ARE NON-JURY TRIALS EVER "APPEALING"?

ATTACKING AND DEFENDING JUDGMENTS FROM NON-JURY TRIALS

ANN CRAWFORD McCLURE
Justice, Eighth Court of Appeals
500 E. San Antonio, Suite 1203
El Paso, Texas 79901
(915) 546-2240 (Telephone)
(915) 546-2252 (Facsimile)

RICHARD R. ORSINGER
Attorney at Law
1616 Tower Life Building
San Antonio, Texas 78205
(210) 225-5567 (Telephone)
(210) 267-7777 (Facsimile)

STATE BAR OF TEXAS
ADVANCED CIVIL APPELLATE PRACTICE COURSE
September 24, 1998
Chapter I

© 1998
Ann C. McClure and Richard R. Orsinger
All Rights Reserved

TABLE OF CONTENTS

ARE NON-JURY TRIALS EVER "APPEALING"?

by

Ann Crawford McClure
Justice, Eighth Court of Appeals
Board Certified
Family Law & Civil Appellate Law
Texas Board of Legal Specialization

Richard R. Orsinger
Attorney At Law, San Antonio
Board Certified
Family Law & Civil Appellate Law
Texas Board of Legal Specialization

I. SCOPE OF ARTICLE This Article is intended to address various aspects of the appeal of a non-jury trial. By far, most of the non-jury appeals involve family law matters and to that extent, there are some peculiarities of family law which are addressed. Appropriate standards of review are discussed, but it is somehow inherent in the scheme of non-jury trials that the focal point is the necessity of obtaining findings of fact and conclusions of law. It is also the primary difference between jury and non-jury trials. And, accordingly, it is the paramount goal of this Article to acquaint you with that practice and procedure. Throughout this Article, the Texas Rules of Civil Procedure are referred to as "TRCP." The Texas Rules of Appellate Procedure are referred to as "TRAP." The Supreme Court Advisory Committee on Rules of Procedure and Evidence is referred to as "SCAC."

II. THE ROLE OF TRIAL COURTS The function of civil trial courts is to grant or deny relief. To do this, the trial court must:

- follow established rules of procedure and evidence,

- resolve factual disputes, and

- then apply the law (i.e., constitution, statutes, regulations, or case law) to the facts of the case in order to arrive an acceptable result.

Each of these areas may be the focus of complaint on appeal.

A. Procedure and Evidence Rules The Rules of Civil Procedure and Rules of Evidence have been issued by the Supreme Court to assure litigants of a fair trial using uniform standards. Where a trial is conducted in violation of a Rule of Civil Procedure or a Rule of Evidence, an appellate court will reverse the trial court's judgment, but only if the violation resulted in an improper judgment.

B. Resolving Factual Disputes The trial court (or jury if one is requested) determines disputed facts. The greater part of trial activity is given over to the development of the facts surrounding the case. The tangible result of the fact-finding process is the jury's answers or the trial judge's findings of fact.

C. Applying The Law to the Facts Once the facts have been determined, the trial court must apply the law to the facts as determined by the fact-finder. This is done in assembling a jury charge and in constructing a judgment from the jury's answers, or from the trial court's findings. The application of law to the facts is evident in a jury trial, when the trial court acts on a motion to enter judgment, or judgment n.o.v. The process is not evident in a non-jury trial, since the trial court's factual findings are not known until after judgment is rendered.

III. APPELLATE REVIEW Texas Supreme Court Justice Nathan Hecht has noted:

> Judgments after non-jury trials are not as secure as judgments in jury cases. It seems appellate courts are not inclined to defer so

> readily to the findings of their trial court colleagues than they are to the verdict of the jury.

Hecht, *Deciding Whether to Appeal and Frivolous Appeals, Federal and State*, STATE BAR OF TEXAS ADVANCED APPELLATE PRACTICE COURSE H-4 (1988). [Cited as "Hecht"]. This observation relates, however, to the sanctity of the trial court's findings of fact. As to evidentiary errors, it is much harder to reverse a judgment from a bench trial than a judgment from a jury trial.

A. Preservation of Error in the Trial Court Suffice it to say that you will not prevail unless the error complained of in the appellate court is first preserved in the trial court. The appellate record must reflect that a timely request, objection or motion was presented to the trial curt, and that it was ruled upon. New TRAP 33.1(a). If the trial judge refused to rule, an objection to that failure preserves the complaint. New TRAP 33.1(a)(2)(B). Under new TRAP 33.1(b), this requirement of a ruling does not apply to the overruling by operation of law of a motion for new trial or motion to modify judgment, unless the taking of evidence was necessary to properly present the complaint in the trial court.

New 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. This invalidates cases which had held that a ruling on a motion for directed verdict must be in writing to be recognized on appeal. *See Soto v. Southern Life & Health Ins. Co.*, 776 S.W.2d 752, 754 (Tex.App.--Corpus Christi 1989, no writ).

B. The "Harmless Error Rule" Even if error occurred in the trial court, it is not automatically "reversible error". New 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, it is unchanged from former TRAP 81(b)(1). "The harmless error rule, as expressed in 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. *City of Brownsville v. Alvarado,* 897 S.W.2d 750 (Tex. 1997); *King v. Skelly*, 452 S.W.2d 691, 696 (Tex. 1970). If so, the judgment is reversed; if not, the judgment is affirmed. *See* 6 McDONALD TEXAS CIVIL PRACTICE: TEXAS CIVIL APPELLATE PRACTICE § 48:6 (1992); W. Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1045, 1056-57 (1993).

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

1. PROCEDURAL ERRORS Some procedural errors are sufficiently significant to warrant reversal, and some are not. For example, few cases are reversed on the adequacy of the pleadings to support the judgment. Few cases (if any) have been reversed for denying special exceptions. Few cases have been reversed for denying a motion for continuance. Improper joinder or severance is rarely a successful claim on appeal. On the other hand, appellate courts are more sensitive to a claim that a litigant was wrongfully deprived of a jury trial. *See General Motors Corp. v. Gayle,* 951 S.W.2d 469 (Tex. 1997); *Halsell v. Dehoyos*, 810 S.W.2d 371, 371 (Tex. 1991); *Grossnickle v. Grossnickle*, 865 S.W.2d 211, 212 (Tex.App.--Texarkana 1993, no writ); *Squires v. Squires*, 673 S.W.2d 681, 684 (Tex.App.--Corpus Christi 1984, no writ) (court has no discretion to deny trial by jury where jury fee paid on or before appearance day).

2. EVIDENCE ERRORS Challenges to the erroneous admission or exclusion of evidence requires a two-prong approach. First, the trial court's evidentiary ruling must be erroneous. Second, assuming error occurred, was it harmful? When considering whether the erroneous admission or exclusion of evidence constitutes error, the appropriate standard of review is whether the trial court abused its discretion.

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. *E.g., 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 the "harmless error" language. *E.g., Service Lloyds Ins. Co. v. Martin,* 855 S.W.2d 816 (Tex.App.--Dallas 1993, no writ); *Riggs v. Sentry Ins. Co.,* 821 S.W.2d 701, 708-709 (Tex.App.--Houston [14th Dist.] 1991, writ denied). The "entire case turns" language has been questioned in recent opinions. *Durbin v. Dal-Briar Corp.,* 871 S.W.2d 263, 267 (Tex.App.--El Paso 1994, writ denied); *Castro v. Sebesta*, 808 S.W.2d 189, 192 n.1 (Tex.App.--Houston [1st Dist.] 1991, no writ). The state of the law with regard to this language is unclear; if it is viewed as a separate standard, the Supreme Court has not developed it in harmful error analysis in more recent cases, *see, e.g., City of Brownsville v. Alvarado,* 897 S.W.2d 750 (Tex. 1995); if it is viewed as a permutation of the "but for" standard, then it should be viewed as disapproved by *McCraw;* if it is a higher standard than "but for," it is most certainly disapproved by *McCraw.* Perhaps the language is only a variation of the other language often present in this area of the law, that the evidence must be controlling on a material issue in the case. *See Gee v. Liberty Mutual Fire Ins. Co.,* 765 S.W.2d 394, 396 (Tex. 1989).

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

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

D. Factual Disputes The Texas Supreme Court and courts of appeals can reverse and render a case where there is no evidence to support a fact finding or where 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 where 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.

Courts of appeals see themselves as ill suited to resolve factual disputes, and the standards of appellate review of the evidence permit the courts of appeals to intervene only in extreme circumstances. As stated above, the Supreme Court by statute is not permitted to weigh conflicting evidence. While many appeals from trial on the merits challenge the factual support for the judgment, the success rate of fact-based appeals is guesstimated by the authors to be less than 20%, including both remands and cases where the judgment is modified and affirmed. As stated by the Corpus Christi Court of Appeals:

> It is the prerogative of the fact finder to resolve any contradictions or inconsistencies in the evidence and to judge the credibility of the witnesses and the weight to be given their testimony . . . . The fact finder can make reasonable inferences and deductions from the direct or circumstantial evidence.

Blanco v. Garcia, 767 S.W.2d 896, 897 (Tex.App.--Corpus Christi 1989, no writ). In *Reynolds v. Kessler*, 669 S.W.2d 801, 807 (Tex.App.--El Paso 1984, no writ), the court said: "The Court of Appeals may not pass on credibility nor substitute its findings for those of the trier of fact."

Justice Hecht characterized sufficiency of the evidence points as "an effort to retry the case to a new group of judges." Hecht, at H-6. Where 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).

The likelihood of prevailing on factual points may increase if a reversal would not require a new trial. If the judgment can be reformed, or a remittitur ordered, the pain of sustaining the factual attack is reduced in the minds of the appellate judges.

E. Applying Substantive Law An appeal attacking the legal basis for the judgment is better received in the appellate court. A statement by the Dallas Court of Appeals reflects this fact:

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

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

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

1. DEFINITION The term "abuse of discretion" is not susceptible to rigid definition. As pointed out in Wendell Hall's article, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1045, 1051 (1993), 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 1051, citing *Landon v. Jean-Paul Budinger, Inc.*, 724 S.W.2d 931, 934 (Tex.App.--Austin 1987, no writ). Amalgamating language from various cases, Hall suggests that "[t]he test is not whether the facts present an appropriate case for the trial court's action; but, instead, whether the trial court acted without reference to any guiding rules and principles, or in other words, acted in an arbitrary or unreasonable manner." *Id.* at 1051 [footnotes omitted]. Thus, "[a] mere error of judgment is not an abuse of discretion." *Id.* at 1052.

The Texas Court of Criminal Appeals once said:

> We are cited to many cases of the different states of the Union relative to what is meant by an "abuse of discretion" and while not lending itself to an absolute measuring stick by which such abuse could be understood, the

> opinions seem to be in fair agreement that an abuse of discretion usually means doing differently from what the reviewing authority would have felt called upon to do. Such ordinarily finds itself depending upon the facts of the particular case . . . .
>
> From the cases cited to us, the matter of equity would have some weight in finding an abuse of discretion.

Williams v. State, 265 S.W.2d 92, 95 (Tex.Crim.App. 1954).

