

POST JUDGMENT ISSUES

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PERSONAL – *The important stuff first*

Married to Martha for 14 great years; full time father to three growing boys allowing me to do fewer hobbies due to homework, Scouts, Little League, football, hunting, yard work, etc.

BOARD CERTIFICATION

Family Law - Texas Board of Legal Specialization

AREAS OF PRACTICE

Complex divorces and child custody cases. Protection of separate property and pursuit of reimbursement and/or economic contribution claims through tracing. Grandparent and third party conservatorship claims. Interstate and international compacts.

LECTURER & AUTHOR

Motions in Limine – SBOT Family Law Boot Camp – 2005
New Grievance Procedures – Smith County Bar Assoc. - 2004
When Disaster Strikes – SBOT Advanced Family Law 2003
Recent Cases and Legislation, Smith County Bar Assoc., Family Law Section – 2002, 2003
Current Issues in Family Law – TAALP - 2003
Texas Private Schools: Family Law Issues and School Responsibility - 2002
Economic Contribution – Smith County Bar Assoc. - 2002
Economic Contribution – Texas Panhandle Family Law Assoc. - 2002
Modification of Custody – State Bar of Texas – Pro Bono Project - 2001
The New Discovery Rules – Smith County Bar Assoc. - 1998
ATLA Family Law Section Newsletter - Contributor

PROFESSIONAL ASSOCIATIONS

Texas Academy Family Law Specialists
Texas Pattern Jury Charge – Family 2001- current
SBOT – Family Law Practice Manual Committee – 2006 - current
Grievance Committee – District 2A 2003 - current
Unauthorized Practice of Law Committee – Texas Supreme Court – 2001 - current
Smith County Bar Association – President 2005-2006; Vice President 2004-2005; Secretary 2002-2003; Director 2001-2002

EDUCATION & ACCOLADES

South Texas College of Law – J.D.
University of Mississippi – B.B.A.
Smith County Bar Association – Young Lawyer of the Year – 2004
Bscene Magazine – Best Family Law Lawyer in East Texas, Fall 2006

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POST JUDGMENT ISSUES

I. INTRODUCTION

Your first deep cleansing breath during trial may well come only after you sit down from your closing argument. And as soon as you let it out, you should take another deep breath, because now begins all those rarely dealt with, but integral, deadlines that may make or break any appeal.

This paper will cover what you need to do after the close of evidence through the entry of a judgment, and how to get the judgment you want.

This paper will not cover what to do for an appeal nor will it cover how to perfect an appeal, although there is significant discussion regarding appellate review issues which are important considerations within each motion.

I would like to thank Tom Ausley for providing me the opportunity to prepare this paper and presentation.

II. ONE JUDGMENT

It is easy to look at a signed order and say, this is what we need to appeal or modify. It is not so easy in determining when the ruling, either by the judge or the jury, reaches the point at which it becomes final. Additionally, it is important to know that there are significant avenues that can occur to ‘reshape’ that ruling. The finality of the order is a threshold issue for not only appeals, but also in determining many post-trial deadlines.

A. Interlocutory vs. Appealable

The date the final judgment is signed controls most post judgment trial and appellate deadlines, with the exception being the filing of findings of fact and conclusions of law. *See infra*.

To become final, a judgment must dispose of all issues and parties in the case. *Lehmann v. Car-Con Corp.* 39 S.W.3d 191 (Tex. 2001). Following a conventional trial on the merits, a presumption arises that the judgment is final. *North East Independent School Dist. v. Aldridge*, 400 S.W.2d 893 (Tex. 1966). This presumption does not arise when a case is disposed of by means other than a trial on the merits at which time you look to the language of the judgment or to the record to determine finality. *Lehmann*, 39 S.W.3d at 194. A judgment that denies all relief not specifically granted is final and can be

appealed. The final judgment must be in writing and it must be signed. *Grant v. American National Insurance Co.*, 808 S.W.2d 181 (Tex. Civ. App. -Houston [14th Dist.] 1991, no writ). A final judgment cannot consist of a series of orders.

TEX. R. CIV. P. 301 requires that there be “[O]nly one final judgment ... in any cause except where it is specially provided by law.” There are a very few proceedings in which multiple final judgments can be rendered. Examples of exceptions would include (1) a judgment to determine heirship. *See* PROB. CODE §54; *In re Estate of Loveless*, 64 S.W.3d 564, 570 (Tex. App. - Texarkana 2001, no pet. hist); (2) an order sealing court records. *See* TEX. R. CIV. P. 76a; *Chandler v. Hyundai Motor Co.*, 829 S.W.2d 774, 775 (Tex. 1992); (3) An order on a TEX. R. CIV. P. 12 motion challenging the capacity of a client to hire an attorney to defend against an heirship proceeding; *Logan v. McDaniel*, 21 S.W.3d 683,688 (Tex. App. - Austin 2000, pet denied); (4) an order allowing a guardian to file for divorce on the ward’s behalf in a guardianship proceeding. *Stubbs v. Ortega*, 977 S.W.2d 718,721 (Tex. App. -Fort Worth 1998, pet denied).

The practical effect of limiting the number of judgments to one per case is that it limits the number of appeals to one per case.

There are occasion when corrections are made to a judgment not by substituting a totally reformed judgment, but by the mere correction of a page or two and reference to a previously signed judgment. Such is highly improper but done regularly – either in acquiescence to the content or by mistake.

The biggest concern when an appealing party must to obtain a judgment or correct a judgment is that your actions might be deemed acquiescence in the judgment. Such is a concern because if one acquiesces in the judgment, it could be argued that since they agreed with the judgment an appeal should be foreclosed to that party. An appealing party cannot treat a judgment as right and as wrong.

In the Texas Supreme Court case of *First National Bank v. Fojtik*, 775 S.W.2d 632 (Tex. 1989), the Court approved of a mechanism for having judgment entered without waiving the right to appeal.

