. The filing on September 22 was untimely and the appeal was dismissed.

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

b. 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.

c. 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?]

3. 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:

a. Newly Discovered Evidence

> Generally speaking, a new trial based upon newly discovered evidence in a civil proceeding will not be granted unless:
>
> (1) admissible competent evidence is introduced showing the existence of the newly discovered evidence relied upon;
>
> (2) the party seeking the new trial demonstrates that there was no knowledge of the evidence prior to trial;
>
> (3) that due diligence had been used to procure the evidence prior to trial;
>
> (4) that the evidence is not cumulative to that already given and does not tend to impeach the testimony of the adversary; and
>
> (5) that the evidence would probably produce a different result if a new trial were granted.

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

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

Courts may be more inclined to accept the theory of newly discovered evidence in cases involving child custody because of the welfare and well being of the children in issue. See, C. v. C., 534 S.W.2d 359 (Tex.Civ.App.–Dallas 1976, no writ) (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) (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).

In termination cases, motions for a new trial are often based on allegations of newly discovered evidence. For example, In *In the Interest of M.A.N.M.*, No. 04-01-00295-CV, 2002 WL 181180, *5 (Tex.App.-San Antonio, Feb. 6, 2002, no pet. history), the biological father of the child appealed the termination of his parental rights on the grounds, among other things, that the trial court had wrongfully denied his motion for new trial, which was based on newly discovered evidence that the husband of the child's biological mother had attempted suicide one month before the child's birth. However, the San Antonio Court of Appeals held that the biological father could not show that it was not owing to want of due diligence that the evidence had not come to his attention sooner, in that the biological father could have discovered such evidence during discovery before trial. *Id*. at *6.

In *In re J.M.*, 955 S.W.2d 405, 408 (Tex.App.-San Antonio 1997, no pet.), the mother, who had placed her child for adoption, argued on appeal that the trial court erred in denying her motion for new trial based upon newly discovered evidence, which allegedly demonstrated that she signed the affidavit of relinquishment under duress and thus would produce a different result at a new trial. The San Antonio appellate court noted that the record revealed that the mother had knowledge of some of her "newly discovered evidence" at the original hearing; additionally, on appeal, she failed to demonstrate how other of her "new" evidence would probably produce a different result at a new trial. *Id*. at 408-409. Thus, the San Antonio Court of Appeals held that the trial court did not abuse its discretion in denying her motion for new trial. *Id*. at 409; *see also, Neal v. Texas Dep't of Human Serv*., 814 S.W.2d 216, 220, n. 5 (Tex.App.–San Antonio 1991, writ denied) (the mother's motion for new trial in a proceeding to terminate parental rights was not based on newly discovered evidence, and therefore the requirements for seeking a new trial based on newly discovered evidence were inapplicable; it was undisputed that the "new" evidence which the mother presented at the hearing on her motion for new trial was not presented at trial because the mother had been unable to appear in court on the date of trial due to a lack of promised transportation to the court).

b. Default Judgments

New trials are routinely granted and default judgments set aside upon demonstration that the failure of the respondent to appear before judgment was not intentional or the result of conscious indifference but was due instead to mistake or accident. The motion for new trial must also raise a meritorious defense and there must be no delay or injury to the opposing party. Craddock v.

Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124 (1939). Although in *Craddock* the default judgment was taken because the defendant failed to answer, the same requirements apply to a post-answer default judgment. *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex.1987); *Grissom v. Watson*, 704 S.W.2d 325, 326 (Tex.1986). When there is defective service of process, however, there is no requirement that a litigant establish a meritorious defense. Such a requirement violates due process rights under the Fourteenth Amendment to the federal constitution. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988); *Lopez v. Lopez*, 757 S.W.2d 751 (Tex. 1988)

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

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

> [i]n the usual case, the defendant who fails to file an answer is said to confess to the facts properly pleaded in the petition. In such a case, the non-answering defendant cannot mount an evidentiary attack against the judgment on motion for new trial or on appeal.
>
> In a divorce case, however, the petition is not taken as confessed for want of an answer. 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 (citations omitted); s*ee also,* Armstrong v. Armstrong, 601 S.W.2d 724 (Tex.Civ.App.–Beaumont 1980, no writ).

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

It appears that the Texas Supreme Court has not yet answered the *Lowe* court's invitation.

c. 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.

d. No Reporter's Record Available

Section 105.003(c) of the Family Code provides that a record shall be made in all suits affecting the parent-child relationship, unless expressly waived by the parties with the consent of the court. TRAP 34.6(f) provides that the inability to obtain the reporter's record in order to pursue an appeal will entitle the complaining party to a new trial (I) if the party has timely requested a reporter's record; (ii) if, without that party's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed; (iii) if that exhibit or portion of the record is necessary to the appeal's resolution; and (iv) if the parties cannot agree on a complete record. The same is true if the trial was electronically recorded and a significant portion of the recording has been lost or destroyed.

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

e. Sufficiency of the Evidence

Remember that while a complaint 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 they may be urged on appeal, *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex.1991), there is no such requirement in non-jury trials. Also recall the conflict among Texas courts of appeals concerning the necessity of preserving factual sufficiency claims as to "core issues" in a termination case tried to a jury. *See*, the discussion hereinabove at Section II(A)(1), "Preservation of Error in the Trial Court."

(1) "No Evidence" Points

A motion for new trial is not required in order to complain of legal sufficiency of the evidence [a "no evidence" point] in a non-jury trial. A "no evidence" or legal insufficiency point is a question of law which challenges the legal sufficiency of the evidence to support a particular fact finding. The standard of review requires a determination by the appellate court as to whether, considering only the evidence and inferences that support a factual finding in favor of the party having the burden of proof in a light most favorable to such findings and disregarding all evidence and inferences to the

contrary, there is any probative evidence which supports the finding. Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965); Dayton Hudson Corp. v. Altus, 715 S.W.2d 670 (Tex.App.–Houston [1st Dist.] 1986, writ ref'd n.r.e.).