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

> The test for an abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. Rather, it is a question of **whether the court acted without reference to any guiding rules and principles**. *Craddock v. Sunshine Buslines*, 133 S.W.2d 124, 126 (Tex.Com.App.--1939, opinion adopted). Another way of stating the test is **whether the act was arbitrary or unreasonable**. *Smithson v. Cessna Aircraft Company*, 665 S.W.2d 439, 443 (Tex. 1982); *Landry v. Travelers Insurance Co.*, 458 S.W.2d 649, 651 (Tex. 1970). The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Southwestern Bell Telephone Co. v. Johnson*, 389 S.W.2d 645, 648 (Tex. 1965); *Jones v. Strayhorn*, 321 S.W.2d 290, 295 (Tex. 1959). [Emphasis added]

Downer v. Aquamarine Operators, Inc., 701 S.W.2d at 238.

2. WHEN DOES ABUSE OF DISCRETION STANDARD APPLY? The following citations in parentheses are to pages of Wendell Hall's article, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1045 (1993). The abuse of discretion standard applies to the following trial court decisions: plea in abatement [p. 1064]; special exceptions [p. 1065]; temporary and permanent injunctions [p. 1067]; severance and joinder [p.1069]; striking intervention [p. 1070]; amendment of responses to requested admissions, and deeming them admitted [p. 1073-74]; good cause for late supplementation of discovery [p. 1075]; motion for continuance [p. 1091]; dismissal for want of prosecution [p. 1091-92]; denial of request for jury [p. 1093-94]; whether to certify a class [p. 1095-96]; recusal [p. 1096]; sealing court records [p. 1097-98]; limiting opening statements [p. 1102]; trial amendment of pleadings [p. 1103]; wording and submission of jury instructions and definitions [p. 1109]. Abuse of discretion is also the standard when the court sets child support and divides property on divorce. *MacCallum v. MacCallum*, 801 S.W.2d 579, 582 (Tex.App.--Corpus Christi 1990, writ denied) (child support); *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981) (property division). *See also Tenery v. Tenery,* 932 S.W.2d 29, 30 (Tex. 1996).

3. APPLYING 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 send the case back to the trial court to exercise discretion using proper legal principles. It is not the prerogative of the appellate court to dictate to the trial court how that discretion should be exercised.

4. IS THERE A DIFFERENT STANDARD OF EVIDENTIARY REVIEW? Recently some courts have said that when the trial court's ruling on the merits is reviewed under an abuse of discretion standard, the normal sufficiency of the evidence review is part of the abuse of discretion review and not an independent ground for reversal. *Crawford v. Hope*, 898 S.W.2d 937, 940-41 (Tex.App.--Amarillo 1995, writ denied) (when standard of review is abuse of discretion, factual and legal sufficiency are not independent grounds of error); *accord*, *Thomas v. Thomas*, 895 S.W.2d 895, 898 (Tex.App.--Waco 1995, writ denied); *In re Marriage of Driver*, 895 S.W.2d 875, 877 (Tex.App.--Texarkana 1995, no writ); *Wood v. O'Donnell*, 895 S.W.2d 555, 556 (Tex.App.--Fort Worth 1995, no writ); *In re Pecht*, 874 S.W.2d 797, 800 (Tex.App.--Texarkana 1994, no writ); *but see Matthiessen v. Schaefer*, 897 S.W.2d 825, 828 (Tex.App.--San

Antonio 1994) (Duncan, J., dissenting) (appellate court should review award of attorney's fees by normal sufficiency of evidence standard, and not subsume sufficiency of evidence into abuse of discretion standard), *rev'd on other grounds*, 915 S.W.2d 479 (Tex. 1995).

The El Paso Court of Appeals has agreed with Justice Duncan's dissenting opinion in *Matthiessen.* In *Lindsey v. Lindsey,* 1998 WL 79064 (Tex.App.--El Paso 1998, n.w.h.), the court addressed the conflict between the traditional sufficiency review and the abuse of discretion standard in the context of a child support modification:

> An order regarding child support will not be disturbed on appeal unless the complaining party can demonstrate a clear abuse of discretion. *Worford v. Stamper,* 801 S.W.2d 108, 109 (Tex. 1990). We are aware of recent opinions holding that when the trial court's ruling on the merits is reviewed under an abuse of discretion standard, the normal sufficiency of the evidence review is part of the abuse of discretion review and not an independent ground for reversal. *Crawford v. Hope*, 898 S.W.2d 937, 940-41 (Tex.App.--Amarillo 1995, writ denied)(when standard of review is abuse of discretion, factual and legal sufficiency are not independent grounds of error); *accord*, *Thomas v. Thomas*, 895 S.W.2d 895, 898 (Tex.App.--Waco 1995, writ denied); *In re Marriage of Driver*, 895 S.W.2d 875, 877 (Tex.App.--Texarkana 1995, no writ); *Wood v. O'Donnell*, 894 S.W.2d 555, 556 (Tex.App.--Fort Worth 1995, no writ); *In the Interest of Pecht*, 874 S.W.2d 797, 800 (Tex.App.--Texarkana 1994, no writ); *but see Matthiessen v. Schaefer*, 897 S.W.2d 825, 828 (Tex.App.--San Antonio 1994)(Duncan, J., dissenting)(appellate court should review award of attorney's fees by normal sufficiency of evidence standard, and not subsume sufficiency of evidence into abuse of discretion standard), *rev'd on other grounds*, 915 S.W.2d 479 (Tex. 1995).
>
> One commentator has suggested that the abuse of discretion standard of review should be standardized. R. Townsend, *State Standards of Review: Cornerstone of the Appeal*, The University of Texas School of Law 6th Annual Conference on State and Federal Appeals (1996). He recommends that once it has been determined that the abuse of discretion standard applies, an appellate court should engage in a two pronged inquiry: (1) Did the trial court have sufficient information upon which to exercise its discretion; and (2) Did the trial court err in its application of discretion? We agree with this approach. The traditional sufficiency review comes into play with regard to the first question; however, our inquiry cannot stop there. We must proceed to determine whether, based on the elicited evidence, the trial court made a reasonable decision. Stated inversely, we must conclude that the trial court's decision was neither arbitrary nor unreasonable.

Overlapping Standards in the Family Law Context

An appeal directed toward demonstrating an abuse of discretion is one of the tougher appellate propositions. Most of the appealable issues in a family law case are evaluated against an abuse of discretion standard, be it the issue of property division incident to divorce or partition, conservatorship, visitation, or child support. While the appellant may challenge the sufficiency of the evidence to support findings of fact, in most circumstances, that is not enough. If, for example, an appellant is challenging the sufficiency of the evidence to support the court's valuation of a particular asset, (s)he must also contend that the erroneous valuation caused the court to abuse its discretion in the overall division of the community estate.[1] In

[1] Consider the following hypothetical. Suppose the parties dispute the value of Husband's business which is operated as a sole proprietorship. Wife contends it has a value of $30,000 while Husband values it at $10,000. For purposes of this example, we will assume that Wife's valuation expert improperly includes personal goodwill. *See Hirsch v. Hirsch*, 770 S.W.2d 924 (Tex.App.--El Paso 1989, no writ)(Goodwill is not to be included or considered when placing a value on a professional corporation unless it can be determined first, that the goodwill exists independently of the personal ability of the professional person, and second, that if such goodwill does exist, it has a commercial value in which the community estate is entitled to share.). We will also assume that the trial court erroneously overrules Husband's objection and makes a specific fact finding that the business has a value of $30,000. On appeal, Husband contends that the trial court erred in admitting

> the child support context, an appellant may challenge the sufficiency of the evidence to support a finding of net resources, a finding of the proven needs of the child, a finding of voluntary unemployment or under-employment, or a finding of a material and substantial change in circumstances. Once we have determined whether sufficient evidence exists, we must then decide whether the trial court appropriately exercised its discretion in applying the child support guidelines to the facts established. Mr. Lindsey has appropriately raised both prongs of this inquiry by designated points of error.

In *In re Marriage of Chandler*, No. 07-95-0026-CV (Tex.App.--Amarillo 1996, no writ), the court considered an order modifying child custody. Ordinarily, reversal of such a decision will occur only when the trial court abuses its discretion. However, the appellant did not claim abuse of discretion; instead the appellant challenged the legal and factual sufficiency of the evidence to support the findings of fact which supported the judgment. The appellate court said that it therefore would not analyze the case under the abuse of discretion standard, but would use a sufficiency of the evidence standard instead. In footnote 1 the Court notes: "Left for another day is the issue of whether those appealing questions controlled by the abuse of discretion standard actually present basis to secure reversal when they fail to argue, through point of error, that the discretion was indeed abused." *Id.* at n. 1.

IV. 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 impaired. And the appeal has not even yet commenced.

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

A. TRCP 296 Findings and Conclusions Requesting findings of fact and conclusions of law is one of the most frequently overlooked steps in preparing the non-jury case for appeal. It is the first step you should take after an adverse judgment is signed by the trial court.

1. ENTITLEMENT Findings of fact and conclusions of law as a general rule are not available after a jury trial. TRCP 296 provides that findings of fact and conclusions of law are available in any case tried in the district or county court without a jury. 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 where the complaining party suffers no injury. *See also*, *Cravens v. Transport Indem. Co.*, 738 S.W.2d 364 (Tex.App.--Fort Worth 1987, writ denied).

In a jury trial, the answers to the jury questions contain the findings on disputed factual issues. When a case is tried to the court, however, there is no ready instrument by which one can determine how the trial court

---

Wife's expert's testimony, and had it been properly excluded, there was no evidence to support a valuation finding of $30,000. While an appellate court would likely agree, that is merely the first hurdle. Husband must still demonstrate that the trial court abused its discretion in dividing the community estate. Even if the evidence is insufficient to support the court's value of $30,000, that valuation error may not constitute an abuse of discretion in the ultimate distribution of a $300,000 estate [the error representing ten percent of the total community estate], but it may well constitute an abuse of discretion in the division of a $100,000 estate [the error representing nearly a third of the community estate], depending upon the equities justifying a disproportionate division.

resolved the disputed fact issues. Nor can the appellate court determine upon which of the alternate theories of recovery or defense the trial court rested the judgment.

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

Given the assumption that findings and conclusions are appropriate in a bench trial but not in a jury trial, what happens when the two are combined? Perhaps the suit involves domestic torts and the jury will determine the personal injury or fraud issues while the judge will decide the ultimate division of property. Also, it is not unusual for the court to permit separate trials on the issues of property and custody, with a jury deciding issues of conservatorship and the judge deciding issues of characterization, valuation and division of property. If one party chooses to appeal from the property division, is (s)he entitled to findings and conclusions? If the jury and non-jury portions of the case are conducted via separate trials, findings and conclusions are available in the non-jury trial. *Operation Rescue - National v. Planned Parenthood of Houston and Southeast Texas, Inc.,* 937 S.W.2d 60 (Tex.App.--Houston [14th Dist.] 1996, no writ); *Shenandoah Associates v. J & K Properties, Inc.*, 741 S.W.2d 470, 484 (Tex.App.--Dallas 1987, writ denied). When the judgment of the court differs substantially or exceeds the scope of the jury verdict, findings are also available. *See Rothwell v. Rothwell*, 775 S.W.2d 888 (Tex.App.--El Paso 1989, no writ). These cases are a departure from the earlier view espoused in *Conrad v. Judson*, 465 S.W.2d 819 (Tex.Civ.App.--Dallas 1971, writ ref'd n.r.e.); *and Aubey v. Aubey*, 264 S.W.2d 484 (Tex.Civ.App.--Beaumont 1954, no writ). In *Aubey*, the court noted that it makes no difference that the issues submitted to the jury were advisory only, holding that TRCP 296 does not require a trial court to split a trial and make findings on the issues as to which the verdict may be advisory; and if at least one of the issues tried in the court below was tried to the jury, the entire trial was to a jury within the meaning of the rules. One more recent opinion has specifically distinguished *Conrad* and *Aubey*. In *Heafner & Associates v. Koecher*, 851 S.W.2d 309, 312-13 (Tex.App.--Houston [1st Dist.] 1992, no writ), the appellee relied upon the older cases to persuade the trial court that there was no need to make findings on an intervention for attorneys' fees because the divorce case had been tried to a jury. The appellate court disagreed:

> Both cases cited by husband are distinguishable from the case at bar. In *Conrad*, no issues were submitted to the judge; the case was strictly a jury trial. The appellant requested findings of fact and conclusions of law, arguing that the court's judgment went beyond the jury findings. The court held that the appellant's argument was without merit in a jury trial. . . In *Aubey*, also a jury trial, the trial court refused to file findings of fact and conclusions of law. Even though the jury verdict may have been advisory only, the judgment was consistent with the verdict and the *Aubey* court concluded it was not reversible error for the trial court to refuse to file findings of fact and conclusions of law . . .
>
> In the case at bar, the judgment regarding attorney's fees resulted from findings made by the trial court, after a bench trial, independent of the jury's verdict. Therefore, Heafner & Associates has a right to have the trial court file findings of fact and conclusions of law in order to urge error on appeal.

