

POST TRIAL MOTIONS

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POST TRIAL MOTIONS¹

I. INTRODUCTION

Even after a case has been tried and the evidence has been closed, in many cases, there remains substantial work to be done. This article will provide a survey of the various post trial motions that one may need or face in a family law case, including motions that are made after the conclusion of the evidence portion of a trial, after the jury renders a verdict, after a judgment is rendered but before it becomes final, and after final judgment. This article will not include anything on the enforcement of a final judgment, however, as such a discussion is beyond the scope of this presentation.

II. MOTIONS FOLLOWING A DEFAULT JUDGMENT

Three procedures are available to directly attack default judgments and thereby set aside the judgment. The effect of a default judgment also may be avoided by certain collateral attacks. Which method to use depends upon the date the respondent received notice of the default judgment, whether the respondent took any action upon finding out about the default judgment, and the reason for the failing to properly respond to the pending case in the first place.

A. Motion for New Trial

If a respondent discovers he has suffered a default judgment after the judgment has been signed, but before it becomes final, he may request that the court set aside the default and grant a motion for new trial. *See* Tex R. Civ. P. 320. A respondent who was not properly served with notice of the suit, trial, or hearing, or a respondent whose failure to appear, suffers a legal error. In such a circumstance, the trial court must grant the motion for new trial on legal grounds. Additionally, the trial court must grant the motion on equitable grounds, if the respondent can show (1) that the failure to answer was not intentional or the result of conscious indifference, but due to mistake or accident; (2) that respondent has a meritorious defense to petitioner's claim; and (3) that the petitioner will not be delayed or otherwise injured if the motion is granted. *See Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939).

A motion for new trial must be filed in the trial court that rendered the default judgment within 30 days after the judgment was signed. Tex. R. Civ. P. 329b(a). A motion for new trial must be in writing and signed by the party or his attorney. Tex. R. Civ. P. 320. *See Appendix, Forms A & B.* Furthermore, the motion should be specific, listing the complaints of what happened and why it was erroneous. Tex. R. Civ. P. 322. The deadline of thirty days to file is extended for a respondent who was served by publication, in which case the respondent has two years after the court signs the judgment to file a motion for new trial. Tex. R. Civ. P. 329(a).

As a motion for new trial is addressed to the trial court's discretion and will not be disturbed on appeal absent a showing of abuse of discretion, a motion for new trial is an optimal means for dealing with a default judgment. *Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex.1984).

B. Restricted Appeal

A respondent's second means for having a default judgment set aside is through filing a restricted appeal, formerly known as a writ of error, in the appellate court. Tex. R. App. P. 30. A restricted appeal may be filed within six months of the date of the judgment, but is available only to those respondents who did not participate in the trial. *Quaestor Invs. v. Chiapas*, 997 S.W.2d 226, 227 (Tex. 1999).

For the appellate court to review a judgment on restricted appeal the respondent must meet certain criteria. In addition to timely filing within six months after judgment, the respondent must have been an actual party to the suit or alternatively, a person whose privity of estate, title or interest is apparent from the record or a person who is a party under the doctrine of virtual representation. *Gunn v. Cavanaugh*, 391 S.W.2d 723, 725 (Tex. 1965). The requirement of non-participation in trial is satisfied so long as the respondent did not participate in a "decision-making event" that produced the final judgment. *Texaco, Inc. v. Central Power & Light Co.*, 925 S.W.2d 586, 588 (Tex. 1996). Merely filing an answer does not qualify as participation in trial. *Flores v. H.E. Butt Grocery Co.*, 802 S.W.2d 53, 55-57 (Tex. App. –Corpus Christi 1990, no writ). If a respondent has filed a post judgment motion, including request for finding of fact or notice of appeal, he has participated in a decision making even and may not file a restricted appeal. Tex. R. App. P. 30.

Once the respondent has surmounted these hurdles to obtain review, a restricted appeal will be successful in reversing the judgment only if the trial court's error is on the face of the record. *Gold v. Gold*, 145 S.W.3d 212, 213 (Tex. 2004). Error may not be inferred from the record. *Id.* Thus, restricted appeal is a fairly limited remedy.

¹ Resources consulted for this paper include: Michol O'Connor & Byron P Davis, *O'Connor's Texas Rules 2009*; William Dorsaneo III, David Crump, Elaine Carlson, Elizabeth Thornburg, *Texas Civil Procedure: Trial and Appellate Practice, 2008-09 Edition*; and the Texas Family Law Practice Manual. (2009 edition).

C. Bill of Review

A respondent's third option for direct attack on a default judgment is a bill of review. *Tex. R. Civ. P. 329b(f)*. See also *Alexander v. Hagedorn*, 226 S.W.2d 996 (1950). A bill of review is filed in the original trial court within four years that the respondent knew or should have known of the default judgment. *Id.* The respondent must file a sworn pleading that states grounds for the review. *Beck v. Beck*, 771 S.W.2d 141, 141-42 (Tex. 1989). A bill of review must show "sufficient cause" for the former judgment to be set aside. *Hagedorn*, 226 S.W.2d 996. The elements of sufficient cause include (1) that the default judgment was acquired through fraud, official mistake, or wrongful act of petitioner; (2) that the respondent has a meritorious defense; and (3) that default judgment did not result from the negligence or fault of the respondent. *Caldwell v. Barnes*, 975 S.W.2d 535 (Tex. 1998). If a respondent claims failure of service of process and thereby a failure of due process, he does not have to prove either elements of a meritorious defense or that the default judgment was rendered due for fraud, official mistake or wrongful act of the petitioner. *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988). These elements are inferred.

D. Collateral Attacks on Default Judgment

A respondent may seek to avoid the binding effect of a judgment through a collateral attack on the judgment. *Austin Independent School District v. Sierra Club*, 495 S.W.2d 878 (Tex. 1973). This may be filed in a court other than the original trial court. In such an attack, the respondent claims that the earlier judgment was void and unenforceable. Specifically, a party may claim a judgment is void due to either the trial court's lack of jurisdiction or the failure of the court order to be a valid judgment. *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005). However, a judgment that contains recitals of proper jurisdiction or service of process cannot be challenged with contrary extrinsic evidence.

III. MOTIONS FOLLOWING A JURY TRIAL

Motion for Instructed Verdict, Motion for Judgment on the Verdict, and Motion for JNOV, and Motion to Disregard Jury Findings are motions for use after the close of evidence in a jury trial. These motions deal with the balancing the power between the jury and the court to effect outcome that comports with evidentiary standards.

A. Motion for Instructed Verdict

In a jury trial, counsel may ask the court to render judgment instead of submitting the case to the jury by making a motion for instructed verdict, also called a motion for directed verdict. *Tex. R. Civ. P. 268*. Such a motion is proper and should be granted when either

there is no evidence to support a jury finding to the contrary or when the party with the burden of proof has conclusive evidence such that the right to judgment arises as a matter of law. *Prudential Ins. Co. v. Financial Rev. Servs.*, 29 S.W.3d 74, 77 (Tex. 2000). An instructed verdict is also proper when the non-movant's pleadings are so defective as to be unable to support a judgment. *Double Ace Inc. v. Pope*, 190 S.W.3d 18, 26 (Tex.App. –Amarillo 2005, not pet.) An instructed verdict may be granted in regard to an entire case or it can be partial removing only portion of the case from the fact finder. *Johnson v. Swain*, 787 S.W.2d 36 (Tex. 1989).

1. Basis for Motion

Under the evidentiary standards, no evidence to support a verdict exists when the party with the burden of proof has failed to produce enough evidence that would support a material issue in the case. *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934 (Tex. 1998). When a party makes a motion for instructed verdict on grounds of no evidence, that party is claiming the proof introduced at trial is not legally sufficient to support submission to the jury. *Prudential Ins. Co.*, 29 S.W.3d at 77. Otherwise stated, the basis of the no evidence ground is that no reasonable juror could find in favor of the party with the burden of proof because that party did not introduce enough evidence to support a verdict in their favor.

Grounds for a motion for instructed verdict also exist when a party has so much supporting evidence that the evidence is conclusive proof of that party's right to relief. *Id.* When proof is conclusive, the right to judgment in the party's favor arises as a matter of law. *Vance v. My Apt. Steak House*, 677 S.W.2d 480, 483 (Tex. 1984). Conclusive evidence is such that there is no conflicting evidence so that reasonable minds could only arrive at one conclusion after its introduction. *Collora v. Navarro*, 574 S.W.2d 65, 68 (Tex.1978).

Defective pleadings are another ground for the granting of a motion for instructed verdict. In such a situation, the pleadings are incapable of supporting a judgment for the party against whom the instructed verdict is sought. *Double Ace Inc.*, 190 S.W.3d 18. An instance of when a pleading would not support a verdict would arise if petitioner sought recovery on grounds not permitted by law, or if respondent asserted a defense not permitted by law. *Id.* In essence, this motion argues that the case must be dismissed for failure to state grounds upon which relief may be granted

2. Form of the Motion

A motion for instructed verdict may be presented to the court in either oral or written form. However, if an oral motion is made, in order to preserve the

grounds, the motion must be made on the court reporter's record. Tex. R. App. P. 33.1. Additionally, the motion must be specific in setting forth the grounds on which it is being made. Tex. R. Civ. Pro. 268. *See also, Reed v. Wormley*, 554 S.W.2d 254 (Tex. Civ. App. –Eastland 1977, writ ref'd n.r.e.)

3. When and By Whom the Motion can be Made

With the basis for granting a motion for summary judgment being no evidence or conclusive evidence, there are several times at which a motion for instructed verdict can be made. Because the focus of this paper begins at that point in trial when the evidence portion concludes, the timing of a motion for instructed verdict is not considered comprehensively. A motion for instructed verdict can be brought after the both sides rest. At this point either party can make a motion for instructed verdict. *Cecil Pond Constr. Co. v. Ed Bell Invs.*, 864 S.W.2d 211, 214 (Tex. App.—Tyler 1993, no writ).

In addition to parties being able to move for a directed verdict, the court can grant a motion for directed verdict sua sponte. *Valero Eastex Pipeline Co v. Jarvis*, 926 S.W.2d 789 (Tex.App.—Tyler, 1996, writ denied). However, prior to granting such a sua sponte motion, the court must inform the parties of its intent to consider such a motion on its own initiative.

In the event that the jury is unable to reach a verdict, a court may grant a mistrial. However, a court also has the option to reconsider a party's prior motion for instructed verdict. *Encina Prtshp v. Corenergy, L.L.C.*, 50 S.W.3d 66, 69 (Tex. App. –Corpus Chisti 2001, pet. denied). In such an instance, the court can reconsider sua sponte or at the urging of a party.

B. Motion for Judgment on the Verdict

Under Texas Rules of Civil Procedure 300-316, a party may make a motion for Judgment on the Verdict and thereby request the court to sign a prepared draft of the judgment. Thus, the motion for judgment should be accompanied by a proposed judgment of for the court to sign. Either party – winner or loser – can bring the motion and it is quite useful for either party to do so.

The winning party's motion for judgment asks the court to enter judgment that comports with the jury's verdict. *See Appendix, Form C*. The winning party must request relief sought including as appropriate, damages, pre- and post-judgment interest, attorney's fees, court costs, and any other relief. Although a response to such a motion is generally not required, if the prevailing party requests relief to which it is not entitled, the non-prevailing party should file a response stating as much. *Wal-Mart Stores, v. McKensie*, 997 S.W.2d 278, 280 (Tex. 1999).

The party that does not prevail on the jury's verdict may likewise file a motion for judgment on the verdict. This can be done without waiving challenges of the judgment on appeal, and in fact, the purpose of the losing party filing such a motion is so that it may begin the appeal process. *First Nat'l Bank v. Fotjik*, 775 S.W.2d 632, 633 (Tex. 1989). In order to preserve the right to appeal, the losing party must state in its motion that it (1) disagrees with the content and the result of the proposed judgment, (2) agrees as to form of the judgment only, and (3) reserves the right to challenge the judgment on appeal. *Id.* If the losing party fails to reserve its right to appeal, then result is a loss of that right.

When the losing party is the respondent, an additional purpose for a losing party to bring a motion for judgment on the verdict is to force the petitioner to elect its remedy. If a party prevails on two theories of recovery, the respondent should ask the court to force election so as to avoid double recovery. *Waite Hills Servs. V. World Class Metal Works*, 959 S.W.2d 182, 184 (Tex. 1998).