Note that as a general rule, in the event a "no evidence" point of error is sustained, it is the court's duty to reverse and **render,** rather than remand. National Life Accident Insurance Co. v. Blagg, 438 S.W.2d 905, 909 (Tex. 1969); Vista Chevrolet, Inc. v. Lewis, 709 S.W.2d 176 (Tex. 1986); *United Mobile Networks, L.P. v. Deaton*, 939 S.W.2d 146, 147 (Tex. 1997). However, to obtain the benefit of a rendered judgment, the appellant must have raised the no evidence issue in a motion for instructed verdict, an objection to the submission of a vital fact issue, a motion for judgment n.o.v., or a motion to disregard the jury's answer. While the no evidence issue may be preserved by motion for new trial, when it is preserved **only** by motion for new trial, the appellate court may only reverse and **remand**. It may not reverse and **render**. Gillespie v. Silvia, 496 S.W.2d 234 (Tex.Civ.App.–El Paso 1973, no writ). This distinction is made because the motion for new trial asks for just that -- a new trial. Thus, remand is proper.

However, if a motion before the court was styled, "Motion to Modify, Correct or Reform Judgment, Or in the Alternative, Motion for New Trial," rendition may be proper following reversal. See, 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.

(2) "Insufficient Evidence"

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

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

f. Jury Misconduct

The movant for new trial must prove that: (1) misconduct occurred; (2) the misconduct was material; and (3) based on the record as a whole, the misconduct probably resulted in harm to the movant. *Redinger v. Living, Inc.,* 689 S.W.2d 415, 419 (Tex. 1985)

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

TEX.R.EVID. Rule 606(b) ("Inquiry Into Validity of Verdict") likewise deals with juror misconduct:

> [u]pon an inquiry into the validity of a verdict or indictment a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from

> the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

Jury misconduct includes outside influence on jurors and incorrect answers by jurors during voir dire examination. TEX.R.CIV.P. 327. To preserve error regarding jury misconduct, the complaining party must present evidence proving the misconduct at a hearing on a motion for new trial. *See, Id.;* TEX.R.CIV.P. 324(b)(1). Although this evidence may generally include testimony from any person with knowledge of the misconduct, jurors may not testify about their deliberations or their mental processes during deliberations, but only about any outside influence that was improperly brought to bear on any juror. TEX.R.CIV.P. 327; TEX.R.EVID. 606(b); *Weaver v. Westchester Fire Ins. Co.,* 739 S.W.2d 23, 24 (Tex. 1987). As was noted in *Wooten v. Southern Pacific Trans. Co.*. 928 S.W.2d 76 (Tex.App.–Houston [14th Dist.] 1995, no writ), such an approach represents a departure from prior law:

> [u]nder former Rule 327(b), effective until April 1, 1984, a juror was permitted to testify as to matters and statements, or "overt acts," which occurred during deliberations. Under the former rule, only the actual mental processes of the jurors were excluded from consideration. Now, however, under the new rule a party can only inquire into whether an 'outside influence' affected the deliberations, and all testimony, affidavits, and evidence are limited to this issue.

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

Whether jury misconduct has occurred is a question of fact to be determined by the trial court; absent an abuse of discretion, an appellate court will not overturn the court's ruling. TEX.R.CIV.P. 327; *Ortiz v. Ford Motor Credit Co.,* 859 S.W.2d 73 (Tex.App.–Corpus Christi 1993, writ denied); *Texas Gen. Indem. Co. v. Watson,* 656 S.W.2d 612, 615 (Tex.App.–Fort Worth 1983, writ ref'd n.r.e.).

In *Rodarte v. Cox*, 828 S.W.2d 65, 76 (Tex.App.–Tyler 1991, writ denied), the parents, whose parental rights were terminated, complained on appeal that jury misconduct occurred when some members of the jury overheard the child's attorney ad litem state to the trial judge during a bench conference at the close of the evidence that he was concerned for the child's welfare because the father was an illegal alien, would probably be deported, and therefore would be unable to support the child. The Tyler Court of Appeals noted that the parents cited no case holding that remarks made during a bench conference, and overheard by some jurors, constitute a communication to the jury constituting jury misconduct as contemplated by TRCP 327; moreover, even assuming the challenged statement was a communication contemplated by TRCP 327, the Tyler appellate court did not believe the trial judge reversibly erred in overruling the appellants' motion for new trial since the trial judge held a hearing on the motion, observed the witnesses, heard their testimony, had been present at the bench conference where the statement was made, and was therefore in the best position to draw the correct conclusion from the evidence. *Id*. at 76-77.

## 4. Other Post-Trial Motions

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

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

### b. Motions to Modify, Correct or Reform the Judgment

One method of complaining of error in rendition of judgment is to file a motion to modify the judgment. This method would be appropriate when the relief you want is a modified or new judgment, as opposed to a new trial. Preserving error by motion to modify judgment was approved by the San Antonio Court of Appeals in *Bulgerin v. Bulgerin,* 724 S.W.2d 943 (Tex.App.–San Antonio 1987, no writ). The appellee urged by cross-point that she was entitled to prejudgment interest. She had prepared a judgment including it which the trial court denied by deleting the provision from the order. The appellee then filed a motion to modify the judgment specifically

including a request for prejudgment interest. Her motion was denied. The appellate court held that the right to recover was waived if not asserted in the trial court, but the filing of the motion to modify was sufficient to preserve error for review.

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

## I. Structuring the Appeal

1. Challenging Alignment of Constituent Elements

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

a. Judgment Should Conform to Conclusions of Law

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

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

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

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

b. Judgment must Conform to the Findings of Fact

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

c. Findings of Fact must Conform to Evidence

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

However, when the evidence does not indisputably establish the facts necessary to resolve the dispute, then the fact finder must ascertain the ultimate facts on which a judgment for or against each party can be based. In a jury trial, this is done through answers to jury questions. In a bench trial, this is done through the trial court's findings of fact, either express or implied. In either type of case, the verdict or

findings of fact must be supported by the evidence. *Swanson v. Swanson,* 228 S.W.2d 156, 158 (Tex. 1950) (trial court's findings are not conclusive when the statement of facts is in the record).