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 **not** authorized in the following circumstances:

- When the cause is dismissed without a trial. *Eichelberger v. Balette*, 841 S.W.2d 508, 510 (Tex.App.--Houston [14th Dist.] 1992, writ denied); *Timmons v. Luce*, 840 S.W.2d 582, 586 (Tex.App.--Tyler 1992, no writ); *Kendrick v. Lynaugh*, 804 S.W.2d 153 (Tex.App.--Houston [14th Dist.] 1990, no writ).

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

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

- When a summary judgment is granted. *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994); *Chavez v. El Paso Housing Authority,* 897 S.W.2d 523 (Tex.App.--El Paso 1995, writ denied); *Chopin v. Interfirst Bank*, 694 S.W.2d 79 (Tex.App.--Dallas 1985, writ ref'd n.r.e.); *City of Houston v. Morgan Guaranty International Bank*, 666 S.W.2d 524 (Tex.App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.).

- In an appeal to district court from an administrative agency. *Valentino v. City of Houston*, 674 S.W.2d 813 (Tex.App.-Houston [1st Dist.] 1983, writ ref'd n.r.e.).
- When a default judgment is granted. *Harmon v. Harmon*, 879 S.W.2d 213 (Tex.App.--Houston [14th Dist.] 1994, writ denied).

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

TRCP 385(b) provides for an option on the part of the trial judge in appeals from interlocutory orders. The court is not required to file findings and conclusions, but it may do so within 30 days after the judgment is signed. *Smith Barney Shearson, Inc. v. Finstad*, 888 S.W.2d 111 (Tex.App.--Houston [1st Dist.] 1994, no writ) (involving interlocutory appeal of denial of motion for arbitration). One court of appeals has admonished trial courts to give findings and conclusions to aid the appellate court in reviewing class certification decisions. *Franklin v. Donoho*, 774 S.W.2d 308, 311 (Tex.App.--Austin 1989, no writ).

2. IMPORTANCE OF OBTAINING Many practitioners fail to obtain findings of fact and conclusions of law. In the absence of findings and conclusions, the judgment of the trial court must be affirmed if it can be upheld on any available legal theory that finds support in the evidence. *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277 (Tex. 1987); *In re W.E.R.*, 669 S.W.2d 716 (Tex. 1984); *Lassiter v. Bliss*, 559 S.W.2d 353 (Tex. 1977); *Temperature Systems, Inc. v. Bill Pepper, Inc*., 854 S.W.2d 669 (Tex.App.--Dallas 1993, no writ). Absent findings of fact, it doesn't make any difference whether the trial court selected the right approach or theory. If the appellate court determines the evidence supports a theory raised by the pleadings or tried by consent, then it is presumed that the trial court made the necessary findings and conclusions to support a recovery on that theory. *Lemons v. EMW Mfg. Co.*, 747 S.W.2d 372 (Tex. 1988). These presumptions are tantamount to implied findings. These implied findings can be challenged by legal and factual insufficiency points, provided a reporter's record is brought forward. Further, presumptions will not be imposed if findings are properly requested but are not given.

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

3. IMPACT OF FILING REQUEST ON APPELLATE DEADLINES The timely filing of a request for findings of fact and conclusions of law extends the time for perfecting appeal from 30 days to 90 days after the judgment is signed by the court. TRAP 26.1(a)(4). The timely filing of a request for findings and conclusions also extends the deadline for filing the record from the 60th to the 120th day after judgment was signed. TRAP 35.1(a). A timely request for findings and conclusions does **not** extend the trial

court's period of plenary power. *See* TRCP 329b (no provision is made for an extension of plenary power due to the filing of such a request).

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

4. SEQUENCE FOR OBTAINING FINDINGS

a. Initial Request Rule 296 requires that the request for findings and conclusions be filed within 20 days after the judgment is signed. ***FILING A MOTION FOR NEW TRIAL DOES NOT EXTEND THE TIME PERIOD FOR FILING A REQUEST FOR FINDINGS AND CONCLUSIONS.*** Often, the decision to appeal is made after the motion for new trial is filed and often after it is presented to the court or overruled by operation of law. Frequently, appellate counsel is employed to handle the appeal after the overruling of the motion for new trial. At that point, it is too late for appellate counsel to file the initial request for findings of fact and conclusions of law. A basic rule of thumb should be 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). Also, TRCP 5, "Enlargement of Time," appears to permit the trial court to enlarge the time for requesting findings and conclusions.

b. Presentment Not Necessary Older case law required that the request for findings of fact and conclusions of law be actually presented to the judge -- it was insufficient to simply file the request among the papers of the cause. *Lassiter v. Bliss*, 559 S.W.2d 353 (Tex. 1977). The Supreme Court, in *Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768 (Tex. 1989), abandoned the requirement of presentment to the trial judge.

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

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

d. Untimely Filing by Court The procedural time limits in the rules do not prevent the trial court from issuing belated findings. *Robles v. Robles*, 965 S.W.2d 605 (Tex.App.--Houston [1st Dist.] 1998, pet. requested); *Jefferson County Drainage Dist. No. 6 v. Lower Neches Valley Authority,* 876 S.W.2d 940 (Tex.App.--Beaumont 1994, writ denied); *Morrison v. Morrison*, 713 S.W.2d 377 (Tex.App.--Dallas 1986, no writ). Unless injury is demonstrated, litigants have no remedy for the untimely filing of findings. *Jefferson County,* 876 S.W.2d at 960; *Morrison*, 713 S.W.2d at 381. Injury may be shown if the litigant was unable to request additional findings or if the litigant has been prevented from properly presenting the appeal. *Id.*

In *Robles,* the appellant made both a timely original and reminder request for findings, but the trial court had not filed them by the time the appellant filed his original appellate brief. Thereafter, a supplemental transcript was filed containing the findings and the appellant was given the opportunity to file an amended brief. Claiming the trial court's untimely filing deprived him of the ability to request additional findings and caused him economic harm due to the added expense of filing an amended brief, the appellant sought a reversal and remand. The appellate court concluded that he had suffered no injury as he had made no request for additional findings nor had he requested the appellate court to abate the appeal in order to secure additional findings.

Similarly, in *Morrison*, 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.

From the standpoint of preservation of error, note that to complain of the untimely filing, the appellant may be required to file a motion to strike. *See*, *Narisi v. Legend Diversified Investments*, 715 S.W.2d 49 (Tex.App.--Dallas 1986, writ ref'd n.r.e.), which contains the following footnote at page 50:

> Although not made a point of error, Narisi complains about when the supplemental findings and conclusions were filed. Even if they were filed late, which we do not decide here, we may consider them because appellant neither filed a motion to strike, *City of Roma v. Gonzales*, 397 S.W.2d 943, 944 (Tex.Civ.App.--San Antonio 1965, writ ref'd n.r.e.), nor has she shown that she was harmed by the delay in the filing. *Fonseca v. County of Hidalgo*, 527 S.W.2d 474, 480 (Tex.Civ.App.--Corpus Christi 1975, writ ref'd n.r.e.).

See also, *Summit Bank v. The Creative Cook*, 730 S.W.2d 343 (Tex.App.--San Antonio 1987, no writ), where the court specifically stated that a reviewing court will consider late filed findings of facts and conclusions of law where there has been no motion to strike. Thus, if the appellant has been prejudiced in his/her appeal because of the late filing, (s)he should consider filing a motion to strike, but (s)he must also be prepared to demonstrate injury.

Note also that if the findings and conclusions are filed too far past the deadline, the appellate court may disregard them. *Stefek v. Helvey,* 601 S.W.2d 168 (Tex.Civ.App.--Corpus Christi 1980, writ ref'd n.r.e.). In *Labar v. Cox*, 635 S.W.2d 801 (Tex.App.--Corpus Christi 1982, writ ref'd n.r.e.), the court determined a late filing to be reversible error because it prevented the appellant from requesting additional findings. The court declined to permit the trial court to correct its procedural errors as permitted by old TRCP 434 because other errors existed which required a reversal.

e. Reminder Notice TRCP 297 provides that if the trial court fails to submit the findings and conclusions within the 20 day period, the requesting party must call the omission to the attention of the judge within 30 days after filing the original request. Failure to submit a timely reminder waives the right to complain of the court's failure to make findings. *Averyt v. Grande, Inc.*, 717 S.W.2d 891 (Tex. 1986); *Employers Mutual Casualty Co. v. Walker,* 811 S.W.2d 270 (Tex.App.--Houston [14th Dist.] 1991, writ denied); *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 appears to additionally answer the question which was left unclear after the *Cherne* decision: must the reminder be personally presented to the trial judge?

Cherne had written a letter to the judge reiterating his earlier request for findings and calling the omission of the filing to the judge's attention. The opinion does not disclose whether "presentment" of the letter was made. The Supreme Court specifically declined to decide whether the second request was proper under TRCP 297 and the court of appeals' decision was silent on the point. *Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768 (Tex. 1989). Two subsequent court of appeals decisions have since addressed the issue and reached opposite results. In *Berry v. Berry*, 770 S.W.2d 90 (Tex.App.--Dallas 1989, writ denied), the court of appeals concluded that absent evidence to the contrary, the timely filing of a reminder notice with the clerk of the court creates a presumption that the reminder was timely called to the judge's attention.

In *National Bugmobiles, Inc. v. Jobi Properties*, 773 S.W.2d 616 (Tex.App.--Corpus Christi 1989, writ denied), the court concluded that presentment was indeed necessary under the precise language of former TRCP 297 which was in effect at that time. However, 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 as to the reminder.

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

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

(1) FAILURE TO REQUEST When a party fails to timely request additional findings of fact and conclusions of law, (s)he is deemed to have waived his/her right to complain on appeal of the court's failure to enter additional findings. *Briargrove Park Property Owners, Inc. v. Riner*, 867 S.W.2d 58, 62 (Tex.App.--Texarkana 1993, writ denied); *Cities Services Co. v. Ellison*, 698 S.W.2d 387, 390 (Tex.App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.). Further, where 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 good will of 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. He challenged the failure to make those findings on appeal. The court of appeals affirmed, noting that the failure to request additional findings constitutes a waiver on appeal.