A further benefit of a motion for judgment on the verdict is preservation of error should trial court modify or reject the proposed judgment. *Emerson v. Tunnel*, 793 S.W.2d 947, 948 (Tex. 1990). Under Texas Rule of Appellate Procedure 33.1, the trial court may expressly or implicitly make such ruling. Tex. R. App. P. 33.1(a)(2)(A). This occurs by either the signing of the proposed judgment or the denial or alteration of the proposed judgment.

C. Motion for Judgment Not Withstanding the Verdict (JNOV) and Motion to Disregard Jury Findings

Under Texas Rule of Civil Procedure 301, when a directed verdict would have been proper, the court may render a judgment non obstante verdict (JNOV), also called a Judgment Not Withstanding the Verdict, and thereby substitute its own findings for those of the jury. Tex. R. Civ. P. 301. Similarly, in response to a motion to disregard jury findings, a court may substitute its findings for those of the jury.

A motion for JNOV and motion to disregard jury findings are distinguished by the breadth of each motion. While a Motion for JNOV asks the court to disregard all of the findings of the jury, a Motion to Disregard Jury Findings asks the court to disregard only some of the jury findings and to render judgment on the remaining jury findings. Because these motions are so similar to one another, the remainder of the references to motion for JNOV are intended to encompass a Motion to Disregard Jury Findings unless otherwise distinguished.

1. Grounds

As Texas Rule of Civil Procedure 301 clearly sets forth that a JNOV is proper only when an instructed verdict would have been proper, the evidentiary standard for JNOV is the same as that for instructed verdict. *Fort Bend Cty, Drainage Dist. v. Shrusch*, 818 S.W.2d 392, 394 (Tex 1991). Thus, when there is no evidence to support a jury finding, granting of JNOV is proper. *Id.* Likewise, when a fact issue is established by conclusive evidence and as a matter of law, and this issue is contrary to the jury finding, granting of JNOV is proper. *Id.* Additionally, it has been held that when a legal principle bars a party from prevailing on its claim or defense regardless of conclusive favorable proof, a Motion for JNOV should be granted. *John Masek Corp. v. Davis*, 848 S.W.2d 170, 173 (Tex. App.—Houston [1st Dist.] 1992, writ denied). Finally, if an immaterial question is submitted to the jury, the finding will likewise be immaterial and can be disregarded by the court. *Salinas v. Rafati*, 948 S.W.2d 465, 470 (Tex. 1997).

2. Form

As a general rule, unlike a Motion for Instructed Verdict, a motion for JNOV can be granted only on a written motion. Tex. R. Civ. P. 301. **See Appendix, Form E.** However, an exception to this rule is made for an immaterial finding by the jury, in which circumstances, the court may disregard the jury finding without a motion. *Salinas*, 948 S.W.2d 465, 470. Unlike a motion for instructed verdict, a motion for JNOV cannot be granted sua sponte. Interestingly, the right to request JNOV is not waived by request for jury questions previously made by the movant. Tex. R. Civ. Pro. 279. While a motion for JNOV can ask the court to disregard all of the jury's findings, a motion to disregard jury findings must be specific in identifying the findings to be disregarded. For both motions, a proposed judgment should be attached.

3. Deadlines for Filing & Ruling

Texas Rule of Civil Procedure 301 does not set forth a deadline for filing a motion for JNOV. Various courts have found differing deadlines to be proper. Some courts have held that filing is proper any time after judgment has been announced, so long as the court's plenary power has not expired. *Spiller v. Lyons*, 737 S.W.2d 29, 29 (Tex. App.—Houston [14th Dist.] 1987, no writ.). Other courts have held that filing is proper only within 30 days of the after the judgment is signed. *Commonwealth c. Lloyd's Ins. Co. v. Thomas*, 825 S.W.2d 135, 141 (Tex. App.—Dallas 1992), judgment vacated by agr., 843 S.W.2d 486 (Tex. 1993). Until there is a clear rule on the timeline to file a motion for JNOV, the safest practice is to file within 30 days after judgment, which is the same time frame as filing motion for new trial.

Just as attorneys are given no clear deadline for filing a motion for JNOV, the court is likewise given no timeline for ruling on the motion. Following the same ruling deadline for a motion for new trial, a movant should request the court to rule no later than 75 days after the trial court signed the judgment. Such a request is important as some courts have held a motion for JNOV does not preserve error unless the court overrules it within the afore stated time frame. *Spiller v. Lyons*, 737 S.W.2d 29 (Tex. App.—Houston [14th Dist.]1987, no writ). *See also, Commercial Std. Ins. Co. v. Southern Farm Bur. Cas. Ins. Co.*, 509 S.W.2d 168 (Tex. 1981).

4. Effect on Appeal

A motion for JNOV may be used to preserve error for appeal. The grounds on which a motion for JNOV may be granted are also the issues that can be preserved for appeal by the motion. Thus, a motion for JNOV will preserve the argument that there was legally insufficient evidence to support the verdict of the jury. Tex. R. Civ. P. 301; *see also, Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003). Also, a motion for JNOV will preserve for appeal the contention that a jury finding must be disregarded because the evidence conclusively establishes the opposite finding as a matter of law. *John Masek Corp.*, 848 S.W.2d 170. A motion for JNOV likewise will preserve the argument that a legal rule prevents recovery. *Holland v. Wal-Mart Stores*, 1 S.W.3d 91 (Tex 1999). Lastly, a motion for JNOV will preserve the contention that a jury finding is immaterial. *Brownsville v. Alvarado*, 897 S.W.2d 750 (Tex. 1995).

While a motion for JNOV will preserve errors for appeal, whether or not the motion will extend the appellate deadline for perfecting appeal is not entirely clear. It has been held that filing a motion for JNOV will extend the appellate deadline just as a motion to modify, correct and reform judgment would, if the motion for JNOV is filed within the 30 day deadline for a motion for new trial. *Kirschberg v. Lowe*, 974 S.W.2d 844, 847-48 (Tex.App. –San Antonio 1998, no pet.). However, the more traditional position maintained by courts is that the deadline is not extended. *Walker v. S & T Truck Lines, Inc.*, 409 S.W.2d 942 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd.). The traditional position comports with Texas Rule of Appellate Procedure 26 which governs when an appeal must be perfected. Tex. R. App. P. 26. However, this rule does not address whether or not a motion for JNOV extends the deadline for perfecting appeal. Thus, despite a move away from the position that the motion does extend the deadline for perfecting appeal, the safer approach is to follow the statutory deadline in Appellate Rule 26. Tex. R. App. P. 26

IV. MOTIONS FOLLOWING A BENCH TRIAL

A. Motion for Judgment

A motion for judgment is the nonjury trial equivalent of a motion for judgment on the verdict following a jury trial. It is likewise governed by Texas Rules of Civil Procedure 300-316. Tex. R. Civ. P. 300-316. Following a bench trial, a party may use this motion in an attempt to have the court render judgment in accord with its announced decision. Most often the prevailing party will prepare a draft of the judgment for the trial court's signature and send a copy to the other parties. However, any party may prepare the judgment. Tex. R. Civ. P. 305. The same reasons exist for either the losing or winning party to file a motion for judgment as exist for filing a motion for judgment on the verdict and will not be reiterated herein.

B. Request for Findings of Fact and Conclusions of Law

Findings of fact in a non-jury case function in the same manner as jury answers to questions in a jury case: they set forth the factual basis of the court's ruling. The conclusions of law give the legal rules applied to the facts to resolve the case. A request for findings of fact cannot be satisfied by recitation in the judgment itself. Upon appeal the findings of fact are reviewed for evidentiary sufficiency. If no findings of facts are filed, the appellate court must imply all fact findings in support of the trial court's judgment. *Black v. Dallas Cty. Child Welfare Unit*, 835 S.W.2d 626, 630 n.10 (Tex 1992).

1. Requesting Findings of Fact & Conclusions of Law: Proper Form and Deadlines

Under Texas Rule of Civil Procedure 296, either the winning or losing party may request findings of fact and conclusions of law. Under Texas rule of Civil Procedure 296, a party must make a written request to the court titled "Request for Findings of Fact and conclusions of Law." Tex. R. Civ. P. 296. *See Appendix, Form C*. The request must be filed within twenty days after the judgment is signed. *Id.* Upon filing, the clerk must immediately bring the request to the attention of the judge. *Id.* When the request is filed, the filing party must also send a copy to the other party. Tex. R. Civ. P. 21a. If the request is made prior to the signing of the judgment, it is deemed filed on the day of the signing of the judgment after the signing. Tex. R. Civ. P. 306c. See also, *Pursley v. Ussery*, 982 S.W.2d, 596, 599 (Tex.App. –San Antonio 1998, pet denied). Despite Texas Rule of Civil Procedure 306c that a prematurely filed request is timely, some courts have disregarded the rule and held such premature requests to be untimely. *Estate of Goski v. Welch*, 993 S.W.2d 298, 301 (Tex.App. –San Antonio 1999, pet denied); see also *Echols v. Echols*, 900 S.W.2d 160, 161-62 (Tex.App.—Beaumont 1995, writ denied).

Under Texas Rule of Civil Procedure 297, the court should file findings of fact and conclusions of law within 20 days after the date of the request. Tex. R. Civ. P. 297. The court must mail a copy of its findings to each party. *Id.* If the court misses this deadline, the requesting party must file within 30 days of making the request, a "Notice of Past due Findings of Fact and Conclusions of Law." *Id.* *See Appendix, Form D*. This notice must state the date the original request was filed and the date the findings of fact were due. *Id.* Once a second request is made, the court has forty days after the date of the first request to respond. Tex. R. Civ. P. 297. Should the requesting party not file a past-due notice, the right to complain about the trial court's failure to make findings is waived. *Gnerer v. Johnson*, 227 S.W.3d 385, 389 (Tex.App.—Texarkana 2007, no pet.). When the time for a trial court to make findings has expired, the court may yet file findings. *Jefferson Cty. Drainage Dist. v. Lower Neches Valley Auth.*, 876 S.W.2d 940, 959 (Tex.App. –Beaumont 1994, writ denied). This is true even when the court has lost plenary power. *Id.*

2. The Court's Findings

The findings of fact and conclusions of law should be made in the same document; however, they should be stated under separate headings. The requesting party should draft proposed findings of fact and conclusions of law to submit to the court along with its original request. *See Appendix, Form E*. If a finding of fact is labeled erroneously as a conclusion of law, the appellate court can still treat it as a finding of fact. *Ray v. Farmers' State Bank*, 576 S.W.2d 607, 608 (Tex. 1979). Texas Rule of Civil Procedure 299a requires that findings be separate from the judgment. Tex. R. Civ. P. 299a. Additionally, when findings of fact differ from those in the judgment, the findings of fact control. *Id.* However, while some courts review findings in the judgment, other courts decline to do so. *Compare Casino Magic Corp. v. King*, 43 S.W.3d 14, 19 (Tex.App. –Dallas 2001, pet. denied)(findings of judgment were not considered findings of fact for appellate review.) *In re Estate of Jones*, 197 S.W.3d 894, 899-900 (Tex.App. –Beaumont 2006, pet. denied)(findings in judgment can be considered on appeal unless they conflict with findings of fact and conclusions of law). The best practice is to ensure preservation for appeal is to be sure all findings of fact set forth in the courts findings.

3. Additional findings

Once the trial court makes findings of fact and conclusions of law, either the requesting or non-requesting party may ask the court to make additional or amended findings. Tex. R. Civ. P. 298. *See Appendix, Form F*. Such a request must be filed within ten days after the court's initial findings. *Id.*

See also, *SMI/USA, Inc. v. profile Techs.*, 38 S.W.3d 205, 209 (Tex.App. –Waco 2001, no pet.). The court has ten days following the request to make additional or amended findings. Tex. R. Civ. P. 298. When making a request for amended or additional findings, the requesting party must submit proposed findings. *Alvarez v. Espinoza*, 844 S.W.2d 238, 242 (Tex. App.—San Antonio 1992, writ dismissed). Requesting an amended finding is proper when the court has made an error in its findings. Requesting an additional finding is proper when the court has omitted a finding concerning a material issue.