In the trial court, Fojtik filed a motion for judgment which stated:

While Plaintiffs disagree with the findings of the jury and feel there is a fatal defect, which will support a new trial, in the event the Court is not inclined to grant a new trial prior to the entry of judgment, Plaintiffs pray the Court enter the following judgment. Plaintiffs agree only as to the form of the judgment but disagree and should not be construed as concurring with the content and result.

The Texas Supreme Court stated “There must be a method by which a party who desires to initiate the appellate process may move the trial court to render judgment without being bound by its terms. Fojtik’s reservation of the right to complain in the instant case was an appropriate exercise of such a right and is distinguishable from the attempted reservation in *Litton Industrial Products, Inc. v. Gammage*, 668 S.W.2d 319, 322 (Tex.1984).” *Fojtik*, 775 S.W.2d at 642.

If one wants to get an appeal underway, but no judgment has been entered, or there is a problem with the judgment as entered, the Fojtik language reserving the right to complain should be used. In addition, one should never agree to a judgment as to substance - that is acquiescence in the judgment. If you must sign the judgment, sign as to form only. In addition, it does not hurt to note under your signature that you are reserving all rights to appeal.

B. Reminder - Post Trial Attorney Fees

A practical tip that really didn’t fit elsewhere within the paper is to remember to testify as to attorney fees and cost necessary to take the case from judgment to the written order but before an appeal. Depending on your judge or your opposing counsel, the post trial motions, as evidenced by this paper, can be voluminous, tedious and lengthy. Just because the jury signs the charge and is excused does not mean your time on the case is over. Taking the verdict and making it into useful form for your clients requires substantial time – especially if your case was contested enough to go to trial. The final document wording will likewise be contested.

Include within your trial testimony for attorney fees the estimated time to respond to a motion for new trial or to file a motion for entry of judgment. Include the cost of the transcript of the judges ruling, especially if property valuation and characterization is involved. Differentiate

this time from any time necessary for appellate work.

Look to the Pattern Jury Charge, Chapter 215 for language within the attorney fee questions that specifically references post verdict time.

III. BILL OF EXCEPTIONS / OFFER OF PROOF

Although you would ideally do the proffer of evidence or offer of proof before the jury begins deliberation, candidly most attorneys view it as an end of trial clean up for appeal. But recall that in addition to making an appellate record, the idea is for the judge to reconsider his ruling of keeping the evidence out.

A. Offers of Proof

Long ago and far away former TRAP 52(b) specifically discussed making an offer of proof when evidence is excluded at trial. The requirement to make an offer of proof when evidence has been excluded is now set out only in TEX R. EVID. 103(b).

B. Formal Bills of Exception

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

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In a case tried without a jury (or partially tried to the trial court) the findings of fact made by the trial court will take the place of jury questions. The findings will serve as the factual basis for the trial court’s judgment. One noted difference - a jury answers the questions presented in the charge and a judgment is fashioned with those jury findings as a basis. When trial is to the bench, the judgment is signed and then findings which form the basis for that judgment are requested. The only findings which, theoretically, precede the judgment are those requested pursuant to certain sections of the

Texas Family Code. *See* TEX. FAM. CODE §§ 153.258, 154.130,

A. Timeline of the Request and Findings

Your deadline depends upon what type of findings and conclusions you are requesting. Be careful and read the below in its entirety.

1. Initial Deadline

The initial request must be entitled "Request for Findings of Fact and Conclusions of Law" and be filed within twenty days after the judgment is signed. But be careful, the deadline is only 10 days of the hearing for a variance from the standard possession schedule and child support issues. *See infra*. But if you are seeking property division issues, your deadline is the twenty days under both the TEX. FAM. CODE 6.711 and TEX. R. CIV. P. 296.

2. Amended Findings

After the trial court files its original findings of fact, any party may file with the clerk of the court a request for specified additional or amended findings of fact and conclusions of law. TEX. R. CIV. P. 298. The request should be filed within ten days after the court filings are signed, and the court should file any additional or amended findings that are appropriate within ten days of the request. *Id.* All parties must be served with each request.

Rule 298 requires that the amended and additional findings be specified; thus, a list of additional or amended findings the party wishes to be made should be presented to the trial court. *See Wagner v. Riske*, 178 S.W. 117, 119-120 (Tex. 1944); *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 838 (Tex. App.-Texarkana 1996, writ denied); *Alvarez v. Espinoza*, 844 S.W.2d 228, 241 (Tex. App.-San Antonio 1992, writ dismissed w.o.j.).

The court's failure to make any additional findings or conclusions will not result in any findings or conclusions to be deemed or presumed. Rule 298 requires the trial court to make additional findings and conclusions only if they relate to ultimate or controlling issues. *Grossnickle*, 935 S.W.2d at 838.

When making requests for amended and additional findings of fact and conclusions of law, it is sometimes necessary to make requests that seem adverse to your client's interest; that is, findings that are in support of the judgment to be

appealed. The trial court should be given that opportunity to make such adverse findings because once requested and not made, such cannot be deemed or implied. *Fanning v. Fanning*, 828 S.W.2d 135 (Tex. App.-Waco 1992), *aff'd in part, rev'd in part*, 846 S.W.2d 225 (Tex. 1993). If one is put in the position of requesting findings adverse to the client's interest, but necessary so that such may be challenged on appeal, one should make known to the trial court that such findings are necessary to the appeal, but that the party does not agree with or acquiesce in the findings.

3. Reminder for Past Due Findings

After a timely request is made, the trial court must file the findings of fact and conclusions of law within twenty days and send a copy to each party in the suit.