(2) COURT'S FAILURE TO RESPOND A trial court's failure to make additional findings upon request is not reversible error if the requested finding is covered by and directly contrary to the original findings filed. *ASAI v. Vanco Insulation Abatement Inc.,* 932 S.W.2d 118 (Tex.App.--El Paso 1996, no writ); *San Antonio Villa Del Sol Homeowners Association v. Miller*, 761 S.W.2d 460 (Tex.App.--San Antonio 1988, no writ).

(3) BILL OF EXCEPTIONS Under the former rules, one could easily assume that error had been preserved so as to enable the appellant to complain on appeal of the trial court's failure to make additional or amended findings and conclusions if (s)he had timely filed his/her request. However, some older cases required the party seeking additional or amended findings to make a bill of exception to the court's failure to respond. *Black v. Basset*, 619 S.W.2d 193 (Tex.Civ.App.--Texarkana 1981, no writ); *Hausler v. Hausler*, 636 S.W.2d 874 (Tex.Civ.App.--Waco 1982, no writ).

The impact of the 1990 amendments on this requirement was discussed in a commentary in THE APPELLATE ADVOCATE by Gail M. Price. She noted that before *Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768 (Tex. 1989), error was preserved by formal bill of exception, because the requesting party was required to show that the request had been presented to the trial court. *See Sinclair v. Sav. and Loan Comm'r of Texas*, 696 S 142, 150 (Tex.App.--Dallas 1985, writ ref'd n.r.e.); *Pan Am. Nat. Bank v. Holiday Wines & Spirits*, 580 S.W.2d 7, 9 (Tex.Civ.App.--Houston [1st Dist.] 1979, writ ref'd n.r.e.). However, after *Cherne* (and under the current version of TRCP 297), a file-stamped copy of the original request should be sufficient to show that it was timely filed in the clerk's office. And under the current rule, Price concluded, a file-stamped copy of the past due notice should be sufficient to preserve any error if the trial court fails to file findings and conclusions. See Price, *Just the Facts, Judge: Findings of Fact and Conclusions of Law*, THE APPELLATE ADVOCATE Vol. III, No. IV (Summer, 1990).

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

5. WHAT FORM IS REQUIRED? Findings of fact and conclusions of law need not be in any particular form as long as they are in writing and are filed of record. *Hamlet v. Silliman*, 605 S.W.2d 663 (Tex.App.--Houston [1st Dist.] 1980, no writ). It is permissible for the trial court to list its findings in a letter to the respective attorneys, as long as the letter is filed of record. *Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120 (Tex.App.--Corpus Christi 1986, no writ). Remember, however, that oral statements by the trial court on the record as to its findings will not be accepted as findings of fact and conclusions of law. *In re W.E.R.*, 669 S.W.2d 716 (Tex. 1984); *Stevens v. Snyder*, 874 S.W.2d 241 (Tex.App.--Dallas 1994, writ denied); *Giangrosso v. Crosley*, 840 S.W.2d 765, 769 (Tex.App.--Houston [1st Dist] 1992, no writ); *Ikard v. Ikard*, 819 S.W.2d 644 (Tex.App.--El Paso 1991, no writ). 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 Supreme Court ruled in one case, however, that appellate courts must give effect to **intended** findings of the trial court, even where the specific findings made do not quite get the job done, provided they are supported by the evidence, the record and the judgment. *See Black v. Dallas County Child Welfare*, 835 S.W.2d 626 (Tex. 1992).

a. Predecessor Rules Historically, while it was preferable to list the findings of fact separately from the conclusions of law, and the intermixing of factual and legal conclusions was not generally approved, it was not reversible error absent a showing of harm to the appellants. Thus, the rule requiring the findings and conclusions to be stated separately was considered to be directory. *Longoria v. Greyhound Lines, Inc.*, 699 S.W.2d 298 (Tex.App.--San Antonio 1985, no writ); *Hill v. Sargent*, 615 S.W.2d 30 (Tex.Civ.App.--Dallas 1981, no writ).

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. Contempt orders must contain specific findings as to the exact violations which have occurred and what actions, if any, will permit the contemnor to purge himself. Orders granting injunctions are required to set forth the reasons for issuance. Decrees make specific findings in matters of military retirement benefits to comply with the Soldiers' and Sailors' Relief Act and still other findings in order to qualify as a Qualified Domestic Relations Order. There was a divergence of opinions as to whether specific findings of fact and conclusions of law which were contained within a decree, such as specific factors considered with regard to a disproportionate division of the estate or specific findings as to values, qualified as formal findings of fact and conclusions of law. *See Cottle v. Knapper*, 571 S.W.2d 59 (Tex.Civ.App.--Tyler 1978, no writ), holding that findings contained within the decree are valid, despite the fact that they are not contained in a separate document. The inclusion of the findings in the order did not preclude a request for separate findings and conclusions. *See also*, *A-- v. Dallas County Child Welfare*, 726 S.W.2d 241 (Tex.App.--Dallas 1986, no writ), holding that where 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.

For a contrary result, *see Jones v. Jones*, 641 S.W.2d 342 (Tex.App.--Corpus Christi 1982, no writ); *City of Houston v. Houston Chronicle*, 673 S.W.2d 316 (Tex.App.--Houston [1st Dist.] 1984, no writ); and *Gonzales v. Cavazos*, 601 S.W.2d 202 (Tex.Civ.App.--Corpus Christi 1980, no writ)(all holding that recitations in the judgment cannot be considered as a substitute for separately filed findings and conclusions). Thus, they provide no basis for attack by a losing party on appeal. For a comprehensive discussion of this conflict, see R. Orsinger, *Handling the Appeal: Procedures and Pitfalls*, State Bar of Texas ADVANCED FAMILY LAW COURSE 1984.

b. TRCP 299a An entirely new rule TRCP 299a was effectuated by the 1990 amendments. It provides:

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

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

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

It is difficult to see just how a court of appeals can determine the fairness of the division without findings as to the values of the assets. The *Wallace* opinion states that it is the burden of the parties to introduce evidence as to the values of the assets whereby a range of value can be determined by the trial court. But if wife introduces a value of $250,000 while husband values an asset at $50,000, it is difficult if not impossible to determine overall fairness without knowing what value the trial court assigned. Further, there is no way to determine that the court assigned a value within that range at all. Secondly, if the trial court is not required to state what factors it considered in dividing the property, the appellant is left in a posture of challenging the sufficiency of the evidence as to every conceivable factor which **might** have been considered, a process that unduly and unnecessarily complicates the appeal. This ladder may be virtually impossible to climb, and any error in the court's failure to identify the proper rungs is in all likelihood not reversible error. In *Tenery v. Tenery*, 932 S.W.2d 29 (Tex. 1996), the trial court awarded the wife a disproportionate division of the community estate. Despite a request for specific findings, the court declined to list the factors

considered. The court of appeals determined that Mr. Tenery was not harmed by the trial court's failure to make the requested findings because there was sufficient evidence to support the division. The Supreme Court agreed, noting that the record reflected that Mr. Tenery had greater earning capacity than his wife, he was at fault in the breakup of the marriage, and that Mrs. Tenery would have benefited from a continuation of the marriage. Thus, the record affirmatively established that Mr. Tenery had suffered no injury.

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

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

> The majority overrules point of error one on the ground that the additional findings were merely evidentiary, not ultimate and controlling issues. Citing *Finch* [citation deleted], the majority holds that the ultimate and controlling issue is whether the trial court divided the property in 'a just and right manner.' Citing *Finch* and *Wallace* [citation deleted], the Court noted that we have 'repeatedly' held the value of specific property is not an ultimate issue. I agree we have. I disagree that we should continue.
>
> I recognize we held in *Finch* that it is not necessary for the trial court to make specific findings in a divorce on the characterization and value of the property. [citation deleted]. Even though I was a member of that panel, I now believe that decision is wrong. In a case like this, with complicated assets and claims of reimbursement, it is not possible to show error without specific findings. The trial court's scant findings are of no assistance to our review." *Id.* at 379

7. CONFLICTING FINDINGS AND FINDINGS AT VARIANCE WITH THE JUDGMENT When the findings of fact appear to conflict with each other, they will be reconciled if reconciliation is possible. If, however, they are not reconcilable, they will not support the judgment. *Yates Ford, Inc. v. Benavides*, 684 S.W.2d 736 (Tex.App.--Corpus Christi 1984, writ ref'd n.r.e.). Where 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 was in accord with the practice of the appellate courts, even before TRCP 299a was adopted. *See Southwest Craft Center v. Heilner*, 670 S.W.2d 651 (Tex.App.--San Antonio 1984, writ ref'd n.r.e.); *Law v. Law*, 517 S.W.2d 379, 383 (Tex.Civ.App.--Austin 1974, writ dism'd); *Keith v. Keith*, 763 S.W.2d 950 (Tex.App.--Fort Worth 1989, no writ).

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

support the corrected judgment because they pertained only to the November 12 judgment.

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

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

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

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

10. EFFECT OF COURT'S FAILURE TO FILE

a. Must Complain in Brief Where 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 failure to file by point of error 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.).

b. When Does the Failure to File Cause Harmful Error? The general rule is that the failure of the trial court to file findings of fact constitutes error where 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. *In the Matter of the Marriage of Combs,* 958 S.W.2d 848, 851 (Tex.App.--Amarillo 1997, no writ); *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). Where there is only one theory of recovery or defense pled or raised by the evidence, there is no demonstration of injury. *Guzman v. Guzman*, 827 S.W.2d 445 (Tex.App.--Corpus Christi 1992, writ denied); *Vickery v. Texas Carpet Co., Inc.*, 792 S.W.2d 759 (Tex.App.--Houston [14th Dist.] 1990, writ denied). *Accord*, *Landbase, Inc. v. T.E.C.*, 885 S.W.2d 499, 501-02 (Tex.App.--San Antonio 1994, writ denied) (failure to file findings and conclusions harmless where 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. *Elizondo v. Gomez,* 957 S.W.2d 862 (Tex.App.--San Antonio 1997, no writ); *Martinez v. Molinar,* 953 S.W.2d 399 (Tex.App.--El Paso 1997, no writ); *Sheldon Pollack Corp. v. Pioneer Concrete*, 765 S.W.2d 843, 845 (Tex.App.--Dallas 1989, writ denied); *Fraser v. Goldberg*, 552 S.W.2d 592, 594 (Tex.Civ.App.--Beaumont 1977, writ ref'd n.r.e.). The issue is whether there are disputed facts to be resolved. *FDIC v. Morris*, 782 S.W.2d at 523.

c. Remedy: Remand vs. Abatement A debate has raged over the appropriate remedy when a trial court fails to file timely requested findings of fact and conclusions of law. The choice is whether to reverse and remand for a new trial or to stay proceedings and order the trial judge to file findings and conclusions. This divergence stems from a conflict between the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure.

Presently, TRCP 296 provides that in any case tried without a jury in the district or county court, the judge shall, at the request of either party, state in writing findings of fact and conclusions of law. The source of the rule is former TEX. REV. CIV. STAT. ANN. art. 2208, which contained virtually the same language. The statute provided that the failure to file requested findings of fact and conclusions of law was reversible error. The rule replaced the statute in 1939.