A losing party must make requests for additional findings carefully so as not to waive objection to the findings on appeal. *In re Grossnickle*, 115 S.W.3d 238, 254 (Tex.App. –Texarkana 2003, no pet.) In such a request the losing party should first allege that that a material issue disputed at trial was not addressed in the findings. *Vicker v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 254 (Tex.App. –Houston [14th Dist.] 1999, pet denied). The request must also be specific and consistent with the judgment. *Id.* Furthermore, the request must inform the court that it disagrees with the findings it is requesting and that the findings are necessary so that the findings may be challenged on appeal. *Id.*

4. Finding Regarding Property Division Findings

The Texas Family Code specifically states that a request for findings of fact and conclusions of law regarding property division upon dissolution of marriage must comply with Texas Rules of Civil Procedure. Tex. Fam. Code § 6.711(b). Proper subject of findings regarding property division include the “characterization of each party’s assets, liabilities, claims, and offsets on which disputed evidence has been presented. Tex. Fam. Code § 6.711(a)(1). Upon request, a court must also provide findings regarding valuation of assets, liabilities, and claims if at issue during trial. Tex. Fam. Code § 6.711(a)(2).

Notably the statute does not require that the trial court specify factors considered when making a disproportionate division of community property. Furthermore, in a disproportionate division, the trial court does not have to make any findings regarding what percentage of distribution it intended. *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 11(Tex. App. –Waco 2002, no pet.). However, such findings may be specifically requested under Texas Rule of Civil Procedure 296 if they might be an issue on appeal. *Refer to Forms E & F.*

5. Findings Regarding Possession Order and Child Support

It is important to note that a party seeking findings of fact and conclusions of law regarding a non-standard possession order or child support are

governed by an abbreviated deadline for request. Concerning such findings, the Texas Family Code specifically disregards Texas Rules of Civil Procedure 296 through 299 and replaces those rules with a ten-day deadline for filing or alternatively, allows an request in open court on the record.. Tex. Fam. Code § 153.258; Tex. Fam. Code §154.130.

In a contested custody case, when a court renders a possession order the deviates from the standard possession order, a written request for findings must be filed with the court no later than ten days after the date of the hearing. Tex. Fam. Code § 153.258. *See Appendix, Form G.* An oral request also may be sufficient if it is made in open court and on the record. Note that the tolling of the ten day deadline does not begin after the judgment is signed, the usual tolling event, but rather the date of the hearing begins the running of the timeline.

Similarly, under Texas Family Code § 154.130, in a case in which child support is contested, request for findings regarding child support must be filed with the court ten days after the date of the hearing. Tex. Fam. Code § 154.130(a)(1). The court may also make findings based on an oral request made in open court and on the record. Tex. Fam. Code § 154.130(a)(2). When finding are so requested, the court is required to enter findings within 15 days of the request. Tex. Fam. Code § 154.130(a-1). *See Appendix, Form H.* Additionally, without request, the court is required to making findings sua sponte if it enters an amount of child support varying from the statutory child support guidelines. Tex. Fam. Code § 154.130(a)(3). A court’s failure to make findings explaining deviation from child support guidelines after a request is reversible error on appeal. *Chamberlain v. Chamberlain*, 788 S.W.2d 455 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

If findings are required either by request or by variance from statutory guidelines, a court must state whether the application of the guidelines would be “unjust or inappropriate”. Tex. Fam. Code § 154.130(b). Furthermore, a court is required to include the following specific findings:

- the net resources of the obligor per month are \$_____;
- the net resources of the obligee per month is \$_____;
- the percentage applied to the obligor’s net resources for child support is _____%; and
- the specific reasons that the amount of child support per month ordered by the court varies from the amount computed by applying the percentage guidelines in the Texas Family Code.

Tex. Fam. Code § 154.13(b)(1)-(4).

Although the above guidelines set forth what the court must include in its findings, the Texas Family Code does not indicate that these requirements are an exclusive list. Furthermore, it has been held that Texas Rule of Civil Procedure 296 may be used by an obligor to request specific findings about the needs of the child. *See In Re Gonzalez*, 993 S.W.2d 147, 159 (Tex.App.—San Antonio 1999, no pet.).

A court's failure to make requested or required findings on net resources has been held to be reversible error. *Hanna v. Hanna*, 813 S.W.2d 626 (Tex. App. – Houston[14th Dist.] 1991, no writ). In *Tenery v. Tenery*, the Texas Supreme Court held that the trial court's failure to make findings as to why it set child support at \$550 per month rather than the guideline support of \$196 per month resulted in a presumption of harm to the complaining party as that party had timely requested findings. *Tenery v. Tenery*, 932 S.W.2d 29 (Tex. 1996). Harmful error occurs when a party is prevented from presenting its case on appeal. Thus, unless the face of the record indicates why guideline support was not followed, the failure of a court to enter findings on request is presumptively harmful.

6. Effect on Appellate Timetable.

A timely request for findings of fact and conclusions of law extends the time to perfect appeal. Tex. R. App. P. 26.1(a)(4). This is true when either the findings and conclusions are required by Texas Rule of Civil Procedure 296 or when the trial court conducts an evidentiary hearing and the findings and conclusions can be properly considered by the appellate court. *IKB Indus. V. Pro-Line Corp.*, 938 S.W.2d 440 (Tex. 1997). The usual 30 days from the signing of judgment deadline is extended to 90 days after the signing of the judgment. Tex. R. App. P. 26.1(a)(4).

V. POST JUDGMENT MOTIONS FOLLOWING EITHER A JURY OR BENCH TRIAL

A. Motion to Modify Judgment

A party may request that the trial court change its judgment by filing a motion to modify the judgment. Tex. R. Civ. P. 329b(g). A motion to correct or reform a judgment are modification motions and are governed by the rules in this portion of the paper. Such a motion is appropriate when the court failed to award the all the relief the prevailing party was entitled to or provided excessive relief to the prevailing party. A motion to modify judgment must be in writing and it brings to the courts attention an error in the judgment. *See Appendix, Form I.* A hearing on the motion is for oral argument only and does not include the introduction of evidence.

1. Specific Grounds

Various specific grounds for filing a motion to modify judgment exist. First, if the trial court fails to award the correct amount of prejudgment interest, the complaining party should bring the error to the trial court's attention by filing a motion to modify. Bringing the motion will preserve the complaint for appeal, and lack of such preservation has been held to have waived the complaint. *See Allright, Inc. v. Pearson*, 735 S.W.2d 240 (Tex. 1987). However, the Texas Supreme Court has also overlooked a failure to file a motion to modify in order to award miscalculated prejudgment interest. *See C&H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315 (Tex. 1994).

Filing a motion to modify the judgment is also appropriate when a court fails to award attorney's fees or awards the wrong amount of attorney's fees. *See Texas Educ. Agency v. Maxwell*, 937 S.W.2d 621 (Tex.App. –Eastland 1997, writ denied). Furthermore, such a motion is proper when the trial court does not award court costs, awards costs to the wrong party or awards the wrong amount of costs. *See Dawson-Austin v. Austin*, 968 S.W.2d 319 (Tex. 1998). A motion to modify judgment is also available to ask a court to incorporate sanctions into the final judgment. *Lane Bank Equip. Co. v. Smith S. Equip., Inc.* 10 S.W.3d 308, 312 (Tex. 2000). Finally, any error in the trial court's judgment renders the filing of a motion to modify judgment proper. *See L.M. Healthcare, Inc. v. Childs*, 929 S.W.2d 442 (Tex. 1996).

2. Deadline for Filing

The motion to modify judgment must be filed within 30 days after the date the judgment was signed. Tex. R. Civ. P. 329b(g). A motion to modify can itself be amended if such an amendment is made within the same 30 day deadline from the date the judgment was signed and so long as the original motion to modify has not been overruled. *Id.* The 30 day deadline applies even if a motion for new trial has been previously filed and overruled. *In re Brookshire Grocery Co.*, 250 S.W.3d 66, 72 (Tex. 2008). Despite the passing of 30 days following the judgment, a motion to modify judgment should still be filed if an error is found. Although this motion will not preserve error, and the court does not have to consider it under the rules, the court has the discretion to consider a tardily filed motion to modify as long as it still has plenary power. *Moritz v. Preiss*, 121 S.W.3d 715 (Tex. 2003). Similar to a prematurely filed request for findings of fact and conclusions of law, a premature motion to modify judgment is considered to have been filed on the day of, but immediately following the signing of the judgment. *Tex. R. App. P. 27.2.*

3. Court Deadline for Response

If the trial court grants a motion to modify it must do so in a written order signed by the court within 75 days after the judgment was signed. Tex. R. Civ. P. 329b(c). While the court may expressly overrule a motion to modify, if the court fails to rule, the motion is overruled by operation of law on the 76th day following the date the original judgment was signed. Id.

4. Effect on Court's Plenary Power & the Appellate Timetable

Filing of a motion to modify judgment will extend the plenary power of the court so long as the motion seeks a substantive change. *Lane Bank Equip. Co. v. Smith S. Equip., Inc.* 10 S.W.3d 308 (Tex. 2000). The court's plenary power that generally lasts 30 days is extended to last 30 more days after the motion has been granted or overruled by written order or by operation of law. Thus, the court's plenary power could last up to a maximum of 105 days if the motion is overruled by operation of law upon the passing of 75 days.

A motion to modify judgment likewise extends the appellate timetable. Tex. R. Civ. P. 329b(g). Rather than running from the time the original judgment is signed, if a judgment is modified, the appellate deadlines run from the time the modified judgment is signed. *Arkoma Basin Expl. Co. v. FMF Assocs. 1990-A Ltd.*, 249 S.W.3d 380, 390-91 (Tex. 2008). Unlike extension of plenary power, the extension of the appellate time table occurs if there is any change in the judgment whether or not the change is material. Id. So long as the court signs the modified judgment within its plenary power, the appellate timetable is restarted. *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988).

B. **Motion for New Trial**

By filing a motion for new trial, a party may ask the court for a new trial in order to reconsider and correct its judgment. General reasons to file a motion for new trial include: (1) to give the trial court a chance to correct what appellant will claim is reversible error on appeal, (2) to preserve that error for appeal, and (3) to extend appellate time lines. Michol O'Connor and Byron P. Davis, O'Connor's Texas Rules, Civil Trials, p.687 (2009). Texas Rule of Civil Procedure 324(b) speaks to the purpose of preservation and requires a motion for new trial to be necessary for the appeal of a jury trial in specific instances, including: complaint of jury misconduct, newly discovered evidence, or failure to set aside default judgment; complaint of factual insufficiency of the evidence to support a jury finding; complaint of inadequacy or excessiveness of damages found by jury; and incurable jury argument. These grounds as well as others will be examined in depth

later in this section. Importantly, even if the reason for filing a motion for new trial is merely to extend the appellate deadlines and lacks any otherwise reasonable grounds, a party has the right to file a motion for new trial. *Old Republic Ins. Co. v. Scott*, 846 S.W.2d 832, 833 (Tex. 1993).

1. Filing a Motion for New Trial: Deadline, Form & Filing Fee

A motion for new trial must be filed within 30 days after the judgment is signed by the court. Tex. R. Civ. P. 329b(a). Amendment or supplement to the original motion may be made so long as it is made within 30 day of the signing of the judgment and prior to the original motion being overruled. *In re Brookshire Grocery Co.*, 250 S.W.3d 66, 69-70 (Tex. 2008). Such amendment or supplement will preserve issues for appeal. *Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003).

A court may not extend the time period for filing a motion for new trial. Tex. R. Civ. P. 5. If the court signs a motion for new trial that was filed after the 30 time period has expired, the action is void and cannot be considered by the appellate court. *Equinox Enters v. Associated Media Inc.*, 730 S.W.2d 872, 875 (Tex.App. –Dallas 1987, no writ). Despite the court's inability to extend the filing deadline, the court can grant a new trial on grounds stated in a late motion if the motion if the motion is filed during the court's plenary power. *Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003).

Under Texas Rule of Civil Procedure 320, a motion for new trial must be in writing and signed by the attorney or party. *See Appendix, Forms J & K*. Although verification is not always necessary when filing a motion for new trial, verification is required when the motion is based on grounds requiring the presentation of evidence at the hearing or when the motion is based on the grounds listing Texas Rule of Civil Procedure 324(b)(1). These grounds include jury misconduct, newly discovered evidence, failure to set aside a default judgment. *See In re Z.L.T.*, 124 S.W.3d (Tex. 2003).