The standard of review of the legal and factual sufficiency of the evidence to support findings of fact is the same in a jury and non-jury trial. *See, Tucker v. Tucker*, 908 S.W.2d 530, 532 (Tex. 1995); *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996). The rule is also the same when you are attacking implied findings of fact, as opposed to express written findings of fact.

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

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

d. Judgment must Conform to Pleadings

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

> [a] judgment must be based upon pleadings, and as this Court has stated, "[a] plaintiff may not sustain a favorable judgment on an unpleaded cause of action, in the absence of trial by consent...." In determining whether a cause of action was pled, plaintiff's pleadings must be adequate for the court to be able, from an examination of the plaintiff's pleadings alone, to ascertain with reasonable certainty...the elements of plaintiff's cause of action and the relief sought with sufficient information upon which to base a judgment.

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

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

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

2. Challenging Sufficiency of The Evidence

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

a. Legal Sufficiency Analysis

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

A "no evidence," or legal insufficiency point, is a question of law which challenges the legal sufficiency of the evidence to support a particular fact finding. The standard of review requires a determination by the appellate court concerning whether, considering only the evidence and inferences that support a factual finding in favor of the party having the burden of proof in a light most favorable to such findings and disregarding all evidence and inferences to the contrary, there is any probative evidence which supports the finding. *Garza,* 395 S.W.2d at 823.

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

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

(1) a complete absence of evidence 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 mere scintilla of evidence; or

(1) the evidence establishes conclusively the opposite of a vital fact.

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

(1) Appellate Remedy

Note that, as a general rule, and as already discussed [*see,* the discussion on motions for new trial hereinabove at Section II(H)(3)(e)(1), "'No Evidence' Points"], in the event a "no evidence" point of error is sustained, it is the court's duty to reverse and render rather than remand. *Vista Chevrolet, Inc. v. Lewis,* 709 S.W. 2d 176 (Tex. 1986); *National Life Accident Insurance Co. v. Blagg,* 438 S.W.2d 905, 909 (Tex. 1969).

(2) The "Scintilla" Standard

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

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

b. Factual Sufficiency Analysis

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

The realm of insufficient evidence exists when there is some evidence of a fact in issue, sufficient such that a jury question is warranted, but that evidence won't support a finding in favor of the proponent of that fact in issue. The parlance used by the courts of appeals is that such a finding "shocks the conscience" or that it is "manifestly unjust" limited by such phrases as "the jury's determination is usually regarded as conclusive when the evidence is conflicting," "we cannot substitute our conclusions for those of the

jury," and "it is the province of the jury to pass on the weight or credibility of a witness's testimony." *See, e.g., Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10, 30 (Tex. 1994); *Beall v. Ditmore,* 867 S.W.2d 791, 795 (Tex.App.–El Paso 1993, writ denied).

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

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

(1) Jury vs. Nonjury Trials

Having established that the standard of review is the same for affirmative jury findings as it is for the jury's failure to make findings, it must also be noted that the test for determining factual sufficiency of the evidence is the same in a jury and nonjury trial. *Escobar v. Escobar,* 728 S.W.2d 474 (Tex.App.–San Antonio 1987, no writ); *State Bar v. Roberts,* 723 S.W.2d 233 (Tex.App.–FHouston [1st Dist.] 1986, no writ).

(2) Court of Appeals is Final Arbiter of Factual Sufficiency

Although recent dissents from the Supreme Court of Texas argue otherwise (*see, e.g., Transport Ins. Co. v. Faircloth,* 898 S.W. 2d 269 (Tex. 1995) (Hightower, J., concurring and dissenting)), a claim of insufficient evidence raises a question of fact, rather than law, and only the courts of appeals can review the issue. The Supreme Court has no jurisdiction to consider questions of fact, *Vallone v. Vallone,* 644 S.W.2d 655 (Tex. 1983), and it may not consider a point of error challenging factual insufficiency of the evidence. *Dyson v. Olin,* 692 S.W.2d 456 (Tex. 1985). The 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. *Hannon 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). Nonetheless, remember that a complaint of factual insufficiency to support a jury verdict or a complaint that a jury verdict is against the overwhelming weight of the evidence must be presented in a motion for new trial in order to preserve error on appeal. TEX.R.CIV.P. 324(b).

(4) Appellate Remedy

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

c. Method of Analysis

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

(1) Legal Sufficiency Analysis

The Supreme Court of Texas requires the courts of appeals to examine a legal sufficiency challenge, if made, before a factual sufficiency challenge on the same point. *Glover v. Texas Gen. Indem. Co.,* 619 S.W.2d 400, 401 (Tex. 1981). This preserves the Supreme Court's jurisdiction to review legal sufficiency challenges. It is only logical that briefs in the courts of appeals should follow suit.

The analysis of the record for a legal sufficiency challenge requires that the court look only at evidence supporting the finding. *National Union Fire Ins. Co. v. Dominguez,* 873 S.W.2d 373, 376 (Tex. 1994). Therefore, presentation to the appellate court of the legal sufficiency argument should involve presentation of only the evidence supporting a finding; anything extra is wasted paper. Though the concept seems straightforward, many presentations are in the form of a comparison of the evidence, which is a presentation suited for factual sufficiency argument only. If a comparison of the evidence is

presented, then an appellate judge's first thought is that the legal sufficiency point of error is without merit.

Challenging a finding on legal sufficiency grounds might entail a showing of the absence of direct evidence supporting a finding; a showing that circumstantial evidence supporting a finding is not legally recognized as evidence; a showing that other circumstantial evidence does not support the finding; and undermining an opponent's presentation of evidence in support of a finding. Once it is shown there is legally insufficient evidence supporting a finding, attacking jury findings on the basis that a fact in issue is conclusively established, or established as a matter of law, requires the extra step of showing that some other proposition is conclusively established. *Holley v. Watts,* 629 S.W.2d 694, 696 (Tex. 1982). Attacking findings based on legal sufficiency points of error in Texas requires practitioners to prove there is nothing with something. This is often a difficult task, and the Fifth Circuit has rejected the framework used in Texas courts in favor of an examination of all the evidence and a standard of whether reasonable minds could differ as to a finding. *See, Boeing v. Shipman,* 411 F.2d 365 (5th Cir. 1969)(*en banc).* Practitioners in Texas courts, though, are stuck with this task unless the Texas Supreme Court adopts some other standard.