TRAP 44.4 is based directly on former TRCP 434, and provides that if the failure of the trial judge to act prevents the proper presentation of a cause to the court of appeals and could be corrected by the judge of the trial court, then the judgment shall not be reversed for such error, but the appellate court shall direct the trial judge to correct the error. TRCP 434 derived in substantial form from Rule 62a, which became effective in 1912. *See Golden v. Odiorne*, 112 Tex. 544, 249 S.W.2d 822 (1923). Likewise, in substantially the same language, Rule 62a provided for error correction if the trial judge's action prevented proper presentation of an appeal. Thus, the conflicting rules have co-existed for decades.

The Supreme Court considered the issue of reversible error for failure to make findings and conclusions in *Wagner v. Riske*, 142 Tex. 337, 178 S.W.2d 117 (1944). The Court acknowledged that under Article 2208, the predecessor to TRCP 296, the failure of the trial court to make requested findings and conclusions generally was reversible error. It concluded that because the language in the rule was the same as in the statute, it should be given the same construction. Thus, injury to the appellant was presumed, unless the record affirmatively showed that the complaining party had suffered no injury. This rule of thumb has been carried forward in *Las Vegas Pecan & Cattle Co. v. Zavala County*, 682 S.W.2d 254 (Tex. 1984) and again in *Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768 (Tex. 1989). *See also*, *Castle v. Castle*, 734 S.W.2d 410 (Tex.App.--Houston [1st Dist.] 1987, no writ) where the court notes that unless the record affirmatively shows that the wife suffered no prejudice as a result of the trial court's failure to perform its duty, the judgment must be reversed.

The judgments in *Wagner* and *Castle* were affirmed, however, because of an affirmative showing that the appellant had suffered no injury. Nevertheless, the mandate of the decisions is that failure to file requested findings can result in reversible error.

The argument for abatement stemmed from 4 MCDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS §16.08.1 (rev. 1984). McDonald disagreed with the premise in *Wagner* that a statute

adopted as a rule of procedure continues to carry its former interpretations. Before the doctrine can be applied, he argued, other pertinent rule changes must be considered. He concluded that the interpretive opinions of Article 2208 were written when there was no substantive provision similar to Rule 434. The implied result is that the creation of Rule 434 eliminated statutory interpretations as viable precedent.

The possible conflict between the rules was noticed in *Richie v. State*, 275 S.W.2d 723 (Tex.Civ.App.--Galveston 1955, no writ). The court acknowledged that Rule 296 had not been specifically ruled upon by the Supreme Court but that the language in *Wagner* indicated that the change from statute to rule did not change the result of non-compliance. The court further noted McDonald's approach favoring abatement but nevertheless reversed and remanded.

McDonald's approach was again reviewed in *McClendon v. McClendon*, 289 S.W.2d 640 (Tex.Civ.App.--Fort Worth 1956, no writ). The court concluded that even if the procedure were considered to be proper, it was unnecessary in view of the state of the record. Thereafter, the pendulum began to swing in the direction of abatement, as more courts relied on the provisions in Rule 434 and McDonald's arguments. Until recently, the cases from the early 1960s indicated one of two results would arise from the trial court's failure to make findings and conclusions: either the appellant process would be abated and the trial judge directed to make the findings, or the court would conclude that the record affirmatively showed the appellant had suffered no injury by virtue of the court's failure to file and the judgment was affirmed.

The Fourteenth Court of Appeals has taken the argument further in attempting to resolve the purported conflict between the rules. In *Joseph v. Joseph*, 731 S.W.2d 597 (Tex.App.--Houston [14th Dist.] 1987, no writ), the court tracked the history of the respective rules, disagreeing with McDonald's interpretation that the rule adoption did not carry previous statutory interpretations. Because no relevant rules have changed since the interpretative opinion on the effect of the failure to file findings of fact and conclusions of law and because the Supreme Court has not opted to announce a new interpretation, the 14th Court chose to reverse and remand. *Id.* at 599-600. The decision has been criticized by economically-inclined observers who argue that reversal unduly burdens the litigants with additional fees, impedes already crowded civil dockets and causes unjust judicial delay. The court answered many of these arguments in the opinion itself. It noted that there was little doubt that the specter of delay played a role in other court decisions to abate rather than reverse, but that regardless of whether an appeal is reversed or abated, delay results. The delay, noted the court, is not occasioned by adherence to established law. Instead, the fault lies squarely with trial courts who fail to follow a familiar and venerable rule.

In *Barnes v. Coffman*, 753 S.W.2d 823 (Tex.App.--Houston [14th Dist.] 1988, writ denied), the same Houston court concluded that its opinion in *Joseph* was dispositive of the case and the cause was reversed and remanded due to the trial court's failure to file findings of fact and conclusions of law. On January 25, 1989, the Supreme Court denied the application for writ of error and allowed the Houston court's reversal and remand to stand. ("Writ denied" indicates that the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law but is of the opinion that the application presents no error of law which requires reversal.) On the very same day, the Court issued its opinion in *Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768 (Tex. 1989), which as noted above, concluded that a request for findings and conclusions had been timely made such that the trial court's refusal to make them was error. The opinion, authored by Chief Justice Phillips, makes the following statement:

> Because the trial judge continues to serve on the district court, we believe the error in this case is remediable. We therefore reverse the judgment of the court of appeals and remand to that court, with instructions for it to direct the trial court to correct its error pursuant to TEX. R. APP. P. 81(a).

This specific statement in *Cherne* with regard to the continued availability of the trial judge forged the distinction that led the Dallas court to reverse and remand rather than abate in *FDIC v. Morris*, 782 S.W.2d at 521. Despite that language however, the Fourteenth Court persisted in reversing and remanding rather than abating. *See Randall v. Jennings,* 788 S.W.2d 931 (Tex.App.--Houston [14th Dist.] 1990, no writ)(post-*Cherne* decision that fails to cite the *Cherne* decision). Even that court has now, however, jumped on board the abatement train. In *Electronic Power Design v. R.A. Hanson,* 821 S.W.2d 170 (Tex.App.--Houston [14th Dist.] 1991, no writ), the court abated

the appeal, noting "[b]ecause the trial judge continues to serve on the county civil court at law, the error in this case is remediable." *Id.* at 171. This language clearly reflects that the court has adopted the *Cherne* approach.

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

11. EFFECT OF COURT'S FILING TRCP 299 provides that where 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. Where 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 where 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. *McPherren v. McPherren*, 1998 WL 166116 *4 (Tex.App.--El Paso 1998, no pet.) When they are supported by competent evidence, they are generally binding on the appellate court. Where a reporter's record is available, challenged findings are not binding and conclusive if 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). Where no reporter's record is presented, the court of appeals must presume that competent evidence supported not only the express findings made by the court, but any omitted findings as well. *D&B, Inc. v. Hempstead*, 715 S.W.2d 857 (Tex.App.--Beaumont 1986, no writ); *Mens' Wearhouse v. Helms*, 682 S.W.2d 429 (Tex.App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 474 U.S. 804 (1985).

12. DEEMED FINDINGS When the trial court gives express findings on at least one element of a claim or affirmative defense, but omits other elements, implied findings on the omitted unrequested elements are deemed to have been made in support of the judgment. In other words, if a party secures an express finding on at least one element of an affirmative defense, then deemed findings arise as to the balance of the elements. *Linder v. Hill*, 691 S.W.2d 590 (Tex. 1985); *Kondos Entertainment, Inc. v. Quinney Electric, Inc.,* 948 S.W.2d 820 (Tex.App.--San Antonio 1997, pet. requested); *Sears, Roebuck & Co. v. Nichols*, 819 S.W.2d 900 (Tex.App.--Houston [14th Dist.] 1991, writ denied). Where deemed findings arise, it is not an appellee's burden to request further findings or to complain of other findings made. It is the appellant's duty to attack **both the express and implied findings**.

13. PECULIARITIES OF CONCLUSIONS OF LAW Conclusions of law are generally lumped in with all discussions of findings of fact, but in reality, they are rather unimportant to the appellate process. The primary purpose is to demonstrate the theory on which the case was decided. A conclusion of law can be attacked on the ground that the trial court did not properly apply the law to the facts. *Foster v. Estate of Foster*, 884 S.W.2d 497 (Tex.App.--Dallas 1994, no writ). However, erroneous conclusions of law are not binding on the appellate court and if the controlling findings of fact will support a correct legal theory, are supported by the evidence and are sufficient to support the judgment, then the adoption of erroneous legal conclusions will not mandate reversal. *Leon v. Albuquerque Commons Partnership*, 862 S.W.2d 693 (Tex.App.--El Paso 1993, no writ); *Westech Engineering, Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190, 196 (Tex.App.--Austin 1992, no writ); *Bexar County Cr. Dist. Atty v. Mayo*, 773 S.W.2d 642, 643 (Tex.App.--San Antonio 1989, no writ); *Bellaire Kirkpatrick Joint Venture v. Loots*, 826 S.W.2d 205, 210 (Tex.App.--Fort Worth 1992, writ denied); *Sears, Roebuck & Co. v. Nichols*, 819 S.W.2d 900, 903 (Tex.App.--Houston [14th Dist.] 1991, writ denied); *Matter of Estate of Crawford*, 795 S.W.2d 835, 838 (Tex.App.--Amarillo 1990, no writ); *Valencia v. Garza*, 765 S.W.2d 893, 898 (Tex.App.--San Antonio 1989, no writ). "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, no writ). The standard of review for legal conclusions is whether they

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

14. CHALLENGES ON APPEAL

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

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

Frequently, trial courts include disclaimers to the effect that "any finding of fact may be considered a conclusions of law, if applicable" and vice-versa. There is a difference, however, in the standard of review. 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); *Lorensen v. Weaber*, 840 S.W.2d 644 (Tex.App.--Dallas 1992) *rev'd on other grounds sub nom.*; *Exxon Corp. v. Tidwell*, 816 S.W.2d 455, 459 (Tex.App.--Dallas 1991, no writ); *A-ABC Appliance of Texas, Inc. v. Southwestern Bell Tel. Co.*, 670 S.W.2d 733, 736 (Tex.App.--Austin 1984, writ ref'd n.r.e.). Conclusions of law should be attacked on the ground that the law was incorrectly applied.

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

B. Findings in Sanction Orders

1. TRCP 13 SANCTIONS TRCP 13 provides:

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

Several appellate decisions have considered the language of the Rule and determined that its requirements are mandatory. In *GTE Communications Systems Corp. v. Curry*, 819 S.W.2d 652 (Tex.App.--San Antonio 1991, *orig. proceeding*), the appellate court determined that a rule of civil procedure is to be interpreted by the same rules that govern statutes. When a rule is clear and unambiguous, the language must be construed according to its literal meaning. *GTE*, at 653; *RepublicBank Dallas, N.A. v. Interkal,*

Inc., 691 S.W.2d 605, 607 (Tex. 1985); *Hidalgo, Chambers & Co. v. FDIC*, 790 S.W.2d 700, 702 (Tex.App.--Waco 1990, writ denied). The court in *GTE* found the language of Rule 13 to be clear and unambiguous in its provisions that no sanctions may be imposed except for good cause shown. The court further noted that the trial court must enumerate the particulars of the good cause in the sanction order and that this requirement of the rule is mandatory. Even more striking is the appellate court's description of the sanction order against GTE:

> The order in this case is defective in that it fails to comply with the mandatory requirements of rule 13. The order merely imposes sanctions. It does not find that good cause exists for such impositions; it does not find that the motion for summary judgment and affidavits were groundless and filed for the purpose of delay or harassment, or were made in bad faith; and, more fatally, it does not state any facts or particulars of the good cause. *Id*. at 654.