Similarly, a motion for new trial usually need not be accompanied by an affidavit. The exception to this arises when the movant files a motion with affidavits in which case the nonmovant should likely file controverting affidavits. In the absence of controverting affidavits or a hearing, the appellate court will treat the movant's affidavit as true. *Director, State Employees Worker's Comp. Div. v. Evans*, 889 S.W.2d 266, 268-69 (Tex. 1994).

A motion for new trial must be filed with the required filing fee and such fees vary from county to county. It is important to note that a motion for new trial that is filed without the filing fee is considered "conditionally filed" on the date it was filed with the

clerk. *Jamar v. Patterson*, 868 S.W.3d 318, 319 (Tex. 1993). The motion is deemed filed on the date it was originally tendered upon the payment of the filing fee. *Id.*

Interestingly, if a filing fee is untimely or never paid, the motion for new trial continues to extend the appellate deadline as discussed in the following section. However, the late payment of the filing fee does not effect the whether or not the motion preserves error. When the filing fee is paid prior to the expiration of the court's plenary power, the motion reserves the issue for appeal. *Jamar*, 868 S.W.2d at 319. (Tex. 2004). Conversely, if the fee is paid after the court loses its plenary power, the motion does not preserve error that must be reserved by a motion for new trial. *Garza v. Garcia*, 137 S.W.3d 36, 37-38 (Tex. 2004).

2. Effect of Motion for New Trial on Plenary Power and Appellate Timetable

The plenary power of the court is extended by the filing of a motion for new trial. Tex. R. Civ. P. 329b. Whether or not the motion is granted or denied and when it is granted or denied determines when the court's plenary expires. *Lane Bank*, 10 S.W.3d 308, 310 (Tex. 2000). If the motion is denied the court's plenary power extends for 30 more days from the date of denial. If the motion is not expressly denied or granted then it is denied by operation of law after 75 days following the signing of the original judgment. Tex. R. Civ. P. 329b. Thus, the plenary power of the court may not extend for more than 105 days following the denial of a motion for new trial. *Lane Bank*, 10 S.W.3d 308, 310 (Tex. 2000). If the motion for new trial is granted, the original judgment is set aside and the case is reinstated on the court's docket. *Wilkins v. Methodist Health Care Sys.*, 160 S.W.3e, 559, 563 (Tex. 2005). Thus, the court has continuing power over the case until it signs another final judgment. *In re Baylor Med. Ctr.*, 280 S.W.3d 227 (Tex. 2008). Once there is a new final judgment, the court's plenary power lasts for 30 days unless one of the parties files a new motion that extends plenary power. Tex. R. Civ. P. 329b(d).

A motion for new trial also extends the appellate timeline for perfecting appeal. Tex. R. App. Pro. 26.1(a). *See also Lane Bank*, 10 S.W.3d 308, 310 (Tex. 2000). Upon filing a motion for new trial the deadline for perfecting appeal by filing a notice of appeal is extended to 90 days from the signing of the judgment. Tex. R. App. Pro. 26.1(a). Likewise, the deadline for delivery of the appellate record is extended to 120 days from the judgment. Tex. R. App. Pro. 35.1(a).

3. Grounds for Motion for New Trial

a. When a Motion for New Trial is Necessary following a Jury Trial

Under certain circumstances, a motion for new trial is necessary following a jury trial in order to preserve complaints on an appeal. Tex. R. Civ. P. 324(b)(1)-(5). First, a motion for new trial is a prerequisite for a "complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence (700) or failure to set aside a judgment by default." Tex. R. Civ. P. 324(b)(1).

Texas Rule of Civil Procedure 327(a) sets forth jury misconduct that must be addressed by a motion for new trial. Tex. R. Civ. P. 327(a). These types of misconduct include: (1) jury misconduct during deliberations, (2) bailiff misconduct, (3) improper contact with jury by an attorney, party, witness, or other interested or connected party, and (4) erroneous answers to a material voir dire question. An outside influence is information that comes from a source outside of the jury. *Golden Eagle Archery, Inc. v. Jackson*, S.W.3d 362 (Tex. 2000). Discussion by jurors during deliberation is not an outside influence. *Id.* Influences that qualify as outside include tampering with evidence, threats to a juror, and conversations between a judge and a juror. *Clancy v. Zale Corp.*, 705 S.W.2d 820 (Tex.App. –Dallas 1986, writ ref'd n.r.e.). Outside influence does not include information known by a juror prior to trial and shared with other jurors during deliberations. *Brandt v. Surber*, 194 S.W.3d 108 (Tex.App.–Corpus Christi 2006, pet. denied).

Texas Rule of Civil Procedure 283 prohibits the bailiff from communicating with the jury outside of inquiring whether or not a verdict has been reached and communicating as ordered by the court. Tex. R. Civ. P. 283. *See also, Pharo v. Chambers Cty*, 922 S.W.2d 945 (Tex. 1996). In order for bailiff misconduct to warrant a new trial, it must reasonably appear on the record that the complaining party was injured. *Id.* Injury exists where it can be shown that a juror voted differently than he would have on a material issue. *Id.*

Jury misconduct in the form of improper contact with the jury occurs when a juror has communication or accepts a favor from an attorney, party, witness, or any other interested party in the case. Tex. R. Civ. P. 226a. If a party's contact with a juror is held to be improper, a judgment in that party's favor will be reversed. *Texas Employers' Ins. Ass'n v. McCaslin*, 317 S.W.2d 916 (Tex. 1958). Although permissibility of juror testimony concerning alleged misconduct is extremely restricted under Texas Rule of Civil Procedure 327(b) and Texas Rule of Evidence 606(b), a juror may testify about improper contacts with persons outside the jury. *Golden Eagle Archery*, 24 S.W.3d 362 (Tex. 2000).

Where newly discovered evidence affects the outcome of a case, a motion for new trial must be filed to preserve the complaint on appeal. Tex. R. Civ. P. 324(b)(1). In order to argue for a new trial based on new claims, the motion must include the following five elements: (1) the movant discovered admissible evidence after the close of trial, *Jackson v. Van Winkle*, 660 S.W.2d 807, 809 (Tex. 1983), *overruled on other grounds*, *Moritz v. Preiss*, 121 S.W.3d 715 (Tex. 2003); (2) the late discovery was not due to lack of due diligence, *Id.*; (3) the evidence is not cumulative, *Id.*; (4) the evidence is not only for impeachment, *New Amsterdam Ca. Co. v. Jordan*, 359 S.W.2d 864, 866 (Tex. 19962); and (5) the evidence is material and would probably produce a different outcome at a new trial, *Jackson*, 660 S.W.2d at 809. Each of these elements should be verified in a supporting sworn affidavit. *Brown v. Hopkins*, 921 S.W.2d 306, 310-11 (Tex.App. –Corpus Christi 1996, no writ). Because this motion involves new evidence, the movant should request an evidentiary hearing and that a record be made of the hearing. *National Med. Fin. Servs. V. Irving ISD*, 150 S.W.3d 901, 905 (Tex. App. –Dallas 2004, no pet.).

Second, a motion for new trial is a prerequisite to a “complaint of factual sufficiency of the evidence to support a jury finding.” Tex. R. Civ. P. 324(b)(2). Such a complaint alleges that the facts presented were either insufficient evidence to support the jury finding or that the jury finding was against the great weight of the evidence. This is the only way to preserve a factual-sufficiency challenge. *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex. 1991).

Third, a motion for new trial is a prerequisite to a “complaint that a jury finding is against the overwhelming weight of the evidence.” Tex. R. Civ. P. 324 (b)(3). This is a legal sufficiency challenge alleging that the facts are so flimsy as to be unable to support the legal outcome. Unlike a factual sufficiency challenge a motion for new trial is not the exclusive way to preserve this complaint. This complaint also may be preserved by making a motion for directed verdict, by objecting to submission of a jury question, and by making a motion for JNOV. *Id.*

Fourth, a motion for new trial is a prerequisite to a “complaint of inadequacy or excessiveness of the damages found by the jury.” Tex. R. Civ. P. 324 (b)(4). *See also*, *Hawthorne v. Guenther*, 917 S.W.2d 924, 937 (Tex.App. –Beaumont 1996, writ denied).

Finally, a motion for new trial is a prerequisite for a complaint of “incurable jury argument.” Tex. R. Civ. P. 324(b)(5). Improper jury argument content includes an appeal to passion and, or prejudice. *See Matter of Marriage of Knighton*, 685 S.W.2d 719 (Tex.App. – Amarillo, 1984, no writ); *Texas employer’s Insurance Association v. Guerrero*, 800 S.W.2d 859 (Tex.App. – San Antonio, 1990, writ denied). Improper jury

argument also includes the introduction of evidence or remarks from outside the record and inferences from evidence on the record. *See Younger Brothers, Inc. v. Myers*, 324 S.W.2d 546 (Tex. 1959). Personal invectives and accusations of misconduct against opposing counsel during a jury argument is also improper and possibly incurable requiring a motion for new trial to preserve error. *American Petrofina, Inc. v. PPG Industries, Inc.*, 679 S.W.2d 740 (Tex. App. –Fort Worth 1984, writ dis. agr.).

b. When a Motion for New Trial is Necessary following a Bench Trial

Usually, a party need not file a motion for new trial to preserve most errors in a nonjury trial. *Park v. Essa Tex. Corp.*, 311 S.W.2d 228, 229 (Tex. 1958). However, recalling the rule that a motion for new trial can be filed merely to extend the appellate deadlines, parties to a bench trial may file a motion for new trial simply to gain this extension. After a nonjury trial, there is no statutory requirement to file a motion for new trial to preserve complaints of factual or legal insufficiency of evidence, or that damages were too large or too small. *Strickland v. Coleman*, 824 S.W.2d 188, 191 (Tex. App. –Houston [1st Dist. 1991, no writ). Rather, these issues can be raised for the first time on appeal. *Tex. R. App. P. 33.1(d)*. A motion for new trial following a bench trial is a prerequisite if the complaint was not presented at trial and has not been presented by any other postjudgment motion. Tex. R. Civ. P. 324(b). Likewise, if the complaint involves the presentation of evidence, such as an argument of newly discovered evidence, a motion for new trial must be filed. *Id.*

C. Motion to Extend Post Judgment Deadlines

Under Texas Rule of Civil Procedure 306a(4) and (5), a party may request the extension of postjudgment deadlines if that party did not receive timely notice of the judgment. A successful motion to extend postjudgment deadlines will extend the plenary power of the court and the appellate timetable. *In re Wal-Mart Stores*, 20 S.W.3d 734, 739 (Tex. App.—El Paso 2000, orig. proceeding).

1. Deadline

The court clerk is required by law to notify parties of a judgment. Tex. R. Civ. P. 306a(3). A party that receives notice of judgment between 21 and 90 days after the judgment is signed may file a motion to extend postjudgment deadlines. Tex. R. Civ. P. 306a(4). Tex. R. App. P. 4,2(a)(1). Although the deadline for filing a motion to extend is not statutorily mandated, the general deadline for filing is the expiration of the court’s plenary power as measured to begin on the date the party received actual notice of the judgment. *John v. Marshall Health Servs.*, 58 S.W.3d

738, 741 (Tex. 2001). Thus, it is important to remember that if no plenary power extending motion has been filed, the plenary power and thus the deadline for filing a motion to extend is 30 days after the judgment. *Id.* Likewise the plenary power could extend for quite some time after that initial 30 day plenary power if a postjudgment motion was filed and depending on when the court rules in regard to that motion. For example, where a motion for new trial was filed on day 13 following the judgment and the court delayed in ruling, a motion to extend postjudgment deadlines filed 71 days after judgment was still within the court's plenary power. *John*, 58 S.W.3d at 741 (Tex. 2001). Although the deadline for filing continues during the plenary power, the latest point at which a motion to extend may be filed is 90 days after the judgment was signed. *Esate of Howley v. Haberman*, 878 S.W.2d 139, 140 (Tex. 1994).