(2) Factual Sufficiency Analysis

The factual sufficiency analysis takes place after the legal sufficiency analysis, if any. The method employed requires the reviewing court to look at all of the evidence, not just the evidence supporting a jury finding. *In re Kings Estate,* 150 Tex. 662, 244 S.W. 2d 660, 661 (1952). For example, in *Ellis County State Bank v. Keever,* 915 S.W.2d 478 (Tex. 1996), the court of appeals affirmed a punitive damage award and the defendant appealed. The Supreme Court noted that the court of appeals had reviewed only the evidence supporting the award. The Court then admonished the lower court that while conducting a factual sufficiency review of the damage award under *Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10 (Tex. 1994), it must detail all of the relevant evidence and explain why the evidence supports or does not support the punitive damages award. The Court remanded the case to the court of appeals for a *Moriel* analysis.

The converse is equally true. When the court of appeals overturns findings because of factual insufficiency, it must consider all of the evidence and state why the finding is factually insufficient or is so against the great weight and preponderance of the evidence as to be manifestly unjust. In *Ortiz v. Jones*, 917 S.W.2d 770 (Tex. 1996), the Supreme Court reversed because the court of appeals did not discuss and apparently did not consider the evidence supporting the finding. Further, the Supreme Court requires the court of appeals to lay out the relevant facts with regard to factual sufficiency challenges sustained to insure that the appellate court applied the correct method of analysis. *Pool v. Ford Motor Co.,* 715 S.W.2d 629, 635-36 (Tex. 1986). This is an opportunity for an advocate to marshal all the facts, showing that the client's position is the righteous one and that the jury was swayed by some adverse force to find as they did.

(3) A Word to the Wise

Don't lose sight of the standards of review for sufficiency of the evidence. Carefully examine your opponent's arguments to insure that the appropriate method of analysis is employed. If an opponent supports a legal sufficiency challenge by presenting a weight of evidence argument, argue it is a concession of the point by the fact that your opponent is making a factual sufficiency argument. In addition, carefully examine the appellate court's opinion to insure that the appropriate method of analysis is employed. If the court of appeals looks at all the evidence when disposing of a legal sufficiency point, challenge it as error on rehearing, and take it up to the Texas Supreme Court on petition for review if it refuses.

If the court of appeals looks only at the evidence from one side on a factual sufficiency point, challenge it as error on rehearing, and take it up to the Texas Supreme Court on petition for review that the court of appeals applied the wrong legal standard. Opinions of appellate courts and the arguments of opponents are never perfect, and they can offer golden opportunities for the practitioner with a firm grasp of sufficiency review.

d. Sufficiency Review of Enhanced Burdens of Proof

Enhanced burdens of proof, *i.e.*, clear and convincing evidence, are prevalent in family law. For example, in the termination/adoption context, the proponent of an affidavit of relinquishment must prove prove by clear and convincing evidence that the involved party "executed before or after the suit [was] filed an unrevoked or irrevocable affidavit of relinquishment of parental rights." *See, Vela v. Marywood,* 17 S.W.3d 750, 758 (Tex.App.–Austin 2000)*, pet. denied,* 53 S.W.3d 684 (Tex.2001) (open adoption case); *see,* TEX.FAM.CODE §161.001.

What effect does an enhanced burden of proof have on review of sufficiency of the evidence? There is clearly no effect with regard to legal sufficiency review because the standard is so low -- any evidence. Review of the factual sufficiency of the evidence with regard to an enhanced burden of proof has generated conflicting authority, however. The issue of the

proper standard of review for factual sufficiency challenges where there is an enhanced burden of proof at trial, and the current conflict among the courts of appeals on the issue, is discussed in detail hereinafter in Section IIIB, "Standard of Review for Factual Sufficiency Challenges."

## J. Briefing in the Court of Appeals and Supreme Court

1. General Requirements

a. Form of Documents

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

(1) must be on 8½ by 11 inch paper with at least one-inch margins all around,

(2) must be double-spaced although footnotes, block quotations, short lists, and issues or points may be single-spaced,

(3) must be printed in standard 10-character-per-inch (cpi) nonproportionally spaced Courier typeface or in 13-point or larger proportionally spaced typeface; however, if the document is printed in a proportionally spaced typeface, footnotes may be printed in typeface no smaller than 10-point,

(4) must be bound so that it will lie flat when opened, but covers must not be plastic or be red, black or dark blue,

(5) must have a front cover containing (i) the case style, (ii) the case number, (iii) the title of the document being filed, (iv) the name of the party filing the document, and (v) the name, mailing address, telephone number, fax number, and State Bar of Texas number of the lead counsel for the filing party, and

(6) if a party requests oral argument in the court of appeals, must have the request appearing on the front cover of the party's first brief.

b. Certificate of Service

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

c. Motions in the Appellate Courts

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

2. Briefing in the Court of Appeals

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

a. Form of Briefs

A party may state either *issues presented or points of error*. TRAP 38.1(e). The brief must have a statement of facts, stating "concisely and without argument the facts pertinent to the issues presented . . .." TRAP 38.1(f). The brief must have a summary of the argument, which should be a "succinct, clear, and accurate statement of the arguments made in the body of the brief." TRAP 38.1(g).

b. Cross-points

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

c. Reply Briefs

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

d. Appendix

The brief should have an appendix containing a

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

e. Length

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

f. Time to File

In an ordinary appeal, the appellant's brief is due 30 days after the clerk's record is filed or 30 days after the reporter's record is filed, whichever is later. TRAP 38.6(a) Under the former rule, the appellant's brief was due 30 days after "the filing of the transcript and statement of facts." Former rule 74(k). The appellee's brief is now due 30 days after the appellant's brief is filed, rather than 25 days. TRAP 38.6(b); *see also,* former rule 74(m).