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

> Rule 13 imposes a duty on the trial court to point out with particularity the acts or omissions on which sanctions are based. *Watkins v. Pearson*, 816 S.W.2d 131 (Tex.App.--Houston [14th Dist.] 1990, writ denied). Thus, an order imposing sanctions for pleadings, motions, and other papers under rule 13 differs markedly from an order imposing sanctions for discovery abuse under rule 215. Rule 215 does not require a court to designate the particulars amounting to 'good cause'. While respondent's order states that the motions for sanctions are 'meritorious', the order contains no specific mention of what conduct on the part of relator was good cause for imposition of sanctions. *Id*. at 133.

See also, *Zarsky v. Zurich Management, Inc.*, 829 S.W.2d 398 (Tex.App.--Houston [14th Dist.] 1992, writ dismissed by agreement), where the appellate court compares the various sanction orders in all of these cases:

> The sanction orders in both *Kahn* and *Watkins* were held to be in violation of this [Rule 13] requirement. In *Kahn*, the order recited that the motions for sanctions were 'meritorious'. *Kahn*, 816 S.W.2d at 132. In *Watkins*, the order merely stated that 'for good cause being shown, monetary sanctions are hereby imposed . . . pursuant to Rule 13.' *Watkins*, 795 S.W.2d at 259. Similarly, the order signed by the trial judge states that 'the Court finds substantial evidence that this Third Party lawsuit . . . was frivolous and of no merit.' The recitation here fails to satisfy the particularity requirements of Rule 13. There is no statement or description of what was done in bad faith, or a description of how Mr. George acted to bring about the improper purpose. The trial court failed to show with particularity its reason for finding the third party lawsuit frivolous and meritless. Thus the trial judge abused his discretion in entering the sanctions order. *Id*. at 400.

Thus, the findings must be fact-based and not merely conclusions of law. *See Schexnider v. Scott & White Memorial Hospital,* 953 S.W.2d 439, 441 (Tex.App.--Austin, 1997, no writ)(Sanctions order based on "good cause" for filing a "groundless petition" brought in "bad faith" and "brought for the purpose of harassment" is erroneous on its face for omitting the particulars underlying the conclusions).

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

2. <u>TRCP 215 SANCTIONS</u> TRCP 215.2 states:

> *b. Sanctions by Court in Which Action is Pending*. If a party or an officer, director, or managing agent of a party of a person designated under Rules 200-2b, 201-4 or 208 to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following.
>
> * * *
>
> (8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or other, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, **unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.** Such an order shall be subject to review on appeal from the final judgment. [Emphasis added]

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

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

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

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

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

Chapters 9 and 10 of the Texas Civil Practices and Remedies Code deal with frivolous pleadings and claims and sanctions for frivolous pleadings and claims respectively. Chapter 10 was added by Acts 1995, 74th Leg., ch. 137, § 1, eff. Sept. 1. 1995. Sections 9.012 and 10.004 provide what the trial court shall consider and what sanctions are available. Significantly, § 10.005 provides:

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

This language implicitly requires that findings be included in the sanctions order. No case law has yet developed construing what "findings" are necessary.

C. Findings in Child Support Orders Section 154.130 of the Family Code provides that, without regard to TRCP 296 through 299, in all cases in which child support is contested and the amount of child support ordered by the court varies from statutory guidelines, the trial court shall make findings in the child support order. TEX.FAM.CODE ANN. § 154.130 (Sampson & Tindall 1995).

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

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

3. TRIAL COURT'S DUTY Under the provision, the trial court is required to include the required findings in the child support order. Note, however, that one court has held that findings are not necessary in a modification proceeding when the motion is denied and the support is not modified. *In Interest of S.B.C., C.F.C., and R.B.C.,* 952 S.W.2d 15 (Tex.App.--San Antonio 1997, no writ). Although this requirement conflicts with TRCP 299a, the Family Code says that the requirement applies notwithstanding TRCP 296 through 299. This rule does not preclude the court from making other findings and conclusions in compliance with the Rules of Civil Procedure, particularly where issues other than child support are involved. However, where child support is the only issue, what then?

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

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

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

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

Insertion of the findings into the support order will be helpful down the road if a modification is necessary. These findings establish what the circumstances of the parties were at the time of the divorce and whether the support ordered was in compliance with the guidelines.

4. REQUIREMENTS Section 154.130 requires the following findings:

1. the monthly net resources of the obligor per month are $_____;
2. the monthly net resources of the obligee per month are $_____;
3. the percentage applied to the obligor's net resources for child support by the actual order rendered by the court is ____%;
4. the amount of child support if the percentage guidelines are applied to the first $6,000 of the obligor's net resources is _____%;
5. if applicable, the specific reasons that the amount of child support per month ordered by the court varies from the amount stated in subdivision (4), are: _____; and
6. if applicable, the obligor is obligated to support children in more than one household, and:
   (A) the number of children before the court is _____;
   (B) the number of children not before the court residing in the same household with the obligor is _____;

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

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

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

See Roosth v. Roosth, 889 S.W.2d 445 (Tex.App.--Houston [14th Dist.] 1994, writ denied) (for child support set at $ 3,000 per month, it was not error for trial court to include findings that appellant's net resources were not capable of determination, but that they exceeded $ 4,000 per month, and that appellant was intentionally underemployed at time of divorce).

Arguably, the obligor could request specific findings under TRCP 296 *et seq.* as to what the demonstrated needs of the children were. If you represent the obligor, don't accept merely the §154.130 findings. Try to pin the trial court down as to what specific factors it considered and what the total monthly needs of the child are, in actual dollars. Utilize your right to follow up with formalized findings and conclusions. It may also be necessary to tie the court down to a formula utilized if there are children born of different marriages. Courts (and opposing counsel) tend to make the findings as vague as possible. Be sure to follow through.

The importance of making the requests for findings in child support cases is quite simple -- a court's order of child support will not be reversed on appeal unless the appellant can show a clear abuse of discretion. *Worford v. Stamper*, 801 S.W.2d 108 (Tex. 1990). In *Worford*, the parties were divorced in 1975, when their son Trey was only five years old. Stamper was ordered to pay $180 per month in support plus one-half of medical expenses incurred on behalf of Trey's medical disabilities. In 1986 a modification was filed, requesting the support be increased and that it be ordered to continue past Trey's 18th birthday. It was undisputed by the parties that Trey would never be able to support himself because of physical and mental handicaps. His developmental levels were between three and five years of age when he was 15 years old. His speech was unintelligible and he suffered from deformities which made it difficult for him to chew his food. He would require some maxillofacial surgery which would not be covered by insurance. The trial court increased the support to $1350 per month, required Stamper to carry medical insurance and to pay for one-half of all expenses not covered by the insurance. Stamper appealed. The court of appeals reversed, noting that the trial court abused its discretion because there was insufficient evidence to support the amount of child support awarded.

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

The intermediate appellate courts are not consistent in their remedies for the failure of the trial court to make the findings when properly requested. In *Hanna v. Hanna*, 813 S.W.2d 626 (Tex.App.--Houston [1st Dist.] 1991, no writ), the court found that the failure to make findings in a child support order upon proper request is reversible error, and the appellate court reversed and remanded. *See also*, *Morris v. Morris*, 757 S.W.2d 466 (Tex.App.--Houston [14th Dist.] 1988, writ denied) (where trial court failed to make required child support findings, case was reversed). *Contra* is *Chamberlain v. Chamberlain*, 788 S.W.2d 455 (Tex.App.--Houston [1st Dist.] 1990, writ denied), where the appellate court abated the appeal and directed the trial court to make the necessary findings. The Supreme Court has recently visited the issue. In *Tenery v. Tenery*, 932 S.W.2d 29 (Tex. 1996), the record reflected that at the

time of trial, the father's net resources were limited to $980 per month. Applying the child support guidelines to the net resources would have resulted in a child support order of $196 per month, for one child ($980 x 20%). The trial court instead set child support at $550 per month, and despite a request for additional findings as to the reason the court varied from the guidelines, the court failed to comply. The court of appeals determined that Mr. Tenery had not been harmed by the court's failure to make additional findings. The Supreme Court disagreed, noting that when findings are timely requested but not filed, harm to the complaining party is presumed unless the contrary appears on the face of the record. Error is harmful if it presents an appellant from properly presenting a case to the appellate court. The Court concluded that the trial court's refusal to abide by the child support guidelines and its failure to make the necessary findings as to the reasons for its deviation prevented Mr. Tenery from effectively contesting the child support order on appeal. In a *per curiam* opinion, the Court reversed and remanded the cause to the court of appeals with instructions for it to direct the trial court to correct its error under former TRAP 81(a)(now TRAP 44.4). Thus, it appears that the Supreme Court opted for abatement *a la Chamberlain.*

D. Findings in Visitation Orders Section 153.258 of the Family Code provides that without regard to Rules 296 through 299 of the Texas Rules of Civil Procedure, in all cases in which possession of a child by a parent is contested and the possession of the child varies from the standard possession order, the trial court shall state in the order the specific reasons for the variance from the standard order. TEX.FAM.CODE § 153.258 (Sampson & Tindall 1995). The court has this obligation only if a written request is filed within ten days after the hearing or upon oral request in open court during the hearing.

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

2. TRIAL COURT'S DUTY Under the provision, the trial court is required to insert the required findings **within the body of the visitation order**. Although this requirement conflicts with TRCP 299a, the disclaimer that the provision be applied notwithstanding TRCP 296 through 299 applies. Thus it appears that the requested findings must be specified in the order, be it a decree of divorce or modification order. It also would appear that compliance with this rule would not preclude the court from making other findings and conclusions in compliance with the Rules of Civil Procedure, particularly where issues other than visitation are involved.

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

E. Findings of Associate Judges One recent, albeit unpublished, opinion addresses the question of the findings of an associate judge when it makes recommendations to the referring court. In *Tanner v. Tanner,* No. 08-94-00214-CV (Tex.App.--El Paso 1996, no writ), the husband challenged the legal sufficiency of the evidence to support the court master's finding that the residence of the parties was the wife's separate property. No traditional findings of fact and conclusions of law authorized by TRCP 296 were filed or requested, thus the court was required to determine whether the home was in fact characterized as separate or community property. The transcript contained the recommendation of the court master, which stated:

> 5. that the following property be confirmed to Petitioner [Margret] as her separate property: MONY account #134585756 ($3300), *5321 Fairbanks*, personal property (#s 21.1 to 21.27 of Petitioner's inventory); [Emphasis added].