2. Form of Motion

A motion to extend postjudgment deadlines may be filed as an independent motion or it may be filed as a part of a motion for new trial or a motion to reinstate. *In re Wal-Mart Stores*, 20 S.W.3 at 739 (Tex. App.—El Paso 2000, orig. proceeding). The motion must allege that the movant received the first notice of the judgment on a specific date and that the date of receipt was more than 20 days after the judgment was signed but not more than 90 days after the judgment was signed. *Tex. R. Civ. P.* 306a(4). *See also Levit v. Adams*, 850 S.W.2d 469, 470 (Tex. 1993). The motion must also describe the notice, and state who gave it, received it and when the notice was received. *Tex. R. Civ. P.* 306a(4), (5). Furthermore, the motion must state whether or not the attorney or party had knowledge of the judgment despite lack of notice. *Tex. R. Civ. P.* 306a(5). The motion must also be sworn and should include a clear affidavit stating that the facts in the motion are true. *Id.* *See also City of Laredo v. Schuble*, 943 S.W.2d 124, 126 (Tex.App.—San Antonio 1997, orig. proceeding).

3. Hearing

The trial court is required to have a hearing on a motion to extend postjudgment deadlines. *Cantu v. Longoria*, 878 S.W.2d 131, 132 (Tex. 1994). Thus, the movant should request a hearing in the motion. Failure of the court to conduct a hearing gives the movant the right to file mandamus to compel a hearing. *Id.* If the trial court does not conduct a hearing, it must accept the movant's affidavits as true. *John*, 58 S.W.3d at 741 (Tex. 2001). Under Texas Appellate Rule 4.2(c), the trial court must sign an order and make a finding as to the date of actual notice or knowledge of the judgment. *Tex. R. App. P.* 4.2(c).

4. Effect of Motion

If the court grants the motion, it must also designate a new date for the judgment based on the date the movant received actual notice of the judgment. *Tex. R. Civ. P.* 306a(4). If the court designates a new date, a motion for new trial and notice of appeal will be considered timely if already filed. *Id.* The appellate deadline may re-opened for a party who received late notice, but this cannot be later than 90 days after the date the judgment was signed. *Id.*

D. Motion for Judgment Nunc Pro Tunc

A motion for Judgment Nunc Pro Tunc may be filed to correct a clerical error in the judgment even after the court's plenary power has expired. *Jenkins v. Jenkins*, 16 S.W.3d 473, 482 (Tex. App.—El Paso 2000, no pet.) The only inquiry in a proceeding for judgment nunc pro tunc is what clerical error exists in the judgment not what judicial error exists. *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986). The movant must give notice to all parties upon filing, or a granted judgment nunc pro tunc will be null. *Tex. R. Civ. P.* 316. *See West Tex. State Bank v. General Res.*, 859 S.W.2d 482, 485 (Tex.App.—Austin, 1987, writ ref'd n.r.e.). *See Appendix, Forms K & L.* Because the motion regards clerical error only, a hearing on a motion nunc pro tunc includes argument only and not receipt of evidence. *Finlay v. Jones*, 435 S.W.2d 136, 138 (Tex. 1968).

1. Proper Subject of Motion for Judgment Nunc Pro Tunc: Clerical Error

A clerical error is a discrepancy in the judgment as it was rendered and as it appears in the record. *Universal Underwriters Ins. Co. v. Ferguson*, 471 S.W.2d 28, 29-30 (Tex. 1971). Furthermore, a clerical error is not an error in reasoning, evidence, or outcome the correction of which would result in a material change to the judgment. *Andrews v. Koch*, 702 S.W.2d 584, 585 (Tex 1986). Examples of a clerical error include but are not limited to: an error in the date or the signing of the judgment, a mathematical error in the calculation of damages, a discrepancy in the acreage description of land, and a mistake in the party's designations. *Claxton v. Lake Fork Water Control & Improv. Dist. No. 1*, 220 S.W.3d 537, 543 (Tex. App.—Texarkana 2006, no pet); *Travelers Cos. V. Wolfe*, 838 S.W.2d 708, 710 (Tex.App.—Amarillo, 1992, no writ); *Escobar*, 711 S.W.2d at 232.; *Dickens v. Willis*, 957 S.W.2d 657, 659 (Tex. App.—Austin 1997, no pet.).

2. Improper Subject for Motion Nunc Pro Tunc: Judicial Error

In contrast, a judicial error occurs when the court makes an error in rendering judgment. *Escobar*, 711 S.W.2 at 231. Examples of judicial error, which are not subject to a judgment nunc pro tunc, include but

are not limited to: mistake in the award of prejudgment interest, erroneous recital that respondent failed to appear and answer resulting in an improper default judgment, and the granting of nonsuit with prejudice when such nonsuit should have been granted without prejudice. *Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 58-59 (Tex. 1970); *Lone Star Cement Corp. v. Fair*, 467 S.W.2d 402, 405-406 (Tex. 1971); *In re Fuselier*, 56 S.W. 265, 268 (Tex.App. –Houston [1st Dist.] 2001, orig. proceeding). A court's attempt to change a judicial error by judgment nunc pro tunc is void. *Dikeman v. Snell*, 490 S.W.2d 183, 186 (Tex. 1973).

3. Deadline

Although under Texas Rule of Civil Procedure 316, no deadline for filing a motion nunc pro tunc exists, the earliest such a motion may be filed is the day after the court's plenary power expires. Tex. R. Civ. P. 316. See *Riner v. Briargrove Park Prop. Owners, Inc.*, 976 S.W.2d 680, 682 (Tex.App. –Houston p1st Dist.] 1997, no writ.). If a court corrects a judgment prior to the expiration of its plenary power, then court has modified the judgment not rendered a judgment nunc pro tunc. *Ferguson v. Naylor*, 860 S.W.2d 123, 128-29. (Tex. App. –Amarillo, writ denied).

4. Effect of Judgment Nunc Pro Tunc

The granting of a judgment nunc pro tunc does not extend the appellate timetable for complaint about the original judgment. Tex. R. Civ. P. 306a(6). However, the appellate deadline for complaining about the corrected judgment begins upon the signing of the judgment nunc pro tunc. Tex R. App. Pro. 4.3(b). It is important to note that this extended deadline applies only to the issue subject to the judgment nunc pro tunc. *Escobar*, 711 S.W.2d at 232. Should a motion for nunc pro tunc be denied, no appeal is permitted. *Shadowbrook Apts. V. Abu-Ahmad*, 783 S.W.2d 210, 211 (Tex. 1990).

VI. APPEALING THE JUDGMENT

A. The Requirement of Finality

Section 51.012 of the Texas Civil Practice and Remedies Code requires a judgment to be final in order for it to be eligible for appeal. Tex. Civ. Prac. & Rem Code § 51.012. To be final, a judgment must dispose of all parties and all issues in the case. *Martinez v. Humble Sand & Gravel, Inc.*, 875 S.W.2d 311, 313 (Tex. 1994). While the finality requirement appears to be straight forward, actual application can be problematic.

1. Multiple Judgments

While Texas Rule of Civil Procedure 301 states that there shall only be one judgment in every case unless otherwise provided by law, if a judgment is vacated, set aside, modified or amended, confusion may arise. Tex. R. Civ. P. 301. The current approach to dealing with such a situation is logical and provides that if there is a second judgment, the latter judgment supersedes its predecessor regardless of the nature of the modifications. *Lane Bank Equip. co. v. Smith S. Equip., Inc.* 10 S.W.3d 308, 310-11 (Tex. 2000). The Texas Supreme Court held this to be true in the *Lane Bank* where a modified judgment rendered after a post trial motion for sanctions was granted. *Id.* Similarly, the Houston Fourteenth District Court of Appeals has held that a trial court's entry of a subsequent order giving different grounds for summary judgment was a new judgment that would restart the appellate timetable. *Quanium v. Frasco Rest. & Catering*, 17 S.W.3d 30, 28-40 (Tex. App. –Houston[14th Dist.] 2000, pet. denied). Applying the same principle, if a court sets aside its judgment, there is no final judgment to appeal. *Wang v. Hus*, 899 S.W.2d 409 (411-12 (Tex. App. –Houston [14th Dist.] 1995, writ denied).

2. Summary Judgment

A summary judgment generally disposes of only some of the issues in a case and is thus, interlocutory not final for purposes of appeal. *Mahan v. Bost*, 577 S.W.2d 541 (Tex. Civ. App. –Tyler 1979, no writ). However, if a summary judgment does dispose of all the issues in a case, it is a final appealable judgment. *Id.* Notwithstanding, if a trial court resolves some claims by summary judgment and leaves other unresolved and yet the judgment unequivocally states that it is final, the judgment is indeed final for appellate purposes. *In re Burlington Coat FactoryWhs.*, 167 S.W.3d 827, 830 (Tex. 2005). A mother Hubbard clause granting all relief not denied does not qualify as an unequivocal final judgment all claims. Thus, a summary disposition containing such a clause and purporting to render final judgment on all issues but failing to actually do so, is not a final judgment. *Lehmann v. Har-can Corp.*, 39 S.W.3d 191 (Tex. 2001).

3. Merger of Interlocutory Orders and Final Judgment

While a final judgment is the general requirement for appeal, the Texas Civil Practice and Remedies Code provides that certain interlocutory orders are eligible for appeal. Tex. Civ. Prac. & Rem. Code § 51.014. As the focus of this paper is post trial motions, these situations are not discussed. Notwithstanding, it is important to note that relief from an interlocutory order not appealable prior to final judgment, is merged into a final judgment when all the remaining claims are

resolved, either on the merits or by dismissal. *Parking Co. v. Wilson*, 58 S.W.3d 742 (Tex. 2001). Under this merger doctrine, interlocutory orders become a part of a final judgment even if not recorded in that judgment. *Webb v. Jorns*, 488 S.W.2d 407, 408-09 (Tex. 1972). In regards to interlocutory orders, it is also important to note that such an order may become a final judgment subject to appeal if it is severed from the remaining claims in the case. Tex. R. Civ. P. 41.

B. When a Judgment Becomes Final

1. Judgment and Plenary Power

The signing of a judgment does not render it final. Rather, the judgment becomes final upon the expiration of the court's plenary power when the trial court loses the power to change it. Tex. R. Civ. P. 306a(1). The expiration of the court's plenary power depends on when the final judgment was signed, whether a postjudgment motion extending the court's plenary power is filed and if so, whether the motion is granted or denied. *Lane Bank*, 10 S.W.3d 310. Plenary power expires 30 days after the signing of a final judgment if no plenary power extending postjudgment motion is filed. *Id.*

2. Effect of Denial of Motion Extending Plenary Power

If a postjudgment motion extending plenary power is filed and denied, the trial court's plenary power continues for 30 days after the motion is overruled either by written order or by operation of law. Tex. R. Civ. P. 329b(e), (g). A postjudgment motion is overruled by operation of law 75 days after the final judgment was signed. Tex. R. Civ. P. 329b(c). Thus, the longest the court's plenary power will last following such a denial is 105 days from the final judgment. *L.M. Healthcare, Inc. v. Childs*, 929 S.W.2d 442, 444 (Tex. 1996). If a postjudgment motion is expressly overruled, and a different postjudgment motion is filed, the new motion will again extend the trial court's plenary power. *In re Brookshire Grocery Co.*, 250 S.W.3d 66, 69-70 (Tex. 2008). However, this extension does not occur if the denial is of a motion for new trial and the new motion is merely an amended motion for new trial. *Id.*

3. Effect of Granting of Motion Extending Plenary Power

If a postjudgment motion extending plenary power is granted, how long the court's plenary power continues depends on the type of motion granted. If a motion for new trial is granted, the original judgment is set aside and the case returns to the court's docket. *Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563 (Tex. 2005). In such a situation, the court's plenary power continues until a new judgment is rendered. If the postjudgment motion that is granted is

not a motion for new trial, the court's plenary power continues for 30 days following the date of the new or modified judgment unless another plenary power extending motion is filed, in which case that grant or denial of that motion determines the length of the plenary power.

4. Withdrawal of Motion Extending Plenary Power

If a plenary power extending motion is withdrawn, the trial court's plenary power returns to its original expiration date of 30 days after the final judgment was signed. *Rogers v. Clinton*, 794 S.W.2d 9, 11 (Tex. 1990). Withdrawal is effective immediately. *Id.* If the party withdraws the motion prior to the court ruling on the motion but after the expiration of 30 days following the signing of the original judgment, the court's plenary power is treated as though it has already expired. *In re Dilley ISD*, 23 S.W.3d 189, 191-92 (Tex. App. –San Antonio 2000, orig. proceeding).