However, there is no rule permitting the filing of a motion for extension of time to file an appellee's brief. Each court of appeals has a different procedure for extending time to file an appellee's brief -- some still require the filing of a motion while others permit you to grant yourself an extension. Check with the particular court in which your appeal is pending. The appellant's reply brief is due 20 days after the date the appellee's brief is filed. TRAP 38.6(c)

g. Cases Recorded Electronically

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

h. Parallel Briefing

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

As previously noted, a party is limited to 90 pages of briefing. TRAP 38.4. Thus, if a party is an appellant, he or she may file a 50 page brief and a 25 page reply. If that party also is an appellee, he or she may file a 50 page response to the appellant's brief. Taken together, that party may file a total of 125 pages of briefing — except for the provision limiting the party to 90 pages -- "the aggregate number of pages of all briefs filed by a party must not exceed 90...." TRAP 38.4.

i. Dismissal

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

3. Motions for Rehearing

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

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

TRAP 53.2(f).

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

4. Appealing to the Supreme Court

a. Conceptual Differences

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

> (1) whether the justices of the court of appeals disagree on an *important* point of law;
>
> (2) whether there is a conflict between the courts of appeals on an *important* point of law;
>
> (3) whether a case involves the construction or validity of a statute;
>
> (4) whether a case involves constitutional issues;
>
> (5) whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; or
>
> (6) whether the court of appeals has decided an *important* question of state law that should be, but has not been, resolved by the Supreme Court.

TRAP 56.1(a) (emphasis added); *see generally,* James A. Vaught & R. Darin Darby, *Internal Procedures in the Texas Supreme Court Revisited: The Impact of the Petition for Review and Other Changes*, 31 TEX. TECH. L.REV. 63, 74-75 (2000). These factors are very similar to the following current jurisdictional requirements in section 22.001(a) of the Government Code:

> (1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;
>
> (2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;
>
> (3) a case involving the construction or validity of a statute necessary to a determination of the case;
>
> (4) a case involving state revenue;
>
> (5) a case in which the railroad commission is a party; and
>
> (6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the

> opinion of the supreme court, it requires correction....

TEX. GOV. CODE § 22.001(a)(1)-(6).

b. Procedural Differences

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

(1) Filing the Petition

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

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

(2) Petition for Review

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

(3) Appendix and Record

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

The record is not sent to the Supreme Court unless requested by the Court (although the statement of facts and argument must be supported by "record references"). The record may be requested by the Supreme Court at any time (before or after granting the petition); but it is not automatically filed as was the case in current practice. TRAP 54.1.

(4) Response and Reply

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

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

(5) Length: Petition, Response and Reply

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

(6) Extension of Time

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

(7) Briefs on the Merits

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

(8) Motions for Rehearing

A motion for rehearing may be filed with the Supreme Court within 15 days from

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

5. Original Proceedings

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

a. Motion for Leave Abolished

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

b. Style

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

c. Petition: Length

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

d. Response: Length

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

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

e. Appendix and Record

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

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

f. Temporary Relief

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

8. Motion for Rehearing

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

## III. SPECIFIC ISSUES CONCERNING TERMINATION DECREES

### A. Accelerated Appeal

TEX.FAM.CODE ANN. §109.002(a) (Vernon Supp. 2001) provides, in pertinent part:

> [a]n appeal in a suit in which termination of the parent-child relationship is in issue shall be given precedence over other civil cases and shall be accelerated by the appellate courts. The 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.

Section 109.002(a) became effective September 1, 2001, and applies only to an appeal in a suit affecting the parent-child relationship pending on or begun on or after that date.

In an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment. 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). The appellate record is due within 10 days after the notice of accelerated appeal is filed. TRAP 35.1(b). The appellant's brief is due within 20 days after the later of: (1) the date the clerk's record is filed; or (2) the date the reporter's record is filed. TRAP 38.6(a). The appellee's brief is due within 20 days after the date the appellant's brief is filed. TRAP 38.6(b).

### B. Standard of Review for Factual Sufficiency Challenges

The Texas Supreme Court has granted a petition for review to address the appropriate standard of review for factual sufficiency challenges in termination cases. *See, In re C.H.*, No. 00-552, 44 Tex. Sup.Ct. J. 433 (Feb. 15, 2001).

In *In re C.H.*, 25 S.W.3d 38, 47-48 (Tex.App.–El Paso 2000, pet. granted) (citations omitted), the El Paso Court of Appeals stated:

> In reviewing factual sufficiency challenges in termination cases, again where the burden of proof at trial is by clear and convincing evidence, we apply a higher standard of factual sufficiency review. After considering all of the evidence, we must determine not whether the trier of fact could reasonably conclude that the existence of a fact is more probable than not, as in cases where the burden of proof is by a preponderance of the evidence, but whether the trier of fact could reasonably conclude that the existence of the fact is highly probable.
>
> Under this standard, we must consider whether the evidence was sufficient to produce in the mind of the trier of fact finder a firm belief or conviction as to the truth of the allegations sought to be established. A challenge to the factual sufficiency of the evidence will only be sustained if the jury could not have reasonably found the facts to be established by clear and convincing evidence.

Currently, Texas courts of appeals are divided on whether a heightened standard of review is required. *In the Interest of M.E.C.*, No. 10-00-297-CV, 2001 WL 1590717, *3, n. 4 (Tex.App.-Waco, Dec. 12, 2001, no pet. history). Many appellate courts, in accord with the El Paso Court of Appeals, have applied a heightened standard. *See, e.g, In re W.C.*, No. 14-00-1280-CV, slip op. at 6-7, 2001 Tex.App. LEXIS 6165, at *11-12 (Tex.App.–Houston [14th Dist.] Sept. 6, 2001, no pet. h.); *In re H.N.P.*, No. 09-99-564 CV, 2000 Tex.App. LEXIS 7644, at *2-3 (Tex.App.–Beaumont 2000, no pet.) (not designated for publication); *M.H.D. v. Texas Dep't of Protective & Regulatory Servs*., No. 13-97-281-CV, 1998 Tex.App. LEXIS 6159, at *5 (Tex.App.–Corpus Christi 1998, pet. denied); *Spangler v. Texas Dep't of Protective & Regulatory Servs*., 962 S.W.2d 253, 257 (Tex.App.–Waco 1998, no pet.); *In re H.C.*, 942 S.W.2d 661, 663-64 (Tex.App.–San Antonio 1997, no writ); *Williams v. Texas Dep't of Human Servs*., 788 S.W.2d 922, 926 (Tex.App.–Houston

[1st Dist.] 1990, no writ); *In re L.R.M.*, 763 S.W.2d 64, 66-67 (Tex.App.–Fort Worth 1989, no writ); *Neiswander v. Bailey*, 645 S.W.2d 835, 835-36 (Tex.App.–Dallas 1982, no writ).