Generally, the trial court's duty to file findings of fact and conclusions of law after a bench trial is mandatory. *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989); *In re Marriage of Edwards*, 79 S.W.3d 88, 95 (Tex. App.-Texarkana 2002, no pet.). If the court does not file timely findings, the requesting party must, within thirty days after filing the original request, file and serve on all parties a "Notice of Past Due Findings of Fact and Conclusions of Law." This second notice must state the date of the original request and the date the findings were due. After the second notice, the court has forty days from the date of the original notice to file the findings. TEX. R. CIV. P. 297.

A failure to file a notice of past due findings of fact waives the right to complain about the trial court's failure to file findings. *Curtis v. Comm'n for Lawyer Discipline*, 20 S.W.3d 227, 232 (Tex. App.-Houston [14th Dist.] 2000, no pet.). If a proper request is filed and the court fails to comply, harm to the complaining party is presumed unless the contrary is on the face of the record. *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996).

When neither a request for findings nor a notice of past due finding are filed, the reviewing court must imply all necessary fact findings in support of the trial court's judgment. *Black v. Dallas County Child Welfare Unit*, 835 S.W.2d 626, 630 (Tex.1992). Error is harmful if the failure to file findings prevents an appellant from properly presenting a case on appeal. *Tenery*, 932

S.W.2d at 30; *In re Marriage of Edwards*, 79 S.W.3d at 95.

B. Child Related Issues

1. Child Support

Family Code § 154.130 requires the court to file findings of fact, when properly requested, without regard to Rule 296 – 299, regarding the amount of child support and its variance from guidelines. The party must file a written request with the court no later than ten days after the date of the hearing; or, the party can make an oral request in open court during the hearing. TEX. FAM. CODE § 154.130; *Evans v. Evans*, 14 S.W.3d 343, 347 (Tex. App.-Houston [14th Dist.] 2000, no pet.).

Realize that these deadlines might occur not only before a judgment is signed, but also even before a trial court even renders a decision. The deadlines are meant to accommodate the requirement that such findings be recited in the child support order or final judgment. Thus, the safest route - if findings are wanted, is to, as a matter of course, make a request during any hearing on the issue of child support.

The court should also issue findings if the amount of child support ordered by the court varies from the amount computed by applying the percentage guidelines. *Tenery v. Tenery*, 339 S.W.2d 29, 30 (Tex. 1996). Such variance automatically triggers the trial court's obligation to make findings.

If findings are properly requested, the trial court's failure to make written findings upon request is reversible error. *Id.* If no request for findings is made, or if the request is filed late, the request is untimely and findings are not required. *Deltuva v. Deltuva*, 113 S.W.3d 882, 886 (Tex. App.-Dallas 2003, no pet.)

If findings are required, the court must state whether the application of the child support guidelines would be inappropriate, and must state in the child support order:

(1) the monthly net resources of the obligor and obligee,

(2) the percentage applied to the obligor's net resources for child support by the actual order rendered by the court,

(3) the amount of child support if the percentage guidelines are applied to the first \$6,000 of the obligor's net resources,

(4) the specific reason the amount of child support per month ordered by the court varies from the amount in (3).

The findings should also include if the obligor is obligated to support children in more than one household; how many children are before the court, the number of children not before the court residing in the same household with the obligor; and how many children the obligor is ordered by the court to pay support, and whether or not the obligor is behind in the child support who are otherwise not included.

Findings regarding child support are not required in cases that maintain a previous child support order. Numerous appellate courts have held that the statutory requirement of findings in a contested child support case is not extended to orders denying a motion to modify child support and effectively ordering continued payment of child support set in original order. *MacCallum v. MacCallum*, 801 S.W.2d 579 (Tex. App.-Corpus Christi 1990, writ denied); *In re D.S.*, 76 S.W.3d 512 (Tex. App.-Houston [14th Dist.] 2002, no writ).

Likewise, findings are not required if the parties have agreed to a support amount which deviates from the guidelines. *McLendon v. McLendon*, 847 S.W.2d 601 (Tex. App.-Dallas 1992, writ denied).

The case must be contested. It has been held that child support was not contested and husband was not entitled to findings of fact on the issue, where husband did not answer wife's divorce petition, did not appear at default hearing to make oral request for findings, and did not request findings of fact until he filed motion for new trial. *Harmon v. Harmon*, 879 S.W.2d 213 (Tex. App.-Houston [14th Dist.] 1994, writ denied).

Finally it should be noted that Texas Family Code section 154.131 provides that an order under that section of the code, which limits the amount of retroactive support, does not constitute a variance from the guidelines requiring the court to make specific findings under section 154.130

2. Custody Items

The Family Code provides guidelines for trial judges when determining the periods of possession for a possessory conservator; it also provides the presumptive minimum amount of time for possession of a child by a joint managing conservator who is not awarded the

exclusive right to designate the primary residence of the child. TEX. FAM. CODE § 153.251. This minimum of possession is known as a standard possession order. TEX. FAM. CODE §§ 153.311-153.317. In a contested possession case, a deviation from the standard possession order can require that findings be made by the trial court.

Specifically, section 153.258 provides that without regard to Rules 296 - 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, on written request made or filed with the court not later than 10 days after the date of the hearing or on oral request made in open court during the hearing, the court shall state in the order the specific reasons for the variance from the standard order."

The statute requires specific findings in unique situation such as 'special needs of the child; *Voros v. Turnage*, 856 S.W.2d 759 (Tex. App.-Houston [1st Dist.] 1992, writ denied); or restrictive access due to a parent's actions; *In re Walters*, 39 S.W.3d 280 (Tex. App.-Texarkana 2001, no writ); or variable work schedules; *In re T.J.S.*, 71 S.W.3d 452 (Tex. App.-Waco 2002, pet. denied).

C. Divorce - Property

Texas Family Code § 6.711 provides that in a suit for dissolution of a marriage in which the court has rendered a judgment dividing the estate of the parties, on request by a party, the court shall state in writing its findings of fact and conclusions of law concerning: (1) the characterization of each party's assets, liabilities, claims, and offsets on which disputed evidence has been presented; and (2) the value or amount of the community estate's assets, liabilities, claims, and offsets on which disputed evidence has been presented.