5. Motions Extending Plenary Power

Although the following motions have been previously discussed, it is helpful to have a quick reference list of motions that result in the extension of the court's plenary power. Motions to extend plenary power include:

- Motion for new trial
- Motion to modify judgment
- Motion for sanctions (included in this paper's discussion as a motion to modify judgment)
- Motion for JNOV

C. Perfecting and Prosecuting Appeal

1. Perfecting Appeal

In Texas, filing an appeal after a final judgment in a district court is a matter of right. Tex. Civ. Prac. & Rem. Code § 51.012. The first step in the appeal process is perfecting the appeal. A party perfects appeal by filing written notice of appeal with the trial court clerk. Tex. R. App. P. 25.1. **See Appendix, Form N.** This notice must also be filed with the appellate court and served on all the parties to the final judgment. Tex. R. App. P. 25.1(e). If instead of filing the notice with the trial clerk, a party files notice with the appellate court, the notice is deemed to have been filed with the trial clerk on the same day. *Id.* Appeal should be filed by any party who wants to contest the ruling of the court. Tex. R. App. P. 25.1(c).

Upon filing a notice of appeal, an appellant must also file a docketing statement containing information about the case. Tex. R. App. P. 32.1. This statement is used for administrative purposes only.

Similar to the rule that a trial court cannot grant relief not requested, the appellate court cannot grant relief other than that granted by the trial court unless

that relief is specifically requested in a notice of appeal. If an appellee or another party to the case seeks alteration of the court’s judgment, it must file a cross-notice of appeal. Tex. R. App. P. 25.1(b). However, an appellee may present alternate grounds for affirming the judgment without filing such a cross notice. *First FGen. Realty Corp v. Maryland Cas. Co.*, 981 S.W.S.W.2d 495, 498-501 (Tex. App.—Austin 1998, pet. denied)

2. Filing of the Appellate Record

After an appeal is perfected, the appellate record must be prepared and filed with the appellate court. The appellate record includes the reporter’s record and the clerk’s record.

a. Reporter’s Record

The reporter’s record is the court reporter’s record taken at trial and includes testimony and exhibits. Tex. R. App. P. 34.6(b). The record should be requested in a letter sent to the reporter by the appellant. *See Appendix, Form O*. In addition to being filed with the appellate court, the record should be served on the opposing party. Tex. R. App. P. 34.6(b). A party may file the record in its entirety or make designations in a partial record. Tex. R. App. P. 34.6(c)(4). If a party files only a portion of the record, the appellate court is to presume the incomplete record is complete for the purposes of appeal. *Id.* If a party fails to file a complete record or to make proper designations in a partial record, the court of appeals will presume the omissions support the trial court’s judgment. *Sandoval v. Commission for Lawyer Discipline*, 25 S.W.3d 720, 722 (Tex. App. –Houston [14th Dist.] 2000, pet. denied).

b. Clerk’s Record

The clerk’s record includes all the pleadings heard at trial, the court’s docket sheet, the court’s charge and jury verdict, the court’s judgment, any requests for findings of fact and conclusions of law, any postjudgment motions, the notice of appeal, any formal bill of exceptions, any request for reporter’s record, any request for preparation of the clerk’s record, and a certified bill of costs, including the cost of the clerk’s preparation of the record. Tex. R. App. P. 34.5(a). Just as a letter should be sent to the reporter to request the record, a letter should be sent to the clerk to request that record. *See Appendix, Form P*. A party may specifically ask for an item to be included in the clerk’s record by making such a request in writing. Tex. R. App. P. 34.5(b)(1). If a relevant portion of the clerk’s record is omitted, the trial court, appellate court, or any party may request by letter that the clerk prepare, certify and file a supplement with the appellate court including that item. Tex. R. App. P. 34.5(c)(1).

3. Appellate Briefs

Texas Rule of Appellate Procedure 38.1 governs the appellant’s brief. The brief must be organized under the following headings and contain the following information:

- Identity of parties and counsel,
- Table of contents,
- Index of authorities,
- Statement of the case,
- Any statement regarding oral argument,
- Issues presented,
- Statement of facts,
- Summary of the argument,
- Argument,
- Prayer,
- Appendix

Tex. R. App. P. 38.1.

Texas Rule of Appellate Procedure 38.2

Governs the appellee’s brief. ex. R. App. P. 38.2. In general, the appellee’s brief must be in the same form of the appellant’s brief. *Id.* However, a list of parties and counsel is not required nor is a statement of the case. *Id.* The appellee’s appendix need not contain an item already in the appellant’s appendix. The appellee’s brief should be responsive to the appellant’s brief. *Id.*

Under certain circumstances, an appellee should include cross points in his brief. Tex. R. App. P. 38.2(b). Such instances include response to a challenge of the trial court’s judgment notwithstanding the verdict in which case an appellee must state in cross point any issue that would have vitiated the verdict. *Id.* A cross point following jnov is required if the verdict or one or more findings of the jury have insufficient evidentiary support or the verdict should be set aside because of improper argument of counsel. *Id.* The appellant in turn may file a reply brief to respond to any matter in the appellee’s brief. Tex. R. App. P. 38.3. However, the appellate court may consider the appeal and render a judgment prior to a reply being filed. *Id.*

Briefs may be amended or supplemented as justice require and on whatever reasonable terms the court may prescribe. Tex. R. App. P. 38.7. Notwithstanding, acceptance of an amended brief or of a supplement is not mandatory as parties are entitled to expeditious resolution. *See King v. Cron*, 285 S.W.2d 833, 834 (Tex.App. –San Antonio 1956, ref. n.r.e.)

D. Appellate Timetable

The appellate timetable begins to run at the time of the signing of the final judgment. *Martinez v. Humble Sand & Gravel, Inc.*, 875 S.W.2d 311, 313 (Tex. 1994).

1. Deadline for Perfecting Appeal

The appellant must be perfect appeal within 30 days of the final judgment. Tex. R. App. P. 38.6. This deadline is extended to 90 days after the judgment is signed if any party files a motion for new trial, a motion to modify judgment, or timely request for findings of fact and conclusions of law. Tex. R. App. P. 26.1. If any party files a notice of appeal, another party to the case may also file a notice of appeal so long as it is within 14 days of the first notice. An extension of the time to file notice of appeal may be obtained if within 15 days of the original deadline, the party seeking appeal files notice of appeal along with a motion for extension explaining the need for extension. Tex. R. App. P. 26.3; *see also* Tex. R. App. P. 10.5(b).

2. Deadline for Appellate Record

After appeal has been perfected, the reporter's record and the clerk's record (appellate record) both must be filed within 60 days after judgment was signed. Tex. R. App. 35.1(a). If the time for giving notice of appeal was extended under Texas Rule of Appellate Procedure 26.1, the appellate record is due within 120 days of the signing of the judgment. Tex. R. App. 35.1(a). If the appellate court does not timely receive the appellate record, the appellate clerk must send notice to the parties and the district clerk stating that the record is late and that it must be filed within 30 days of the late notice. Tex. R. App. P. 37.3(a). If the record has still not arrived within this 30 day time period, the clerk must refer the matter to the appellate court which must make whatever order to avoid further delay. *Id.*

3. Deadlines for Briefs

The appellant's brief must be filed with the court of appeals within 30 days after the record is filed. Tex. R. Civ. App. 38.6(a). In turn, the appellee's brief must be filed within 30 days after the appellant's brief was filed. Tex. R. App. P. 38.6(b). An appellant may file a reply brief addressing any point in the appellee's brief within 20 days after the date the appellee's brief was filed. Tex. R. App. P. 38.6(d).

Despite the timetable set forth for filing a brief, an extension may be granted if the appellant files a motion to extend the time to file either before or after the brief was due. Tex. R. App. P. 38.6(d). In order to receive an extension, the appellant's motion must meet the requirements of Texas Rule of Appellate Procedure 10.5. Tex. R. App. P. 10.5. Under this rule, a motion to extend time must state the deadline for filing the

brief, the length of extension sought, the facts relied on to reasonably explain the need for an extension, and the number of previous extensions granted if any. *Id.*

VII. CONCLUSION

Despite the temporal nature of post trial or postjudgment motions, the motions discussed in this paper should be kept in mind throughout trial. Some of the motions can be strategically used to push favorable ruling or to extend deadlines, while others require preservation of error during trial in order to be used following trial. Thus, post trial practice is integral to successful litigation.

APPENDIX

Form A

CAUSE NO. _____

<p>IN THE MATTER OF THE MARRIAGE OF</p> <p>HUSBAND</p> <p>AND</p> <p>WIFE</p> <p>AND IN THE INTEREST OF</p> <p>MINOR CHILDREN</p>	<p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p>	<p>IN THE DISTRICT COURT OF</p> <p>_____ COUNTY, TEXAS</p> <p>_____ JUDICIAL DISTRICT</p>
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**MOTION TO SET ASIDE DEFAULT JUDGMENT/
MOTION FOR NEW TRIAL AFTER DEFAULT JUDGMENT**

This Motion to Set Aside Default Judgment is brought by HUSBAND, who shows in support:

1. This motion is presented within the time allowed by law on motions for new trial, the default judgment in this case having been rendered on *date*.
2. Husband’s failure to appear on the trial date was the result of accident and mistake, rather than any intentional or indifference, because:
 - a. *Insert specifics for failure to appear, including any problems with notice or improper service*
 - b.
3. In this divorce cause of action, Husband can and does set up valid meritorious defenses including:
 - a. *State specific defenses here, including overcoming community property presumption; applicable reasons for a different division of property; overcoming any SAPRC presumptions, etc.*
4. A new trial in this case will neither occasion delay nor prejudice Petitioner, because:.
5. HUSBAND will tender reasonable costs and expenses incurred by reason of this motion.

HUSBAND requests that the Court grant the Motion to Set Aside Default Judgment/Motion for New Trial Following Default Judgment.

TINDALL & ENGLAND, P.C.

By: _____

Angela Pence England
State Bar Card: 00794920
1300 Post Oak Boulevard, Ste. 1550
Houston, Texas 77056-3093
Telephone: (713) 622-8733
Fax: (713) 622-8744
E-mail: apengland@tindallengland.com

NOTICE OF HEARING

The above motion is set for hearing on _____ at _____ . M. in the _____ district court of _____ County, Texas.

SIGNED on _____.

Judge or Clerk

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure by fax/personal delivery/certified mail ,return receipt requested.

Angela Pence England
Attorney for HUSBAND

AFFIDAVIT OF HUSBAND

Husband appeared before me in person today and stated under oath as follows:

“My name is HUSBAND. I am over the age of 18 and fully competent to make this affidavit. I am the movant in this Motion to Set Aside Default Judgment/Motion for New Trial Following Default Judgment. I have read the above motion and all of the facts stated therein are within my personal knowledge and are true and correct.

State specific facts supporting reason for failure to appear and meritorious defense.

HUSBAND

SIGNED under oath before me on _____.

Notary Public, State of Texas

Form B

CAUSE NO. _____

**IN THE MATTER OF
THE MARRIAGE OF**

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IN THE DISTRICT COURT OF

**HUSBAND
AND
WIFE**

_____ **COUNTY, TEXAS**

**AND IN THE INTEREST OF
MINOR CHILDREN**

_____ **JUDICIAL DISTRICT**

**ORDER ON MOTION TO SET ASIDE DEFAULT JUDGMENT/
MOTION FOR NEW TRIAL FOLLOWING DEFAULT JUDGMENT**

On _____, the Court considered the Motion to Set Aside Default Judgment of Husband and ORDERS the default judgment set aside and that a new trial be granted in this case.

IT IS FURTHER ORDERED that HUSBAND tender \$_____ by cash, cashier's check, or money order to Wife/Wife's attorney of record, at _____ on or before Monday, January 15, 2012, for reasonable costs and expenses incurred by her.

SIGNED on _____.

JUDGE PRESIDING

Form C

CAUSE NO. _____

**IN THE MATTER OF
THE MARRIAGE OF**

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IN THE DISTRICT COURT OF

**HUSBAND
AND
WIFE**

_____ **COUNTY, TEXAS**

**AND IN THE INTEREST OF
MINOR CHILDREN**

_____ **JUDICIAL DISTRICT**

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

HUSBAND, requests the Court to state in writing the findings of fact and conclusions of law as provided by rule 296 of the Texas Rules of Civil Procedure/Texas Family Code § 6.711.