The final decree of divorce contained a section entitled "Division of Marital Estate" in which the wife was awarded the residence. Citing *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977), the court noted that the phrase "estate of the parties" refers to the community estate. The decree also contained a section entitled "Confirmation of Separate Property of Petitioner." Twenty-eight items were enumerated, including the MONY account and the 27 items of personal property taken from the wife's inventory. The residence, however, was excluded. There was thus a conflict between the final decree and the recommendation of the court master as to the

characterization of the property. Recognizing the general rule that where the decree varies from the formal findings of fact and conclusions of law, the later filed findings of fact are controlling, [TRCP 299a], the court stated it had found no authority addressing a variance between the recommendation and the final decree. It stated:

> Ordinarily, this difficulty would be resolved by the general rule that in the absence of findings of fact, the judgment of the trial court will be affirmed if it can be upheld on the basis of any theory finding support in the pleadings and the evidence. *In re W.E.R.,* 669 S.W.2d 716, 717 (Tex. 1984). Further, TEX.R.CIV.P. 299a provides that findings of fact shall be recited in a separate document. At first blush, it would appear that the characterization of the home would be controlled by the final decree of divorce inasmuch as there are no findings of fact of record. This situation is complicated, however, by TEX.GOV'T CODE ANN. § 54.013 (Vernon 1988), which provides:
>
> > If an appeal to the referring court is not filed or the right to an appeal to the referring court is waived, the findings and recommendations of the master become the decree or order of the referring court only on the referring court's signing an order or decree conforming to the master's report.
>
> In the case before us, the findings of the court master clearly indicate the characterization of the residence as Margret's separate property. The decree, however, does not conform to the recommendation and thus that particular finding cannot be attributed to the trial court. No appellate court has addressed the inquiry of whether the findings of the court master may be considered as "findings of fact" of the referring court as contemplated by Rule 296, nor are we in a posture to make such a determination here, given the discrepancy between the findings and the final decree.

That debate will no doubt arise again.

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

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

B. Timetable For Filing - Rule 329(b) TRCP The motion for new trial shall be filed within 30 days after judgment is signed by the court. If the motion is not determined by **written** order, it shall be deemed overruled by operation of law 75 days after judgment is entered. Balazik v. Balazik, 632 S.W.2d 939 (Tex.App.--Fort Worth 1982, no writ). Mere reference in an order that a hearing was held on the motion for new trial without specifically granting the motion will not suffice. The overruling by operation of law of a motion for new trial preserves error unless the taking of evidence was necessary to present the complaint in the trial court. TRAP 33.1(b). The automatic overruling of a motion for new trial on which there has been no trial court's ruling is constitutional. Texaco, Inc. v. Penn-

zoil Company, 729 S.W.2d 768 (Tex.App. - Houston [1st Dist.] 1987, writ ref'd n.r.e.).

1. PLENARY POWER OF TRIAL COURT

The trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within 30 days after 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. The court may, however, correct a clerical error in the judgment by a nunc pro tunc order entered under Rules 316 and 317 TRCP. The nunc pro tunc order will extend the appellate timetable provided it does not appear that the second order was signed solely to provide the extension. *Mackie v. McKenzie,* 890 S.W.2d 807 (Tex. 1994).

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

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

2. AMENDED OR SUPPLEMENTAL MOTIONS An amended motion for new trial may be filed without leave of court, provided it is filed within the 30-day period and before the original motion is overruled. The Dallas Court of Appeals has considered the distinction between an amended motion and a supplemental motion. In Sifuentes v. Texas Employers' Insurance Association, 754 S.W.2d 784 (Tex.App.--Dallas 1988, no writ), the appellant filed a motion for new trial on May 29, 1987 and a "Plaintiff's Second Motion for New Trial" on June 4, 1987. While the initial motion complained of factual insufficiency of the evidence, the second did not. Claiming waiver, TEIA urged that the second motion was in fact an amended motion that superseded the original motion, so that there was no "live" motion for new trial raising factual insufficiency of the evidence as required by the rules. 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. Although this case involves a complaint of factual sufficiency in an appeal from a jury trial, the construction of an amended vs. supplemental motion for new trial may be equally applied in non-jury appeals.

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

C. Grounds For New Trial Motions for new trial may be granted by the trial court so long as it comes within the umbrella of "good cause". TRCP 320. While certain matters have been raised in this state in virtual perpetuity, the laundry list is by no means

exclusive. Many bases strictly apply to jury trials, such as errors in the charge and jury misconduct. In non-jury trials, the practitioner may well be facing some of the following considerations:

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

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

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

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

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

- that the evidence would probably produce a different result if a new trial were granted. Wilkins v. Royal Indemnity Company, 592 S.W.2d 64 (Tex.App.-Tyler 1979, no writ).

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), where the court ruled that in an extreme case where the evidence is sufficiently strong, failure to grant the motion for new trial may well be an abuse of discretion. See also, Gaines v. Baldwin, 629 S.W.2d 81 (Tex.App.--Dallas 1981, no writ) which holds that the evidence presented must demonstrate that the original custody order would have a serious adverse effect on the welfare of the child and that presentment of that evidence would probably alter the outcome.

2. DEFAULT JUDGMENTS New trials are routinely granted and default judgments set aside upon demonstration that the failure of the respondent to appear before judgment was not intentional or the result of conscious indifference but was due instead to mistake or accident. The motion for new trial must also raise a meritorious defense and there must be no delay or injury to the opposing party. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124 (1939). Although in *Craddock* the default judgment was taken because the defendant failed to answer, the same requirements apply to a post-answer default judgment. *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex.1987); *Grissom v. Watson*, 704 S.W.2d 325, 326 (Tex.1986). Where 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? The Corpus Christi court has answered the question in the negative. 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, Incorporated was not. A lawsuit

filed against the former 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. Tell that to your malpractice carrier.

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

> In the usual case, the defendant who fails to file an answer is said to confess to the facts properly pleaded in the petition. Stoner v. Thompson, 578 S.W.2d 679 (Tex. 1979). In such a case, the non-answering defendant cannot mount an evidentiary attack against the judgment on motion for new trial or on appeal.
>
> In a divorce case, however, the petition is not taken as confessed for want of an answer. TEX.FAM.CODE ANN. §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.

The court treats the issue as if it were one of first impression and makes no reference to Armstrong v. Armstrong, 601 S.W.2d 724 (Tex.Civ.App.--Beaumont 1980, no writ), which is directly on point and comes to the same conclusion.

Quite 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,* No. 14-96-01146-CV (Tex.App.--Houston 14th Dist.] 1998, no pet. h), 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. Slip op. at 9. 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. The legislative committee of the Family Law Section is considering amendments to the Family Code to address this specific problem.

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

4. NO REPORTER'S RECORD AVAILABLE Section 105.003(c) of the Family Code provides that a record shall be made in all suits affecting the parent-child relationship, unless expressly waived by the parties with the consent of the court. Inability to obtain the reporter's record in order to pursue an appeal will entitle the complaining party to a new trial:

- if the party has timely requested a reporter's record;

- 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;

- if that exhibit or portion of the record is necessary to the appeal's resolution; and

- if the parties cannot agree on a complete record.

TRAP 34.6(f). This is a major change from former TRAP 50(e), which authorized a new trial if any portion of the record were lost or destroyed. There does not appear to be any change with regard to the necessity of an agreement between the parties concerning a complete record or whether the trial court has the authority to require a condensed narrative as a substitute for the missing portions of the record. *See* Hidalgo, Chambers & Co. v. FDIC, 790 S.W.2d 700 (Tex.App.--Waco 1990, writ denied). In *Hidalgo*, all of the trial exhibits were lost and the appellant sought a reversal due to its inability to obtain a complete statement of facts. On appeal, the FDIC argued that the trial court had the authority to tender substituted exhibits. The appellate court disagreed:

> FDIC contends the first sentence of Rule 50(e) gave the trial court the authority to substitute copies for the lost exhibits without the appellants' agreement. However, Hidalgo and Chambers argue they are entitled to a new trial under the second sentence because they did not agree to the substitution of the documents for the lost exhibits and, thus, did not agree on a statement of facts. Hidalgo and Chambers are correct in their interpretation.
>
> * * *
>
> If the trial court has authority under the first sentence to substitute a statement of facts without the appellant's agreement, as FDIC contends, then the second sentence is useless and ineffective. This result could not have been intended by the enacting authorities. . . However, the two sentences can be interpreted in a way

> that both are given effect. As already noted, the purpose of the first sentence is to grant the trial court specific authority to perform an act (substitute the lost or destroyed record) after it loses jurisdiction. . . This authority becomes operative, as far as the statement of facts is concerned, when the parties agree on a statement of facts under the second sentence. Id. at 702.

The second sentence, noted the court, is clear and unambiguous. An appellant is expressly entitled to a new trial if: (s)he has made a timely request for the statement of facts; the court reporter's notes and records have been lost or destroyed without the appellant's fault; and the parties cannot agree on a statement of facts. The court concluded that these are the only prerequisites to a new trial. [Note that there may well be the necessity of a hearing to develop evidence concerning the appellant's lack of fault or complicity].

With regard to the issue of agreement, the court held that the second sentence does not qualify or circumscribe an appellant's right to disagree on a statement of facts, nor must an appellant show that the disagreement is based on reasonable grounds, nor is the trial court or the appellate court permitted to review the reason for the disagreement. This is true, said the court, regardless of the fact that such an interpretation removes any incentive for an appellant to agree to a substitution of the record:

> FDIC argues that such an interpretation removes any 'incentive' for an appellant ever to agree on a statement of facts and, in effect, gives the appellant a 'windfall'. This result is certainly possible, if not probable. However, considering that the appellant was not responsible for the lost record and the disastrous consequences of having to appeal on an incomplete or inaccurate statement of facts, one cannot say that the Court of Criminal Appeals and the Texas Supreme Court did not clearly intend to protect the appellant from having to appeal on a statement of facts to which he had not agreed. When the meaning is clear and unambiguous, as here, the rule is entitled to a literal interpretation unless it would lead to absurdities or injustices and defeat the intent of the enacting body. . .Furthermore, this court cannot consider the wisdom of the second sentence. Id. at 702-703.

5. SUFFICIENCY OF THE EVIDENCE

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

Lucci, 670 S.W.2d 657 (Tex.App.--San Antonio 1984, writ ref'd n.r.e.); Dayton Hudson Corp. v. Altus, 715 S.W.2d 670 (Tex.App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.).

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

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

- a complete absence of evidence of a vital fact;

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

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

- the evidence establishes conclusively the opposite of a vital fact. Neily v. Aaron, 724 S.W.2d 908 (Tex.App.--Fort Worth 1987, no writ).

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).

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

"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.

The realm of insufficient evidence exists in an area where there is some evidence of a fact in issue sufficient that a jury question is warranted, but that evidence won't support a finding in favor of the proponent of that fact in issue. The 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). Because the trial court's findings of fact are are accorded the same force and dignity as a jury verdict, the appellate court likewise will not not substitute its conclusions for those of the fact-finder, even when the fact-finder is the trial court rather than a jury. *McPherren v. McPherren,* 1998 WL 166116 *4 (Tex.App.--El Paso 1998, no pet.).

In constructing points of error 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 court's findings. Neily v. Aaron, 724 S.W.2d 908 (Tex.App.--Fort Worth 1987, no writ).

(1) JURY VS. NON-JURY TRIALS The test for determining factual sufficiency of the evidence is the same in a jury and non-jury trial. Escobar v. Escobar, 728 S.W.2d 474 (Tex.App.--San Antonio 1987, no writ); State Bar v. Roberts, 723 S.W.2d 233 (Tex.App.--Houston [1st Dist.] 1986, no writ); Foreman v. Graham, 693 S.W.2d 774 (Tex.App. Fort Worth 1985, no writ).

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

(3) FINDINGS OF FACT AND CONCLUSIONS OF LAW NOT REQUIRED TO RAISE SUFFICIENCY A request for findings of fact and conclusions of law is not required in order to raise the issue of sufficiency of the evidence. Pruet v. Coastal States Trading Company, 715 S.W.2d 702 (Tex.App.--Houston [1st Dist.] 1986, no writ).