These findings are mandatory only when the value and or character of property or liabilities are in dispute. *In re Marriage of Perkins*, 2004 WL 112598 (Tex. App.-Amarillo 2004, no pet.) (unpublished).

It has been held that a trial court's erroneous failure to comply with husband's request to file findings of fact and conclusions of law in divorce action required court of appeals to abate husband's appeal for entry of proper findings and conclusions; thus, trial court would be directed to enter findings and conclusions regarding items of

disputed property because such would affect husband's appellate challenge to division of community estate. *Panchal v. Panchal*, 2003 WL 21543757 (Tex. App.-Eastland 2003, no pet.) (unpublished).

In contrast to the Family Code findings regarding child support and possession, a request for findings of fact and conclusions of law under this section, regarding property values, must conform to the Texas Rules of Civil Procedure. That is, the time limits established by the rules controls, either for time limits for the filing of a notice of past due findings, for requesting amended or additional findings of fact.

D. Deemed Findings

Findings made by the trial court are the basis of the judgment for all grounds of recovery. A judgment will not stand on appeal with a presumed finding on any ground or recovery or defense which is not an element included in the findings. Rule 299.

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 re de la Pena*, 999 S. W.2d 521, 536 (Tex. App.- El Paso 1999, no pet.).

If findings are not requested or filed, findings necessary to support the judgment of trial court will be implied, or deemed, provided the missing element was raised by the pleadings and supported by the evidence; and, the trial court's decision can be sustained on any reasonable theory consistent with the evidence and applicable law, considering evidence favoring the decision. *Roberson v. Roberson*, 768 S.W.2d 280, 281 (Tex. 1989); *In re T.J.S.*, 71 S.W.3d 452, 459 (Tex. App.-Waco 2002, pet. denied); *Garcia v. Garza*, 5 S.W.3d 241, 252 (Tex. App.-Houston [14th Dist.] 1999, pet. denied). *Cf. Boy Scouts v. Responsive Terminal Sys.*, 790 S.W.2d 738, 742 (Tex. App. -Dallas 1990, writ denied) (holding Rule 299 allows deemed findings only as to unrequested elements and a court that does not make a requested finding is essentially a refusal to do so.)

Thus, it is the request for additional or amended findings of fact and conclusions of law that precludes findings to be presumed or deemed on appeal. Therefore, in order to avoid findings

being deemed, a proper original and additional request must be made to the trial court.

E. Challenge to Findings

Nowhere in the rules which govern findings of fact and conclusions of law is there a requirement that objections be lodged against findings with which the Appellant does not agree. However, a unpublished case does suggest such. *Piro v. Sarofim*, 2002 WL 538741 (Tex. App.-Houston [1st Dist.] 2002, pet. denied) (unpublished); *see also Piro v. Sarofim*, 80 S.W.3d 717 (Tex. App.-Houston [1st Dist.] 2002 (pet. denied) (court publishes portion of previously unpublished opinion on second issue at request of nonparty, the Honorable Harvey Brown, without withdrawing unpublished opinion).

F. If Findings Are Not Completed

If findings of fact and conclusions of law are properly requested, the trial court has a mandatory duty to file findings and conclusions. *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex.1989). If a trial court does not file findings of fact and conclusions of law, the reviewing court must determine whether the complaining party has been harmed. *Id.*; *see also* TEX R. APP. P. 44.1. The trial court's failure to comply with a proper request to prepare and file findings and conclusions is presumed harmful, unless the record affirmatively shows that the complaining party suffered no injury. *Id.*; *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996).

The general rule is that an appellant has been harmed if he has to guess at the reason the trial court ruled against him. *Smith v. Weber*, 110 S.W.3d 611, 614 (Tex. App.-Dallas 2003, pet. denied). An appellant is harmed if there are two or more possible grounds on which the court could have ruled and the appellant is left to guess the basis for the trial court's ruling. *Zieba v. Martin*, 928 S.W.2d 782, (Tex. App. -Houston [14th Dist.] 1996, writ denied); *Goggins v. Leo*, 849 S.W.2d 373,379 (Tex. App.-Houston [14th Dist.] 1993, no writ). Thus, if there is only a single ground of recovery or defense, there is no need to guess and error may be harmless.

If the error is curable, the proper remedy is to abate the appeal and direct the trial court to correct its error. *Cherne Indus.*, 763 S.W.2d at 773; *In re M.W.*, 959 S.W.2d 661, 664 (Tex. App.-Tyler 1997, writ denied). Oral findings

made in the record are not sufficient or substitutes for written findings. *In re W.E.R.*, 669 S.W.2d 716 (Tex. 1984). *But see Sagemont Plaza Shopping ex rel. O'Connor & Assocs., Inc. v. Harris County Appraisal Dist.*, 30 S.W.3d 425, 427 (Tex. App.-Corpus Christi 2000, pet. denied) (holding that a ruling made in open court was harmless error as parties were apprised of reason for ruling).

Likewise, findings recited in the judgment do not constitute findings pursuant to Rules 297 & 298. *See Sutherland v. Cobern*, 843 S.W.2d 127, 131 n.7 (Tex. App.-Texarkana 1992, writ denied). Findings of fact are required to be filed with the court clerk as a separate document from the judgment. TEX. R. CIV. P. 299a.

If the trial court errs by not filing findings, and no harm is found, the appellate court will affirm. *Elliot v. Kraft Foods N. America, Inc.*, 118 S.W.3d 50, 54 (Tex. App.-Houston [1st Dist.] 2003, no pet.); TEX R. APP. P. 44.1(a). Error is only harmful if the lack of findings prevents a party from properly presenting their case on appeal. TEX R. APP. P. 44.1(a)(2); *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996).