TINDALL & ENGLAND, P.C.

By: _____

**Angela Pence England
State Bar Card: 00794920
1300 Post Oak Boulevard, Ste. 1550
Houston, Texas 77056-3093
Telephone: (713) 622-8733
Fax: (713) 622-8744
E-mail: apengland@tindallengland.com**

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure by fax/personal delivery/certified mail, return receipt requested.

Angela Pence England
Attorney for HUSBAND

Form D

CAUSE NO. _____

IN THE MATTER OF THE MARRIAGE OF HUSBAND AND WIFE AND IN THE INTEREST OF MINOR CHILDREN	§ § § § § § § § § §	IN THE DISTRICT COURT OF _____ COUNTY, TEXAS _____ JUDICIAL DISTRICT
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NOTICE OF PAST-DUE FINDINGS OF FACT AND CONCLUSIONS OF LAW

HUSBAND, in accordance with rule 297 of the Texas Rules of Civil Procedure, gives notice to the Court that a timely Request for Findings of Fact and Conclusions of Law was filed on *date*. Findings and conclusions were due to be filed by the Court on or before *date* but have not been filed.

TINDALL & ENGLAND, P.C.

Angela Pence England
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Houston, Texas 77056-3093
Telephone: (713) 622-8733
Fax: (713) 622-8744
E-mail: apengland@tindallengland.com

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure by fax/personal delivery/certified mail, return receipt requested.

Angela Pence England
 Attorney for HUSBAND

Form E

CAUSE NO. _____

IN THE MATTER OF
THE MARRIAGE OF

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IN THE DISTRICT COURT OF

HUSBAND
AND
WIFE

_____ COUNTY, TEXAS

AND IN THE INTEREST OF
MINOR CHILDREN

_____ JUDICIAL DISTRICT

SUGGESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

WINNER, WIFE, hereby files these suggested Findings of Fact and Conclusions of Law.

TINDALL & ENGLAND, P.C.

Angela Pence England
State Bar Card: 00794920
1300 Post Oak Boulevard, Ste. 1550
Houston, Texas 77056-3093
Telephone: (713) 622-8733
Fax: (713) 622-8744
E-mail: apengland@tindallengland.com

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure by fax/personal delivery/certified mail ,return receipt requested.

Angela Pence England
Attorney for WIFE

CAUSE NO. _____

IN THE MATTER OF THE MARRIAGE OF	§ § § § § § § § § §	IN THE DISTRICT COURT OF _____ COUNTY, TEXAS _____ JUDICIAL DISTRICT
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FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to the request of HUSBAND, the Court makes and files the following as original Findings of Fact and Conclusions of Law in accordance with rules 296 and 297 of the Texas Rules of Civil Procedure and sections 6.711, 153.258, and 154.130 of the Texas Family Code.

[NOTE: THESE ARE SAMPLES ONLY, TAKEN FROM A NUMBER OF POSSIBLE CASE SCENERIOS AND MUST BE TAILORED TO YOUR SPECIFIC FACTS AND JUDGMENT. DRAFTING SUGGESTION: TRACK THE FINAL DECREE OF DIVORCE AND MAKE SPECIFIC FINDINGS FOR EVERY RULING OF THE COURT BASED UPON THE EVIDENCE PRESENTED AT TRIAL.]

1. WIFE, Petitioner, and HUSBAND, Respondent, were married on March 17, 2004.
2. At the time of the filing of this suit, Petitioner had been a domiciliary of Texas for six months and a resident of Harris County County for ninety days.
3. Texas was the last marital residence of the parties within two years before the suit was filed.
4. Respondent, although a non-resident of Texas, has significant connections within the State of Texas and has maintained sufficient minimum contacts with the state for the basis of personal jurisdiction.
5. The child the subject of this suit, CHILD, resides in Texas as a result of the acts or directives of the Respondent.
6. Respondent resided in Texas with the child the subject of this suit and Texas has personal jurisdiction in conformity with the requirements of the constitutions of the state of Texas and the United States.
7. Respondent has submitted to the jurisdiction of Texas by consent, by entering a general appearance, by the filing of a counter-claim, by seeking affirmative relief, by filing a responsive document having the effect of waiving any contest to personal jurisdiction, and by accepting the benefit of his requests for affirmative relief by this court.

8. The marriage of Petitioner and Respondent has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation.

9. Respondent is guilty of adultery during the marriage that renders further living together insupportable.

10. At the time of divorce, Petitioner and Respondent were the parents of the following child under the age of eighteen years:

Name: *CHILD*

Sex:

Birth date:

Home state: *Texas*

11. It is in the best interest of the child that WIFE, Petitioner, be appointed the sole managing conservator of the child and that HUSBAND, Respondent, be appointed the possessory conservator of the child, as the presumption that the parents should be appointed joint managing conservators has been overcome.

12. It is not in the best interest of the child that the parents be appointed joint managing conservators of the child based upon _____.

13. The following assets for the benefit of the child were created during the marriage:

14. It is in the best interest of the child that the sole managing conservator, WIFE, have the sole and exclusive right to manage all of the assets identified in number 14 above for the benefit of the child.

16. It is in the best interest of the child that HUSBAND be awarded a Standard Possession Order with the child, with the following variances:

17. It is in the best interest of the child that HUSBAND pay child support in the amount of \$1,416.00 per month.

INCLUDE the findings as required by Texas Family Code § 154.130 if appropriate.

18. WIFE, Petitioner, provides high deductible health insurance coverage for the child available through her employment. Husband does not.

19. It is in the best interest of the child that WIFE, Petitioner, continue to provide health insurance for the child.

20. It is in the best interest of the child that Respondent, HUSBAND, be ordered to reimburse Petitioner, WIFE, as additional child support, the monthly cost of providing health insurance for the child.

21. It is in the best interest of the child that Petitioner and Respondent each pay 50% of the child's uninsured medical expenses for the child as additional child support.

22. The parties stipulated that the following permanent mutual injunctions are necessary and in the best interest of the child:

- a. Disturbing the peace of the child or of another person.
- b. Hiding or secreting the child from the other party.
- c. Making disparaging remarks regarding the other party in the presence or within the hearing of the child.
- d. Using any means of corporal punishment in disciplining the child.
- e. Consuming alcohol or taking a controlled substance for which the party does not have a prescription within 12 hours before or during any period of possession of the child.

23. The following property should be awarded to Petitioner, WIFE, as part of a just and right division of the estate of the parties:

TRACK PROPERTY DIVISION TO WIFE

24. To the extent any of the property awarded to Petitioner, WIFE, is the separate property of WIFE, that property is hereby confirmed as the separate property of WIFE, and the nature and extent of such separate property has been considered by the court in making its just and right division of the community estate of the parties.

25. The following property should be awarded to Respondent, HUSBAND, as part of the just and right division of the estate of the parties:

26. To the extent any of the property awarded to Respondent, HUSBAND, is the separate property of HUSBAND, that property is hereby confirmed as the separate property of HUSBAND, and the nature and extent of such separate property has been considered by the court in making its just and right division of the community estate of the parties.

27. The following property belongs to the separate estate of WIFE:

TRACK ANY SEPARATE PROPERTY OF WIFE

28. The following are liabilities of the community estate:

29. During the marriage, the community estate received reimbursement in the amount of \$_____ from the use and enjoyment of the separate property residence of WIFE.

30. During the marriage, the community estate received reimbursement in the amount of \$_____ from the use and benefit of the separate property vacation home of WIFE.

31. The Court took into consideration the following factors in making a determination of a just and right division of the community estate:

- a. The amount of separate property that was liquidated by WIFE for the benefit of the community;
- b. The adultery on the part of Respondent, HUSBAND, during the marriage;
- c. The failing health and disability of Petitioner, WIFE;
- d. The granting of conservatorship of the minor child to WIFE;
- e. The future needs of the child of the marriage;
- f. The community indebtedness and liabilities for which Petitioner, WIFE, will be responsible;

- g. The tax consequences of the division of property;
- h. The future earning power, business opportunities, capacities, and abilities of the spouses;
- i. The need for future support of Petitioner, WIFE, including her anticipated health care expenses;
- n. The amount of the benefits received by Respondent, HUSBAND, by Petitioner's separate property;
- o. The wasting of community assets by Respondent;
- p. The reimbursement claims;
- q. The attorney's fees to be paid;
- r. The creation of community property through the use of a Petitioner's separate estate;
- s. The creation of community property by the efforts of Petitioner;
- t. The lack of community property due to the lack of efforts by Respondent;
- u. the failure of Respondent to contribute to the support of the family during the pendency of this suit.

FINDINGS OF FACT AS CONCLUSIONS OF LAW

Any finding of fact that is a conclusion of law shall be deemed a conclusion of law.

CONCLUSIONS OF LAW

1. The Original Petition for Divorce filed by WIFE and the counterclaim for divorce filed by HUSBAND are in due form and contain all the allegations required by law.
2. This Court has jurisdiction of the parties and of the child, and of the subject matter of this case.
3. All legal prerequisites to granting a divorce have been met.
4. The divorce is granted on the ground of insupportability and in favor of WIFE on the ground of adultery.
5. WIFE should be named sole managing conservator of CHILD, the child the subject of this suit and HUSBAND should be named possessory conservator of the child.
6. HUSBAND is entitled to a Standard Possession Order with the child the subject of this suit at the times and under the terms and conditions set forth in the order.
7. HUSBAND should pay monthly periodic child support in the amount of \$1416.00 per month. He should also pay additional child support to WIFE by reimbursing her each month for the cost of the child's health care insurance.
8. The division of the property of Petitioner and Respondent effected by the final judgment is just and right, having due regard for the rights of each party and the child of the marriage, irrespective of the characterization of any item of property as either community or separate.
9. The following property is confirmed as the separate property of WIFE:
10. To the extent any of the property awarded to WIFE in the division of the estate of the parties is separate property it is confirmed as the separate property of WIFE.

11. To the extent any of the property awarded to HUSBAND in the division of the estate of the parties is the separate property of HUSBAND it is confirmed as the separate property of HUSBAND.

SIGNED on _____.

JUDGE PRESIDING

Form F

CAUSE NO. _____

**IN THE MATTER OF
THE MARRIAGE OF**

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IN THE DISTRICT COURT OF

**HUSBAND
AND
WIFE**

_____ **COUNTY, TEXAS**

**AND IN THE INTEREST OF
MINOR CHILDREN**

_____ **JUDICIAL DISTRICT**

**REQUEST FOR ADDITIONAL OR AMENDED FINDINGS OF
FACT AND CONCLUSIONS OF LAW**

HUSBAND requests the Court to make the following additional findings of fact and conclusions of law in accordance with rule 298 of the Texas Rules of Civil Procedure. This request is filed within ten days of the date on which the Court’s Findings of Fact and Conclusions of Law were filed.

The following factual and legal issues were not addressed by the Findings of Fact and Conclusions of Law filed by the court on _____:

LIST ANY ADDITONAL FINDINGS REQUESTED

The following findings of fact or conclusions of law should be amended for the following reasons:

TINDALL & ENGLAND, P.C.

Angela Pence England
State Bar Card: 00794920
1300 Post Oak Boulevard, Ste. 1550
Houston, Texas 77056-3093
Telephone: (713) 622-8733
Fax: (713) 622-8744
E-mail: apengland@tindallengland.com

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure by fax/personal delivery/certified mail ,return receipt requested.

Angela Pence England
Attorney for WIFE

Form G

CAUSE NO. _____

**IN THE MATTER OF
THE MARRIAGE OF**

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IN THE DISTRICT COURT OF

**HUSBAND
AND
WIFE**

_____ **COUNTY, TEXAS**

**AND IN THE INTEREST OF
MINOR CHILDREN**

_____ **JUDICIAL DISTRICT**

REQUEST FOR FINDINGS IN POSSESSION ORDER

This request is filed by WIFE, Petitioner, who shows in support:

On *date* a hearing was held to determine the periods of possession to be awarded to WIFE.

WIFE, requests that the Court state in the possession order the specific reasons for all deviations from the standard possession order.

TINDALL & ENGLAND, P.C.

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Houston, Texas 77056-3093
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Fax: (713) 622-8744
E-mail: apengland@tindallengland.com

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure by fax/personal delivery/certified mail ,return receipt requested.