The argument in favor of a heightened standard of review was aptly summed up by the Waco Court of Appeals:

> [w]e do not believe that the Texas Supreme Court intends to require trial courts to adhere to a higher standard of proof in termination cases while allowing the courts of appeals to use the same standard of review as in cases decided by a preponderance of the evidence.

*Spangler*, 962 S.W.2d at 257.

Other appellate courts apply the same standard of review for factual sufficiency challenges regardless of the burden of proof at trial. *See, e.g., Leal v. Texas Dep't of Protective & Regulatory Servs.*, 25 S.W.3d 315, 320-21 (Tex.App.–Austin 2000, no pet.); *In re J.J.*, 911 S.W.2d 437, 439 40 & n. 1 (Tex.App.–Texarkana 1995, writ denied); *In re R.D.S.*, 902 S.W.2d 714, 716 (Tex.App.–Amarillo 1995, no writ); *In re J.F.*, 888 S.W.2d 140, 141 (Tex.App.–Tyler 1994, no writ).

The appellate court decisions declining to apply a heightened standard of review for factual sufficiency challenges tend to rely, in large part, on *Meadows v. Green,* 524 S.W.2d 509, 510 (Tex. 1975) and *State v. Turner*, 556 S.W.2d 563, 565 (Tex. 1977), which in turn relied on *Omohundro v. Matthews,* 341 S.W.2d 401, 410-11 (Tex. 1960) and *Sanders v. Harder*, 227 S.W.2d 206, 209-10 (Tex. 1950). However, the Supreme Court authority relied on by such courts of appeals in their opinons may not be as solid as it has been treated.

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

The Texas Supreme Court opinion in *State v. Turner*, also relied on in *D.O. v. Texas Department of Human Resources,* is similarly unclear. There, the trial court had instructed the jury that the burden of proof was clear and convincing evidence, but the court of appeals reversed on the ground that the appropriate burden was the "beyond a reasonable doubt" burden of criminal prosecutions. The Supreme Court reversed, holding that the burden at trial was by a preponderance of the evidence and again stating there were but two standards of review. The character of the Supreme Court's opinion lends itself more to the proposition that there was no intermediate *burden of proof*, rather than the proposition that there was no intermediate *standard of review* for issues predicated on an intermediate burden of proof.

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

> [i]n certain types of cases courts have frequently pointed out that the facts must be established by clear and convincing evidence. That rule . . . arose at a time when such suits were cognizable only in courts of chancery where matters of fact, as well as of law, were tried by the chancellor. Verdicts of juries in those courts were advisory only. In our blended system the field in which that rule operates is very narrow. In practical effect it is but an admonition to the judge to exercise great caution in weighing the evidence. No doctrine is more firmly established than that the issues of fact are resolved from a preponderance of the evidence, and special issues requiring a higher degree of proof than a preponderance of the evidence may not be submitted to a jury. In ordinary civil cases trial courts and Courts of Civil Appeal may set aside jury

> verdicts and grant new trials when, in their opinion, those findings, though based upon some evidence, are against the great weight and preponderance of the evidence, but they may not render judgment contrary to such findings. In those cases in which the "clear and convincing" rule is applicable if, in the opinion of the trial judge, the evidence in support of the verdict does not meet the test of that rule, he may set it aside and order a new trial; but he should not render judgment contrary thereto. (citations omitted).

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

Finally, the *Omohundro* case says nothing about the standard of review. The Supreme Court treated the issue, couched in the terms "the jury's findings to certain special issues are not supported by clear and convincing evidence," as jurisdictional. *Omohundro,* 341 S.W.2d at 410-411. The Court stated that this contention was an attack on the sufficiency of the evidence, over which it had no jurisdiction. The Court, citing *Sanders*, stated that the clear and convincing test was merely another method of measuring the weight of the evidence, and thus is also a fact question. Worthy of note is that the petitioner's application for writ of error was predicated on a motion for judgment *non obstante veredicto*, which would not preserve factual sufficiency questions for review, and that it did not attack the court of civil appeals' disposition on the basis of an error of law. Taken literally, the Supreme Court's statement merely acknowledges that the clear and convincing standard is a different burden of proof at trial, and that it affects only factual sufficiency review. The statement provides no foundation for later courts' reliance on it for the proposition that there are only two standards of sufficiency review.

In any event, since the resolution of many–perhaps even most–termination appeals revolves around the factual sufficiency of the evidence, the Texas Supreme Court's decision in *In re C.H.* will be significant indeed.

### C. Limits on Direct or Collateral Attacks

TEX.FAM.CODE §161.211 provides:

> (a) Notwithstanding Rule 329, Texas Rules of Civil Procedure, the validity of an order terminating the parental rights of a person who has been personally served or who has executed an affidavit of relinquishment of parental rights or an affidavit of waiver of interest in a child or whose rights have been terminated under Section 161.002(b) is not subject to collateral or direct attack after the sixth month after the date the order was signed.
>
> (b) Notwithstanding Rule 329, Texas Rules of Civil Procedure, the validity of an order terminating the parental rights of a person who is served by citation by publication is not subject to collateral or direct attack after the sixth month after the

> date the order was signed.
>
> (c) A direct or collateral attack on an order terminating parental rights based on an unrevoked affidavit of relinquishment of parental rights or affidavit of waiver of interest in a child is limited to issues relating to fraud, duress, or coercion in the execution of the affidavit.