If the error is not curable the remedy is to reverse and remand the case for a new trial. *Tenery*, 932 S.W.2d at 30; *Smith v. Weber*, 110 S.W.3d 611, 616 (Tex. App.-Dallas 2003, pet. denied).

Legal conclusions of the trial court are not binding on an appellate court. *Pegasus Energy Group v. Cheyenne Pet. Co.*, 3 S.W.3d 112, 121 (Tex. App.-Corpus Christi 1999, no pet.). Review of conclusions of law is de novo. *Hydrocarbon Mgmt. v. Tracker Expl.*, 861 S.W.2d 427, 431 (Tex. App.-Amarillo 1993, no writ).

In sum, if findings of fact and conclusions of law are not filed after a proper request: (1) if the error is curable, the appellate court may abate the appeal and remand the case to the trial court to make appropriate findings; (2) if the error is not curable, the appellate court will reverse and remand; and (3) if the error is harmless, the appellate court will affirm. Keep in mind, however, that even with a finding of harm for failure to file findings of fact and conclusions of law, reversal is not mandated; the appellate court may choose to abate the appeal if the court feels the error can be cured.

Finally, it is important to note that even though findings of fact and conclusions of law have not been requested; and, as a result, all

findings will be implied in favor of the judgment, these implied findings may still be challenged by factual and legal sufficiency. *Roberson v. Roberson*, 768 S.W.2d 280, 281 (Tex. 1989). If confronted with this situation, the appealing party should determine what all the implied findings may be and then challenge them.

V. MOTION FOR DIRECTED VERDICT

The motion may be made at the end of plaintiff's case or at the close of all evidence. TEX. R. CIV. P. 268. A party, usually respondent, is entitled to a directed verdict when reasonable minds could reach only one conclusion under the available evidence. *Vance v. My Apartment Steak House*, 677 S.W.2d 480, 483 (Tex.1984).

A directed verdict is proper when:

(1) a defect in the pleading makes it insufficient to support a judgment; or

(2) certain fact propositions are true which, under the substantive law, entitle a party to judgment as a matter of law; or

(3) the evidence is insufficient to raise a fact issue that must be established for the opponent to be entitled to judgment; or

(4) the substantive law bars the plaintiff's recovery on its cause of action or prevents the defendant from asserting its defense.

Southwestern Bell v. Delanney, 809 S.W.2d 493, 494-95 (Tex. 1991); *City of San Benito v. Cantu*, 831 S.W.2d 416, 422 (Tex. App.--Corpus Christi 1992, no writ.).

The motion for directed verdict must state specific grounds therefor. TEX. R. CIV. P. 268. However, failure to state specific grounds is not always fatal, especially if there are no fact issues raised by the evidence. *Texas Ins. Ass 'n v. Page*, 553 S.W.2d 98, 102 (Tex. 1977). Although the better practice is to file a written motion, a formal writing is not required. *Castillo v. Euresti*, 579 S.W.2d 581 (Tex. Civ. App.--Corpus Christi 1979, no writ).

Your motion for directed verdict must be presented to the court and ruling obtained before the jury returns a verdict. *Cantu*, 831 S.W.2d at 422. There is no reason not to have the overruling of the motion be in writing. See *City of Alamo v. Casas*, 960 S.W.2d 240,247 (Tex. App.--Corpus Christi 1997, pet. denied and dism'd by agr). This is due in part that an appellate affirmation is only available on the grounds provided within your motion and order. *Kassen v. Hatley*, 887 S.W.2d 4, 12 (Tex. 1994).

Rule 33.1 now provides that no signed, separate order is required to preserve a complaint for appeal, TEX. R APP. P. 33.1, so presumably, the formal written order requirement no longer exists. However, in *City of Alamo v. Casas*, 960 S.W.2d 240, 247 (Tex. App.--Corpus Christi 1997, pet. denied and dism'd by agr.), which was decided after the effective date of Rule 33.1, the Corpus Christi Court of Appeals required a denial of a motion for directed verdict to be in writing (although a less formal handwritten notation was held to be sufficient to satisfy the requirement).

Failure to present a formal order or judgment denying your motion for directed verdict often will not matter, however, because no-evidence points can also be raised by a motion for judgment notwithstanding the verdict, an objection to the submission of the issue to the jury, a motion to disregard the jury's answer to a vital fact issue, or a motion for new trial. *Cecil v. Smith*, 804 S.W.2d 509, 511 (Tex. 1991); see also *Thedford v. Missouri Pacific R. Co.*, 929 S.W.2d 39, 50 (Tex. App.--Corpus Christi 1996, writ denied).

Appellate review of a directed verdict is similar to appellate review of legal sufficiency challenges because in both the reviewing court considers only the evidence and inferences that, viewed in their most favorable light, tend to support the judgment and disregards all contrary inferences. *S.V. vs. R.V.*, 933 S.W.2d 1, 8 (Tex. 1996) (directed verdict); *Szczepanik v. First Southern Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994) (directed verdict); *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989) (legal sufficiency); *Henderson v. Travelers Ins. Co.*, 544 S.W.2d 649, 650 (Tex. 1976) (directed verdict).

However, in directed verdict cases, in contrast to legal sufficiency cases, the appellate court typically does not examine the entire record to determine whether there is some evidence contained therein to support the verdict. Rather, because the appellate court determines whether there is any evidence of probative force to raise a fact issue. *McDonald v. State*, 936 S.W.2d 734, 736 (Tex. App.--Waco 1997, no pet.) (citing *Szczepanik*, 883 S.W.2d at 649).

VI. MOTION FOR MISTRIAL

If, before trial is completed and judgment rendered, a trial court concludes there is some error or irregularity that prevents proper judgment being rendered, the court may declare a mistrial. *Cortimeglia v. Herron*, 281 S.W.2d 305 (Tex. Civ. App.--Waco 1925, writ refd).