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

VI. STRUCTURING THE APPEAL

A. Challenging Alignment of Constituent Elements The trial court's judgment is the capstone of the case, built upon elements which are themselves built upon other elements. If the appellant preserves error properly, the trial court's judgment must be supported by conclusions of law applied to specific findings of fact that are supported by evidence and by pleadings. *See, e.g., Light v. Wilson*, 663 S.W.2d 813, 814 (Tex. 1984) ("conclusions of law which are not based on findings of fact and supported by pleadings will not

sustain a judgment"). The chance of reversal increases when the appellant forces the trial judge to commit to specific findings of fact and specific conclusions of law, for if the elements of the case (pleadings, evidence, fact findings, conclusions of law, and judgment) are not properly aligned, reversal should occur. *See* TRCP 301 which says that "[t]he judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any . . . ."

1. JUDGMENT SHOULD CONFORM TO CONCLUSIONS OF LAW In *Light v. Wilson,* 663 S.W.2d 813, 814 (Tex. 1984), the Supreme Court said:

> Conclusions of law which are not based on findings of fact and supported by pleadings will not sustain a judgment.

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

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

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

2. JUDGMENT MUST CONFORM TO THE FINDINGS OF FACT The trial court's judgment must conform to the verdict of the jury, TRCP 301, or the trial court's findings of fact. *Wirth, Ltd. v. Panhandle Pipe & Steel, Inc.,* 580 S.W.2d 58, 62 (Tex.Civ.App.--Tyler 1979, no writ). This rule that the judgment must conform to the verdict or findings is different from the rule that the verdict or findings must be supported by sufficient evidence. For example, where there is no reporter's record brought forward, 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 where there is no reporter's record, and the verdict or findings of fact are binding on the parties and are presumed to be supported by the evidence, still, the correctness of legal conclusions drawn from these facts is subject to appellate review. *Vasquez v. Vasquez,* 645 S.W.2d 573 (Tex.Civ.App.-El Paso 1982, writ ref'd. n.r.e.). In the event of a conflict between the judgment and the findings of fact and conclusions of law, the findings and conclusions are controlling. TRCP 299a.

3. FINDINGS OF FACT MUST CONFORM TO EVIDENCE The judgment must conform to the nature of the case proved. TRCP 301. Where 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,* 148 Tex. 600, 228 S.W.2d 156, 158 (1950) (trial court's findings are not conclusive where 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 Escobar v. Escobar*, 728 S.W.2d 474 (Tex.App.--San Antonio 1987, no writ); *State Bar v. Roberts*, 723 S.W.2d 233 (Tex.App.--Houston [1st Dist.] 1986, no writ); *Foreman v. Graham*, 693 S.W.2d 774 (Tex.App.--Fort Worth 1985, no writ). The rule is 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. 1989). When as appellant you have no express findings of fact, just make up the implied findings that necessarily follow from the judgment and challenge them: "The evidence is legally/factually insufficient to support an implied finding that . . . ."

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

> A judgment must be based upon pleadings, and as this Court has stated, "[A] plaintiff may not sustain a favorable judgment on an unpleaded cause of action, in the absence of trial by consent . . . ." *Oil Field Haulers Association, Inc. v. Railroad Commission*, 381 S.W.2d 183, 191 (Tex. 1964). In determining whether a cause of action was pled, plaintiff's pleadings must be adequate for the court to be able, from an examination of the plaintiff's pleadings alone, to ascertain with reasonable certainty and without resorting to information aliunde the elements of plaintiff's cause of action and the relief sought with sufficient information upon which to base a judgment. *C & H Transportation Company v. Wright*, 396 S.W.2d 443 (Tex.Civ. App. 1965, writ ref'd n.r.e.).

Stoner v. Thompson, 578 S.W.2d 679, 682-83 (Tex. 1979). A variance between the pleadings and proof that is substantial, misleading, and prejudicial is fatal. *Kissman v. Bendix Home Systems*, 587 S.W.2d 675, 677 (Tex. 1979). However, the aggrieved party may have to object to the judgment exceeding the scope of the pleadings. *Siegler v. Williams*, 658 S.W.2d 236, 240 (Tex.App.--Houston [1st Dist.] 1983, no writ).

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

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

1. LEGAL SUFFICIENCY ANALYSIS The Supreme Court 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. *See* Calvert, at 38 Tex.L.Rev. 369-71. It is only logical that briefs in the courts of appeals should follow suit. The analysis of the record for a legal sufficiency challenge requires that the court look only at evidence supporting the finding. *National Union Fire Ins. Co. v. Dominguez,* 873 S.W.2d 373, 376 (Tex. 1994); *Garza v. Alviar,* 395 S.W.2d 821, 823 (Tex. 1965). Therefore, presentation to the appellate court of the legal sufficiency argument should involve presentation of only the evidence supporting a finding; anything extra is wasted paper. Though the concept seems straightforward, many presentations are in the form of a comparison of the evidence, which is a presentation suited for factual sufficiency argument only. If a comparison of the evidence is presented, then an appellate judge's first thought probably is that the legal sufficiency point of error is without merit. Challenging a finding on legal sufficiency grounds might entail presentation including the following: showing the absence of direct evidence supporting a finding; showing that circumstantial evidence supporting a finding is not legally recognized as evidence; showing that other circumstantial evidence does not support the finding; and undermining an opponent's presentation of evidence in support of a finding. Attacking findings

based on legal sufficiency points of error in Texas requires practitioners to prove there is nothing, with something. This is often a difficult task, and the Fifth Circuit has rejected the framework used in Texas courts in favor of an examination of all the evidence and a standard of whether reasonable minds could differ as to a finding. See *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969)(en banc). Practitioners in Texas courts, though, are stuck with this task unless the Supreme Court adopts some other standard.

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 finding. *In re Kings Estate,* 150 Tex. 662, 244 S.W.2d 660, 661 (1952). 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.

3. A WORD TO THE WISE Don't lose sight of the standards of review for sufficiency of the evidence. Carefully examine your opponents arguments and the appellate court's opinion 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. If the court of appeals looks at all the evidence when disposing of a legal sufficiency point, challenge it as error on rehearing to make them look at it the right way, and take it up on petition for review. If the court of appeals looks only at the evidence from one side on a factual sufficiency point, challenge it as error on rehearing, or take it up 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 opportunities for the practitioner with a firm grasp of sufficiency review.

4. SUFFICIENCY REVIEW OF ENHANCED BURDENS OF PROOF Enhanced burdens of proof, i.e. clear and convincing evidence, are prevalent in family law, and are repeatedly mentioned as part of tort reform. New legislation signed by Governor Bush elevates the burden of proof necessary to recover punitive damages from preponderance of the evidence to clear and convincing evidence. TEX.CIV.PRAC. & REM.CODE §41.003, amended by Acts 1995, 74th Leg., ch. 19, § 1, eff. Sept. 1, 1995. What effect does an enhanced burden of proof have on review of sufficiency of the evidence? There is clearly no effect with regard to legal sufficiency review because the standard is so low--any evidence. Review of the factual sufficiency of the evidence with regard to an enhanced burden of proof has generated conflicting authority, however.

a. Higher Standard Cases The El Paso Court of Appeals has adopted an enhanced standard of factual sufficiency review in those cases where the burden of proof at trial was clear and convincing evidence. Citing *Neiswander v. Bailey*, 645 S.W.2d 835, 835-36 (Tex.App.--Dallas 1982, no writ), the court determined it would "consider whether the evidence was sufficient to produce in the mind of the fact finder a firm belief or conviction as to the truth of the allegation sought to be established." *In Interest of B.R.,* 950 S.W.2d 113, 199 (Tex.App.-- El Paso 1997, no writ). *See also, Lozano v. State,* 958 S.W.2d 925, 928 (Tex.App.--El Paso 1997, no pet.); *In Interest of G.B.R.*, 953 S.W.2d 391, 396 (Tex.App.--El Paso 1997, no writ). The *Neiswander* court had relied on authority from other jurisdictions, and the common sense notion that a higher burden of proof required a stricter standard of review. The standard promulgated in *Neiswander* was "whether the trier of fact could reasonably conclude that the existence of the fact is highly probable." Other courts of appeals adopted this standard. *E.g., Ybarra v. Texas Dept. of Human Servs.,* 869 S.W.2d 574, 580 (Tex.App.--Corpus Christi 1993, no writ); *Neal v. Texas Dept. of Human Servs.,* 814 S.W.2d 216, 222 (Tex.App.--San Antonio 1991, writ denied); *Williams v. Texas Dept. of Human Servs.,* 788 S.W.2d 922, 926 (Tex.App.--Houston [1st Dist.] 1990, no writ); *In re L.R.M.*, 763 S.W.2d 64, 66 (Tex.App.--Fort Worth 1989, no writ); *In re Estate of Glover*, 744 S.W.2d 197, 199 (Tex.App.--Amarillo 1987)(discussing the higher standard of review in dicta), *writ denied per curiam*, 744 S.W.2d 939 (Tex. 1988)(the per curiam opinion did not mention the court of appeals' discussion of the higher standard of review). Another group of opinions from the courts of appeals reference the burden of proof at trial with the factual sufficiency standard of review in a fashion that indicated a stricter review than regular factual sufficiency review. *See Doria v. Texas Dept. of Human Resources,* 747 S.W.2d 953, 959 (Tex.App.--Corpus Christi 1988, no writ); *G.M. v. Texas Dept. of*

Human Resources, 717 S.W.2d 185, 186 (Tex.App.--Austin 1986, no writ); *Baxter v. Texas Dept. of Human Resources,* 678 S.W.2d 265, 267 (Tex.App.--Austin 1984, no writ).

b. Same Standard Cases Other courts of appeals have backed away from a higher standard of review for factual sufficiency when the burden of proof at trial was by clear and convincing evidence. This trend seems to begin with *D.O. v. Texas Department of Human Services,* 851 S.W.2d 351, 353 (Tex.App.--Austin 1993, no writ). *See also In the Interest of W.S., R.S., and A.S.,* 899 S.W.2d 772, 776 (Tex.App.--Fort Worth 1995, no writ); *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex.App.--Fort Worth 1995, no writ); *In re A.D.E.,* 880 S.W.2d 241, 245 (Tex.App.--Corpus Christi 1994, no writ); *Oadra v. Stegall*, 871 S.W.2d 882, 892 (Tex.App.--Houston [14th Dist.] 1994, no writ). These decisions rely on *Meadows v. Green,* 524 S.W.2d 509, 510 (Tex. 1975) and *State v. Turner*, 556 S.W.2d 563, 565 (Tex. 1977), which in turn relied on *Omohundro v. Matthews,* 161 Tex. 367, 341 S.W.2d 401, 410-11 (1960) and *Sanders v. Harder*, 148 Tex. 593, 227 S.W.2d 206, 209-10 (1950).

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

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

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

> In certain types of cases courts have frequently pointed out that the facts must be established by clear and convincing evidence. That rule . . . arose at a time when such suits were cognizable only in courts of chancery

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

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

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

VII. CONCLUSION Litigants tend to believe that if they are unsuccessful at the trial court, they will get a second bite at the apple on appeal. Appeals, of course, are not trial de novo, and only where the trial court has actually committed reversible error will the fruits of

labor be sweet. How tragic, though, to have a client lose an opportunity to get that second taste because a truly reversible error was not adequately preserved. Our rules of procedure and interpreting decisions require that the practitioner get it right the first time; the burden is upon each attorney to become familiar with the requirements such that the rights of the clients are not jeopardized. This is particularly true with regard to the peculiarities of non-jury trials.