It will be recalled that a direct attack seeks to correct an erroneous judgment and is made by postjudgment motion, ordinary or restricted appeal or, if the time for an appeal has expired, as it had in the underlying case, a bill of review proceeding, while a collateral attack seeks to avoid the effect of a void judgment. *See, e.g, In re Lambert*, 993 S.W.2d 123, 132, n. 4 (Tex.App.–San Antonio 1999, no pet.). Direct and collateral attacks are subject to constraints imposed by statutory and common law and court rules; additional constraints are imposed by §161.211 statute for attacks on termination orders signed after January 1, 1997. *Id*; *see also*, *In re T.R.R.*, 986 S.W.2d 31, 35 (Tex.App.–Corpus Christi 1998, no pet.) (the general four-year statute of limitations, and not the specific statute proscribing a direct or collateral attack on an order terminating parental rights more than six months after such order was rendered, applied to a bill of review brought by the biological mother whose rights were involuntarily terminated, where the specific statute took effect after the mother filed her bill of review and the statute was not made applicable to pending suits).

At present, there appear to be no reported cases addressing the constitutionality of §161.211. Given that "[t]he liberty interest ... of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court," one might wonder if a constitutional challenge to §161.211 might be brought. *See, Troxel v. Granville*, 530 U.S. 57, 65 (2000).

**D. Right to Jury Trial**

In a termination case, the mother orally and by written motion requested that the trial court empanel a twelve-member jury, which the trial court denied; on appeal, she complained about the trial court's denial of her motion. *In re G.C.,* No. 2-99-003-CV, 2002 WL 5693, *1 (Tex.App.-Fort Worth, Jan. 3., 2002, no pet. history). However, the Fort Worth appellate court held that the mother's equal protection challenge to Government Code provision entitling a party to a family law proceeding in statutory county court to a six-member jury (*i.e.*, the legislative scheme violated her equal protection rights by affording family law litigants in statutory county court only a six-member jury while affording family law litigants in district court a 12-member jury) was not subject to strict scrutiny review, but merely to rational basis review, since the number of jurors allowed to hear a termination of parental rights case did not significantly interfere with fundamental parental rights; thus, her equal protection challenge failed. *Id*. at *4.

Moreover, held the Fort Worth Court of Appeals, the mother's right to procedural due process was not violated by having only six jurors evaluate the facts of her case, because the empaneling of the six-member jury did not affect the accuracy of the jury's determination of the fact issues relevant in the mother's case, and the government's interest in reducing number of jurors in certain civil trials to mitigate fiscal and administrative burdens was better served by limiting 12-member juries to specific cases. *Id*. at *5.

**E. Standing**

Where the father was properly served, but filed no answer, made no appearance, and prosecuted no appeal from the judgment terminating his parental rights, the mother lacked a justiciable interest in father's parental rights and, therefore, could not appeal from that part of judgment involving only the termination of father's rights to his child. *Keith v. Spratlan*, 530 S.W.2d 348, 349-350 (Tex.Civ.App.–Tyler 1975, writ ref'd n.r.e.); *see also, D--- F--- v. State*, 525 S.W.2d 933, 94 (Tex.Civ.App.–Houston [1st Dist.] 1975, no writ) (the mother had no standing to attempt to raise "no evidence" and "insufficient evidence" points as to the termination of the natural father's rights).

However, until a decree of termination is actually entered, a party who has signed a voluntary affidavit of relinquishment is still a "party in interest" for purposes of obtaining a review by writ of error [currently called a "restricted appeal"]. *Brown v. McLennan County Children's Protective Servs*., 627 S.W.2d 390, 392 (Tex.1982).

**F. Effective Assistance of Counsel**

Section 107.013(a) of the Texas Family Code requires a trial court to appoint an attorney ad litem to represent the interests of an indigent parent who responds in opposition to a suit seeking termination of his or her parent-child relationship. TEX.FAM.CODE §107.013(a); *see also*, *In re T.R.R.*, 986 S.W.2d at 37. However, a majority of the Texas courts of appeal have held that the constitutional right to effective assistance of counsel in criminal actions does not extend to a civil proceeding for termination of parental rights. *See, In re I.V.,* 61 S.W.3d at 799, *citing*, *In re B.B.*, 971 S.W.2d 160, 172 (Tex.App.–Beaumont 1998, pet. denied); *Arteaga v. Tex. Dep't of Protective and Regulatory Servs*., 924 S.W.2d 756, 762 (Tex.App.–Austin 1996, writ denied); *In re J.F.*, 888 S.W.2d 140, 143

(Tex.App.–Tyler 1994, no writ); *Posner v. Dallas County Child Welfare Unit*, 784 S.W.2d 585, 588 (Tex.App.–Eastland 1990, writ denied); and *Howell v. Dallas County Child Welfare Unit*, 710 S.W.2d 729, 734-35 (Tex.App.–Dallas 1986, writ ref'd n.r.e.).

However, both the Houston First and Waco appellate courts of appeal have recently held that a parent is entitled to receive effective assistance of counsel in a termination proceeding. *See*, *In re B.L.D.*, 56 S.W.3d 203, 211-12 (Tex.App.–Waco 2001, no pet.) and *In re J.M.S.*, 43 S.W.3d 60, 62-63 (Tex.App.–Houston [1st Dist.] 2001, no pet.) In *B.L.D.,* the Waco Court of Appeals held that "[j]ust as a Sixth Amendment constitutional right to counsel in a criminal case includes a right that the representation be effective, a statutory right to counsel in a termination case includes a due-process right that the representation be effective." *B.L.D.*, 56 S.W.3d at 211-12.

Having recognized the right to effective counsel in termination cases, the Waco and Houston First appellate courts apply the two-prong test for criminal cases set forth in *Strickland v. Washington*, 466 U.S. 668, 686 (1984), under which an appellant must show that (1) his counsel's performance was deficient to the level that counsel made error so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment, and (2) the deficient performance prejudiced the defense. *See, e.g.*, *J.M.S.*, 43 S.W.3d at 63-64.

In *Lumbis, v. Texas Department of Protective and Regulatory Services*, No. 03-01-00030-CV, 2002 WL 90824, *6 (Tex.App.-Austin, Jan. 25, 2002, no pet. history), the birth mother who had signed an affidavit of relinquishment contended on appeal that she had received ineffective assistance of counsel. Although the Austin Court of Appeals noted that it had previously held that parents in a termination case are not entitled to the same constitutional guarantee of effective counsel afforded to criminal defendants, it went ahead with the *Strickland* analysis under the contrary assumption that the mother was entitled to such effective counsel. *Id*.