The most common circumstance calling for a motion for mistrial occurs when the jury is allowed to hear evidence that the court has already ruled is inadmissible.

To preserve error after inadmissible evidence is allowed before the jury, a party must sequentially pursue an adverse ruling from the trial court by:

- (1) objecting to the complained-of-evidence;
- (2) moving the court to strike the evidence from the record;
- (3) requesting the court to instruct the jury to disregard the evidence; and
- (4) moving for a mistrial.

One Call Systems, Inc. v. Houston Lighting & Power, 936 S.W.2d 673, 677 (Tex. App.--Houston [14th Dist.] 1996, writ denied).

Failure to give the trial court an opportunity to cure the error will result in a waiver of the right to complain. *Till v. Thomas*, 10 S.W.2d 730, 734 (Tex. App.--Houston [1st Dist.] 1999, no pet.) (finding waiver); *Cook v. Sabia Oil & Gas, Inc.*, 972 S.W.2d 106, 112 (Tex. App.--Waco 1998, pet. denied) (finding waiver); *Fort Worth Hotel Ltd. Partnership v. Enserch Corp.*, 977 S.W.2d 746 (Tex. App.--Fort Worth 1998, no pet.) (finding no waiver).

A mistrial ruling has the same effect as the granting of a new trial, *Songer v. Clement*, 20 S.W.3d 188, 193 (Tex. App.--Texarkana 2000, no pet.), except that a motion for mistrial is decided before judgment, and a motion for new trial is effective only from date of judgment. *Cortimeglia v. Herron*, 281 S.W.2d 305 (Tex. Civ. App.--Waco 1925, writ ref d).

An order granting a mistrial is not appealable making mandamus the proper remedy. *Galvan v. Downey*, 933 S.W.2d316, 322 (Tex. App.--Houston [14th Dist.] 1996, writ denied) (citing *Rod Ric Corp. v. Earney*, 651 S.W.2d 407, 408 (Tex. App.--EI Paso 1983, no writ).

If the judge denies a motion for mistrial, the appellate court will not be disturb it except upon a showing of an abuse of discretion. *Van Allen v. Blackledge*, 35 S.W.3d 63 (Tex. App.--Houston [14th Dist.] 2000, pet. denied), after it considers

applies a harmless error analysis. *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 452 (Tex. 1997); TEX R. APP. P. 81(b)(1).

VII. MOTION FOR JUDGMENT NOT WITHSTANDING THE VERICT (JNOV)

A motion for judgment notwithstanding the verdict (JNOV) and a motion to disregard jury findings (motion to disregard) are governed by rule 301. Unlike a motion to disregard, which asks the court to disregard a jury finding on a question that had no support in the evidence, a JNOV asks the court to render a judgment contrary to the jury's answers. *See* Tex. R. Civ. P 301.

A trial court cannot disregard jury findings on its own; a party must file a written motion. *Rush v. Barrios*, 56 S.W.3d 88, 93 (Tex. App.-Houston [14th Dist.] 2001, pet. denied); *Lamb v. Franklin*, 976 S.W.2d 339, 343 (Tex. App.-Amarillo 1998, no pet.). Once the trial court disregards the findings, a judgment must be entered on the remaining verdict.

There are three necessary elements which must be included in a motion to disregard findings. The motion must: 1) designate the finding and/or findings which the court is called upon to disregard; 2) specify the reason why the finding or findings should be disregarded; 3) contain a request that judgment be entered upon the remaining findings after the specific findings have been set aside or disregarded. *Dupree v. Piggly Wiggly Shop Rite Foods*, 542 S.W.2d 882, 892 (Tex. App.-Corpus Christi 1976, writ ref d n.r.e.).

A trial court may grant a JNOV if there is no evidence to support one or more of the jury findings on issues necessary to liability. *Brown v. Bank of Galveston, Nat'l Ass'n*, 963 S.W.2d 511, 513 (Tex. 1998); *Rush*, 56 S.W.3d at 94. A motion to disregard jury findings and for judgment notwithstanding the verdict should be granted when the evidence is conclusive, and one party is entitled to recover as a matter of law, or when a legal principle precludes recovery. *Anthony Equip. Corp. v. Irwin Steel Erectors, Inc.*, 115 S.W.3d 191, 205 (Tex. App.-Dallas 2003, no pet.); *John Masek Corp. v. Davis*, 848 S.W.2d 170, 173 (Tex. App.-Houston [1st Dist.] 1992, writ denied) (citing *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227 (Tex. 1990).

A trial court may disregard a jury's answer and render a judgment notwithstanding the

verdict only if a directed or instructed verdict would have been appropriate. *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 394 (Tex. 1991); *City of Lubbock v. Corbin*, 942 S.W.2d 14, 19 (Tex. App.-Amarillo 1996, writ denied); TEX. R. CIV. P. 301.

The JNOV is reviewed upon a legal sufficiency test; that is, no evidence must be available to support the judgment. If any of the evidence raises a question of fact, the motion for JNOV must be denied. *Edgington v. Maddison*, 870 S.W.2d 187, 189 (Tex. App.-Houston [14th Dist.] 1994, no writ). If more than a mere scintilla of evidence supports the jury verdict, the judgment must be entered upon that jury verdict. *Cathey v. Meyer*, 115 S.W.3d 644, 662 (Tex. App.-Waco 2003, pet. filed). A motion for JNOV will not preserve a complaint off actual insufficiency. *Moser v. Davis*, 79 S.W.3d 162, 169-70 (Tex. App.-Amarillo 2002, no pet.).

The only time limitation for filing a motion JNOV is upon reasonable notice, but it would be prudent to file for JNOV as soon as practical after the jury verdict and ask for the court to sign the motion. TEX. R. CIV. P. 301. Some courts have held that, in order to preserve error, the JNOV must be overruled within the same 75 day time frame as for a ruling on a motion for new trial; other courts hold the deadline is before the judgment becomes final. For a motion for JNOV to extend the appellate deadlines and the court's plenary power, the motion for JNOV must be filed within the same deadlines as a motion for new trial, i.e., 30 days from the date the court signed the judgment. *See Gomez v. Texas Dep't of Criminal Justice*, 896 S. W.2d 176, 176-77 (Tex.1995); *Estate of Davis v. Cook*, 9 S.W.3d 288, 295-296 (Tex. App.-San Antonio 1999, no pet.).

Seeking a JNOV will sometimes make the difference between a reverse and remand and a reverse and render. A render can be obtained only if that relief was sought at the trial court level. A motion to amend, modify, or reform judgment may also support a render. The substance of the motion will control, not the title. *Ferguson v. Naylor*, 860 S.W.2d 123, 129 (Tex. App.-Amarillo 1993, writ denied). Thus, it is important to ask for the appropriate relief in the appropriate motion; the trial court cannot grant relief that is not requested.

VIII. MOTION FOR JUDGMENT OR MOTION FOR ENTRY OF JUDGMENT (MEJ)

Nowhere within the Texas Rules of Civil Procedure is this very common and useful motion mentioned. You are essentially requesting the court to sign your draft judgment as your understanding of the ruling of the court or jury. Because there is no specific rule of procedure concerning it, there is no need for a hearing. This lack of hearing lends itself to be a useful tool – both in its request as well as defense.

The losing party may request the court to render judgment on the verdict without losing the right to challenge the judgment on appeal by stating within the motion that the party disagrees with the findings of the jury or judge and feels there is a fatal defect which will support a new trial. *First Nat'l Bank v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989). The losing party may still agree to the form of judgment only. *Id.*

A party who asks the trial court to accept a settlement agreement and to enter judgment cannot not later attack that judgment. *Mailhotv. Mailhot*, 124 S.W.3d 775,777 (Tex. App.-Houston [1st Dist.] 2003, no pet.). The reservation of the right to appeal must be contained in the motion for judgment; a reservation contained in some other motion will not preserve error. *Fojtik*, 775 S.W.2d at 633. Although rare in family law cases, if the court is rendering judgment on only part of the suit, you must either nonsuit, dismiss, or sever the remaining claims so you will have a final judgment.

A response to the motion for judgment is not necessary; however, if a party requests improper relief, the opposing party should object. *See Wal-Mart Stores v. McKenzie*, 997 SW.2d 278, 280 (Tex. 1999). The motion for judgment preserves error when the trial court renders judgment for the movant but for less than the verdict. *See Emerson v. Tunnell*, 793 S.W.2d 947, 947-48 (Tex. 1990); *Elliott v. Kraft Foods N. Am., Inc.*, 118 S.W.3d 50, 55 (Tex. App.-Houston [14th Dist.] 2003, no pet.).

The motion is impliedly denied if the trial court enters a judgment different from the one proposed by the motion. *See Salinas v. Rafati*, 948 S.W.2d 286, 288 (Tex. 1997); *Karen Corp. v. The Burlington N and Santa Fe Ry. Co.*, 107 S.W.3d 118, 125 (Tex. App.-Fort Worth 2003, pet. denied).

In response to a requested MEJ hearing and drafted order, a quickly prepared chart makes the court's job much easier to decide for your requested relief. The left column of the chart should identify the page on which the change is needed, the next column should identify the specific language that is in error, the next column should identify the language you wish to be utilized within the order and the far right hand column should contain the basis for the requested change.

This last column is part argument, part fact driven and should be succinct. Consider the last column is as a mixture of the future drafted findings of fact or conclusions of law. It will tell the judge the legal grounds and the factual basis for including the language that supports your theory of the judgment.

IX. MOTION FOR NEW TRIAL

The use of a motion for new trial in a nonjury 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.

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

A. Timing For Filing – TRCP 329(b)

The motion for new trial shall be filed within 30 days after the court signs judgment. 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 motion must list specific complaints in written points of error so that the trial court can clearly and easily understand the movant's objections. TEX R. CIV. P. 320-22; *see also Ramey v. Collagen*, 821 S.W.2d 208, 210-11 (Tex. App.-Houston [14th Dist.] 1991, writ denied). The appellate court will not consider a motion for new trial if the grounds of objections are not clear and specific; general objections will not be considered. TEX R. CIV. P. 322; *D/FW Commercial Roofing Co. v. Mehra*, 854S.W.2d 182, 189 (Tex. App.-Dallas 1993, no writ). The motion should refer to the ruling of the court, the charge, the evidence, or other proceedings complained of so the objection can be identified and understood by the court. TEX R. CIV. P. 321; *Marino v. Harifield*, 877 S.W.2d 508, 513 (Tex. App.-Beaumont 1994, writ denied).

Except as required by Rule 324(b), a point in a motion for new trial is not a prerequisite to complaining on appeal in a jury or nonjury case. TEX. R. CIV. P. 324(a); *Lee v. Braeburn Valley W. Civic Ass'n*, 786 S.W.2d 262, 263 (Tex. 1990). Rule 324(b) establishes when a motion for new trial is a prerequisite for appeal: (1) complaint on which evidence must be heard, like jury misconduct, newly discovered evidence, lack of consent to an agreed judgment, or failure to set aside a judgment by default; (2) a complaint of actual insufficiency of the evidence to support a jury finding, (3) that the jury finding is against the great weight and preponderance of the evidence; (4) complaint that jury's damages are inadequate or excessive; or (5) complaint of incurable jury argument not ruled upon by trial court. If these complaints are not included in the motion for new trial the issues will not be preserved for review. *See In re Robinson*, 16 S.W.3d 451, 453 (Tex. App.-Waco 2000, no pet.).