Although the mother argued that her attorney did not clearly explain the consequences of an open adoption agreement and that, had she known such an agreement was not legally enforceable, she would not have signed the affidavit of relinquishment, she admitted that before she signed, the attorney told her "that the Department did not have to find a family who would participate in an 'open adoption.'" *Id.* Furthermore, there was evidence from the attorney that she told the mother that she could not enforce an open adoption in a court of law and that the adoptive parents did not have to allow post-adoption contact. *Id.* Consequently, held the Third Court of Appeals, the mother failed to show that she did not know the consequences of relinquishment or open adoption, that her attorney's performance was so deficient that the attorney did not function as counsel, or that any deficient performance prejudiced the mother's case. *Id.*

## IV. SPECIFIC ISSUES CONCERNING ADOPTION DECREES

### A. Limits on Direct and Collateral Attacks

TEX.FAM.CODE §162.012 provides:

> (a) Notwithstanding Rule 329, Texas Rules of Civil Procedure, the validity of an adoption order is not subject to attack after six months after the date the order was signed.
>
> (b) The validity of a final adoption order is not subject to attack because a health, social, educational, and genetic history was not filed.

There appear to be few, if any, reported Texas cases addressing §162.012. In *Queen v. Goeddertz*, 48 S.W.3d 928, 929 (Tex.App.–Beaumont 2001, no pet. history), the father filed a bill of review contesting the termination of his parental rights and subsequent adoption of his child. Although the appellate court's opinion is unclear as to the operative timelines in the case, the Beaumont Court of Appeals did specifically note that there had been no claim that the father could not file his suit and that the trial court did not find his direct attack barred. *Id.* (*citing*, in footnote No. 1 of the opinion, both §162.012 and *In re T.R.R.*, 986 S.W.2d 31).

It should also be recalled that he Texas Supreme Court has stated that an equitable bill of review is the proper proceeding for a biological father to challenge an adoption order to which he was not a party. *Gunn v. Cavanaugh*, 391 S.W.2d 723, 724 (Tex.1965)

### B. Right to Jury Trial

In *In re V.R.W.*, 41 S.W.3d 183, 194 (Tex.App.–Houston [14th Dist.] 2001, no. pet.), the birth mother contended on appeal that the trial court erred in denying her a jury trial to determine

whether the affidavit of relinquishment she had signed was procured by fraud. The couple with whom the child had been placed had filed filed their petition to terminate the parent-child relationship and for adoption on November 5, 1999. *Id*. at 195. The birth mother filed her response to the termination suit and her revocation of the affidavit on December 1, 1999, and her demand for a jury trial on December 14, 1999. *Id*. A hearing on the termination of the birth mother's parental rights commenced on December 22, 1999, without a jury; significantly, there was no trial setting in the case. *Id*.

On appeal, the couple desiring to adopt to child maintained that that the birth mother did not timely request a jury trial because she filed her request for a jury trial only eight days prior to the commencement of the trial, but conceded that she could not have filed her demand in compliance with TRCP 216 since she hadn't been given, pursuant to TRCP 245, at least forty-five days' notice of the setting for trial (there was no such setting). *Id*. According to the Houston appellate court, since the birth mother filed her request for a jury trial only two weeks after she had filed her revocation of the affidavit contesting the termination suit, her request for a jury trial was timely. *Id*.

Furthermore, since an involuntarily executed affidavit of relinquishment is a complete defense to a termination decree, and in view of the disputed facts surrounding the birth mother's signing of the affidavit, an issue of material fact existed and a directed verdict would not have been appropriate; therefore, held the Houston Fourteenth Court of Appeals, the trial court's denial of the birth mother's timely request for jury trial was not harmless error. *Id*. at 196.

### C. Recent Relinquishment Highlights

In *Vela v. Marywood*, 17 S.W.3d 750, 753-755 (Tex.App.–Austin 2000), *pet. denied*, 53 S.W.3d 684 (Tex.2001) (*per curiam*), a young, unwed mother signed an irrevocable affidavit of relinquishment. On the mother's appeal, the Austin appellate court held the affidavit was involuntarily procured by misrepresentation, fraud, or overreaching because the adoption agency had a special duty to the birth mother but never told her that the open adoption "sharing plan" they discussed with her could not be enforced legally. *Id*. at 760-64. Instead, the agency told the birth mother that the sharing plan would allow her to be a part of her child's life forever, leading her to believe she was only giving up guardianship of the child. *Id.* at 755, 763. The birth mother was not represented by an attorney during the termination process. *Id*. at 755.

It should be noted that the Texas Supreme Court denied review in the case when the adoptive couple with whom the adoption agency had placed the child voluntarily relinquished custody and returned the child to the birth mother. *See, Marywood v. Vela*, 53 S.W.3d 684, 684 (Tex.2001) (*per curiam*).

*Vela* should be compared to another recent case out of the Third Court of Appeals, *Lumbis*, 2002 WL 90824. In *Lumbis*, the Austin appellate court held that the evidence was legally sufficient to support a finding that the mother voluntarily signed an affidavit of relinquishment, in a termination of parental rights proceeding, distinguishing the case from *Vela* on the grounds that in *Lumbis* the mother was represented by counsel when she signed the affidavit, she discussed the relinquishment extensively with her counsel prior to signing it, and the Department of Protective and Regulatory Services told the mother that it would try to arrange an open adoption but that the mother was not guaranteed an open adoption. *Id*. at *5.

In *In re M.A.W.*, 31 S.W.3d 372, 375-376 (Tex.App.–Corpus Christi 2000, no pet.), the evidence was not sufficient to show that the mother executed an affidavit of relinquishment of parental rights due to duress, or that she involuntarily executed the affidavit, where she made no claim of fraud, duress, coercion, or overreaching at time of relinquishment or at her motion for new trial, but testified that when she signed affidavit she believed that it was in best interest of children to relinquish her rights to them, and then changed her mind; thus, the mother knew what she was doing when she signed affidavit and understood that affidavit was irrevocable.