Rule 329(b) also sets out the time for filing motions, ruling on motions, the time at which the motion is overruled by operation of law, and the requisites, i.e., that it be in writing. As to preservation of error, a late filing of motion for new trial will not preserve error on appeal. *Equinox Enters, Inc. v. Associated Media*, 730 S.W.2d 872, 875 (Tex. App.-Dallas, no writ).

B. Plenary Power of Trial Court

The trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within 30 days after the judgment is

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

TRCP 329b 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, but how the judge perceives your post verdict motions may dictate the results. See generally *First Freedom National Bank v. Brazoswood National Bank*, 712 S.W.2d 168 (Tex. App. -- Houston [14th Dist] 1986, no writ) compared to *Brazos Electric Power Co-Op v. Callejo*, 734 S.W.2d 126 (Tex. App.--Dallas 1987, no writ).

Luckily the Texas Supreme Court in *L.M Healthcare, Inc., v. Childs*, 920 S.W.2d 286 (Tex. 1996) resolved the issue by determining that 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.

TRAP 26.1(a) allows for extension of the appellate timetable upon the filing of a motion for new trial, a motion to modify the judgment, a motion to reinstate under TRCP 165a or a request for findings of fact and conclusions of law.

C. 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 granting of a motion for new trial is within the total discretion of the trial court and may be set aside only in two circumstances: (1) the new trial was granted after the expiration of the trial court's plenary power; or (2) the motion for new trial was based upon a finding of conflict of jury issues where none existed. *Johnson v.*

Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985); *Stolhandske v. Stern*, 14 S.W.3d 810, 815-816 (Tex. App.-Houston [1 Dist.] 2000, pet. denied). It is a well-established rule that an appellate court will not review an action of the trial court granting a new trial while it still has jurisdiction of the cause. Rule 326 requires that not more than two new trials shall be granted either party in the same cause.

A motion for new trial filed more than thirty days after the trial court signs a formal judgment is untimely. See TEX. R. CIV. P. 306a(1); *Coinmach Inc. v. Aspenwood Apt. Corp.*, 98 S.W.3d 377, 379 (Tex. App.-Houston [1st Dist.] 2003, no pet.). The trial court's inherent power does not allow a trial court to enlarge the time for filing new trial motions. *A.F. Jones & Sons v. Republic Supply Co.*, 246 S.W.2d 853, 854 (Tex. 1952). A trial court's order overruling an untimely new trial motion cannot be the basis of appellate review, even if the trial court acts within its plenary power period. *Thomas v. Davis*, 553 S.W.2d 624, 626 (Tex. 1977). But, the trial court may, at its discretion, consider the grounds raised in an untimely motion and grant a new trial under its inherent authority before the court loses plenary power. *Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003); *Jackson v. Van Winkle*, 660 S.W.2d 807, 808 (Tex. 1983). If an original or amended motion for new trial is not determined by a signed, written order of the court within seventy-five days after the judgment was signed, it is overruled by operation of law. TEX. R. CIV. P. 329(c); *Coinmach*, 98 S.W.3d at 380. If a motion for new trial is overruled by a signed order or by operation of law, the trial court will retain plenary jurisdiction to grant a new trial for thirty days after the ruling. TEX. R. CIV. P. 329b(e).

X. MOTION FOR JUDGMENT NUNC PRO TUNC

If the typewriter did not quite work properly or the 'draft, review and edit' entry on your client's bill did not provide her with quite the value of services rendered, then a nunc pro tunc order is available.

The parties at almost any time are able to rectify a clerical error contained within an order of the court. This "clerical error" typically is the misspelling of a name or the transposition of the who gets which vehicle or the typographical error on the property description.

The nunc pro tunc correction is not designed nor is it proper for change of the asset or debt division, nor a change in terms of access or custody of the child, nor is the change appropriate for a change in child support.

XI. MOTION TO AMEND, MODIFY, CORRECT OR REFORM JUDGMENT

The motion to amend, modify or reform judgment is mentioned in Rule 329(b) and is similar to a motion for new trial as far as time for filings and rulings and the appellate timetable.

The motion to amend, modify, or reform judgment only seeks to change the judgment to conform with what the proponent perceives to be a proper judgment, but does not seek a complete new trial.

A common reason a motion is filed is when the prevailing party has not been awarded any or enough attorney's fees or if the judgment does not award costs. This preserves error for appeal and if successful on appeal, judgment can be rendered without the necessity of a new trial.

Other instances for filing a motion to modify are or if an order is presented that fails to include an integral ruling or issue before the court – such as the actual divorce language that dissolves the marriage relationship. If that this the case, although all parties agree it needs to be included, it is not a nunc pro tunc but requires the necessity of reforming or correcting the judgment because it, in actuality, adds a command or judicial determination within the order.

Affidavits are not required nor should the motion be verified unless it presents facts not supported by the record.

If a timely filed motion to modify or reform the judgment is signed by the trial court within its plenary power, the court may then set aside or further modify or reform the judgment within thirty days after signing, unless another motion is filed to extend the time period. *Bd of Trs. of Bastrop v. Towngate*, 958 S.W.2d 365, 367 (Tex. 1997); *Coinmach*, 98 S.W.3d at 381; TEX. R. CIV. P. 329b.

Although a change to the judgment made by the trial court while it retains plenary jurisdiction will restart the timetable for appeal under Rule 329b(h), only a motion seeking a substantive change will extend the deadlines for appeal and the trial court's plenary power under Rule 329b(g). *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 313 (Tex. 2000); *In*

re Gillespie, 124 S.W.3d 699, 702 (Tex. App.-Houston [14th Dist.] 2004, no pet.).

XII. CONCLUSION

As may be readily discernable upon review, the variables to consider when finishing a trial are almost as numerous as those facing you during a trial. Your trial notebook would be well updated to include draft motions and supporting case law for the many previous items that will need to be considered after the verdict is announced.