Angela Pence England
Attorney for WIFE

Form H

CAUSE NO. _____

**IN THE MATTER OF
THE MARRIAGE OF**

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IN THE DISTRICT COURT OF

**HUSBAND
AND
WIFE**

_____ **COUNTY, TEXAS**

**AND IN THE INTEREST OF
MINOR CHILDREN**

_____ **JUDICIAL DISTRICT**

REQUEST FOR FINDINGS IN CHILD SUPPORT ORDER

This Request for Findings in Child Support Order is brought by WIFE, Petitioner, who shows in support:

On *date* a hearing was held to determine child support. WIFE requests that the Court state the following in the child support order:

1. The amount of child support ordered by the Court is (choose one of the following) the amount of child support ordered by the court is in accordance with the statutory guidelines or the application of the guidelines in this case would be unjust or inappropriate;

2. the amount of net resources available to WIFE per month is \$_____;

3. the amount of net resources available to HUSBAND per month is \$_____;

4. HUSBAND is obligated to support children in more than one household;

a. the number of children before the Court is _____;

b. the names and birth dates of all children not before the Court who reside in the same household with HUSBAND are as follows:

Name: CHILD

Birth date:

Name: CHILD

Birth date:

c. the names and birth dates of all children not before the Court for whom Husband has a legal duty to pay support (and who are not counted under item a. or b.) are as follows:

Name: CHILD

Birth date:

Name: CHILD

Birth date:

5. the amount of child support payments per month that is computed if the percentage guidelines of Texas Family Code § 154.125 or 154.129 of the Texas Family Code are applied to the first \$7,500 of Husband’s net resources is \$_____ ; and

6. the percentage applied to the first \$7,500 of Husbands’s net resources for child support by the actual order rendered by the Court is _____%; and \$_____.

7. the specific reasons that the amount of support per month ordered by the Court varies from the amount computed by applying the percentage guidelines of Texas Family Code §154.125/154.129 of the Texas Family Code are: *include reasons guidelines have not been followed.*

TINDALL & ENGLAND, P.C.

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Houston, Texas 77056-3093
Telephone: (713) 622-8733
Fax: (713) 622-8744
E-mail: apengland@tindallengland.com

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure by fax/personal delivery/certified mail ,return receipt requested.

Angela Pence England
Attorney for WIFE

Form I

CAUSE NO. _____

**IN THE MATTER OF
THE MARRIAGE OF**

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IN THE DISTRICT COURT OF

**HUSBAND
AND
WIFE**

_____ **COUNTY, TEXAS**

**AND IN THE INTEREST OF
MINOR CHILDREN**

_____ **JUDICIAL DISTRICT**

MOTION TO MODIFY, CORRECT, OR REFORM JUDGMENT

This Motion to Modify, Correct, or Reform Judgment is brought by HUSBAND, Petitioner, who shows in support:

1. This motion is presented within the time allowed by law on postjudgment motions, the judgment in this case having been rendered on *date*.
2. It was improper for the Court to enter orders that
state error or deficiency of the judgment that you are asking the court to fix

Husband prays that the Court grant the Motion to Modify, Correct, or Reform Judgment.

TINDALL & ENGLAND, P.C.

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Houston, Texas 77056-3093
Telephone: (713) 622-8733
Fax: (713) 622-8744
E-mail: apengland@tindallengland.com

Notice of Hearing

The above motion is set for hearing on _____ at _____ M. in the _____ district court of _____ County, Texas.

SIGNED on _____.

Judge or Clerk

Certificate of Service

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure on *date*.

Angela Pence England
Attorney for HUSBAND

Form J

CAUSE NO. _____

<p>IN THE MATTER OF THE MARRIAGE OF</p> <p>HUSBAND AND WIFE</p> <p>AND IN THE INTEREST OF MINOR CHILDREN</p>	<p>§</p>	<p>IN THE DISTRICT COURT OF</p> <p>_____ COUNTY, TEXAS</p> <p>_____ JUDICIAL DISTRICT</p>
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MOTION FOR NEW TRIAL

This Motion for New Trial is brought by HUSBAND, RESPONDENT, who shows in support:

1. On *date* a judgment was signed by this Court in this case.
2. *Specifically allege trial court error in accordance with Texas Rules of Civil Procedure 320-322 as applicable:*
 - a. A new trial should be granted to HUSBAND because this Court abused its discretion in denying HUSBAND’S pretrial Motion for Continuance based on Respondent’s failure to properly respond to HUSBAND’S discovery requests despite being ordered to do so by the Court. Because HUSBAND was unable to obtain the requested discovery, he was unable to properly present his case.
 - b. A new trial should be granted to HUSBAND because this Court abused its discretion in allowing WIFE’s Expert to testify as an expert on WIFE’s behalf. The expert’s testimony was conjectural and speculative, and he lacked the knowledge to testify as an expert on the subject for which he was called.
 - c. A new trial should be granted to HUSBAND because this Court abused its discretion in excluding the testimony of HUSBAND’s expert, *name of husband’s expert*, as a rebuttal or impeachment witness to *name of wife’s expert’s* testimony.
 - d. A new trial should be granted to HUSBAND because this Court erroneously failed to disqualify wife’s attorney, *name of wife’s attorney*. Wife’s attorney should have been disqualified because *state basis for disqualification*.
 - e. A new trial should be granted to HUSBAND because this Court abused its discretion in failing to grant HUSBAND’S request for a mistrial based on *specifically state basis*.
 - f. A new trial should be granted to HUSBAND because Petitioner made an improper and prejudicial jury argument. Specifically, *state incurable portion of the jury argument*.

- g. A new trial should be granted to HUSBAND because this Court abused its discretion in denying HUSBAND’S objections to the jury charge. Specifically, *state grounds of objections*.
- h. A new trial should be granted to HUSBAND because the evidence is legally and factually insufficient to support this Court’s judgment. Specifically, the evidence is legally and factually insufficient to support this Court’s judgment based on the following *jury findings or findings of fact*. Specifically, *state jury finding or finding of fact* .
- i. A new trial should be granted to HUSBAND because this Court abused its discretion in making the property division.

The above errors amounted to such a denial of HUSBAND’S rights as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case. Tex. R. App. P. 44.1(a)(1).

- 3. HUSBAND has a meritorious defense to the cause of action alleged in this case.
- 4. The granting of a new trial would not injure WIFE.
- 5. Justice will not be properly served unless a new trial is granted.

HUSBAND prays that the Court set aside the judgment signed on *date* and grant a new trial.

TINDALL &

ENGLAND, P.C.

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State Bar Card: 00794920
1300 Post Oak Boulevard, Ste. 1550
Houston, Texas 77056-3093
Telephone: (713) 622-8733
Fax: (713) 622-8744
E-mail: apengland@tindallengland.com

Notice of Hearing

The above motion is set for hearing on _____ at _____ . M. in district court of _____ County, Texas.

SIGNED on _____
 Judge or Clerk

Certificate of Service

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure on *date*.

Angela Pence England
 Attorney for HUSBAND

Form K

CAUSE NO. _____

**IN THE MATTER OF
THE MARRIAGE OF**

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IN THE DISTRICT COURT OF

**HUSBAND
AND
WIFE**

_____ **COUNTY, TEXAS**

**AND IN THE INTEREST OF
MINOR CHILDREN**

_____ **JUDICIAL DISTRICT**

ORDER ON MOTION FOR NEW TRIAL

On *date* the Court heard the Motion for New Trial of HUSBAND.

IT IS ORDERED that the motion is GRANTED and that a new trial is GRANTED.

IT IS ORDERED that the motion is partially GRANTED and that a new trial is GRANTED with respect to the following issues:

- a. *specifically state grounds on which new trial is granted;*
- b.

IT IS ORDERED that the motion is DENIED.

SIGNED on _____.

JUDGE PRESIDING

Form L

CAUSE NO. _____

**IN THE MATTER OF
THE MARRIAGE OF**

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IN THE DISTRICT COURT OF

**HUSBAND
AND
WIFE**

_____ **COUNTY, TEXAS**

**AND IN THE INTEREST OF
MINOR CHILDREN**

_____ **JUDICIAL DISTRICT**

MOTION FOR JUDGMENT NUNC PRO TUNC

This Motion for Judgment Nunc Pro Tunc is brought by WIFE, Petitioner who shows in support:

1. A final judgment was signed in this case on *date*.
2. The judgment signed is incorrect because *specify the clerical mistakes to be corrected*.
3. Wife requests that the court issue a corrected judgment nunc pro tunc as attached to this motion as Exhibit A.

WIFE prays that the Court grant the Motion for Judgment Nunc Pro Tunc.

TINDALL & ENGLAND, P.C.

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1300 Post Oak Boulevard, Ste. 1550
Houston, Texas 77056-3093
Telephone: (713) 622-8733
Fax: (713) 622-8744
E-mail: apengland@tindallengland.com

Notice of Hearing

The above motion is set for hearing on _____ at _____ . M. in district court of _____ County, Texas.

SIGNED on _____.

Judge or Clerk

Certificate of Service

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure on *date*.

Angela Pence England
Attorney for WIFE

Form M

CAUSE NO. _____

**IN THE MATTER OF
THE MARRIAGE OF**

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IN THE DISTRICT COURT OF

**HUSBAND
AND
WIFE**

_____ **COUNTY, TEXAS**

**AND IN THE INTEREST OF
MINOR CHILDREN**

_____ **JUDICIAL DISTRICT**

ORDER ON MOTION FOR JUDGMENT NUNC PRO TUNC

On _____, the Court considered the Motion for Judgment Nunc Pro Tunc of WIFE.

IT IS ORDERED that a Judgment Nunc Pro Tunc be entered as follows:

Insert entirety of judgment here with corrected language.

SIGNED on _____.

JUDGE PRESIDING

APPROVED AS TO FORM:

Angela Pence England
Attorney for WIFE

Opposing Counsel
Attorney for HUSBAND

Form N

CAUSE NO. _____

**IN THE MATTER OF
THE MARRIAGE OF**

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IN THE DISTRICT COURT OF

**HUSBAND
AND
WIFE**

_____ **COUNTY, TEXAS**

**AND IN THE INTEREST OF
MINOR CHILDREN**

_____ **JUDICIAL DISTRICT**

NOTICE OF APPEAL

This Notice of Appeal is filed by HUSBAND, Respondent, a party to this proceeding who seeks to alter the trial court’s judgment or other appealable order.

1. The trial court, cause number, and style of this case are as shown in the caption above.
2. The judgment or order appealed from was signed on *date*.
3. HUSBAND desires to appeal from *all portions of the judgment / specify ruling or portion of the order being appealed*.
4. This appeal is being taken to either the First or Fourteenth Court of Appeals.
5. This notice is being filed by HUSBAND; jointly by the following parties whose interests are aligned: *names*.
6. This is an accelerated appeal.
6. This is a restricted appeal, and:
 - a. The names and addresses of each party to the trial court’s judgment are: *names and addresses*.
 - b. Appellant is a party affected by the trial court’s judgment who did not participate either in person or through counsel in the hearing resulting in the judgment being appealed.
 - c. Appellant did not timely file either a postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal.

TINDALL & ENGLAND, P.C.

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Houston, Texas 77056-3093
Telephone: (713) 622-8733
Fax: (713) 622-8744
E-mail: apengland@tindallengland.com

Certificate of Service

I certify that a true copy of this Notice of Appeal was served in accordance with rule 9.5 of the Texas Rules of Appellate Procedure on each party or that party's lead counsel as follows:

Party
Lead attorney
Address of service
Method of service
Date of service

A copy of this notice is being filed with the appellate clerk in accordance with rule 25.1(e) of the Texas Rules of Civil Procedure.

Angela Pence England
Attorney for HUSBAND

Form O

TINDALL & ENGLAND, P.C.

ATTORNEYS AT LAW
 1300 POST OAK BLVD., SUITE 1550
 HOUSTON, TEXAS 77056-3081
 TELEPHONE: (713) 622-8733
 FAX: (713) 622-8744
 www.tindallengland.com

HARRY L. TINDALL

BOARD CERTIFIED - FAMILY LAW
 TEXAS BOARD OF LEGAL SPECIALIZATION
 FELLOW, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

ANGELA PENCE ENGLAND

BOARD CERTIFIED - FAMILY LAW
 TEXAS BOARD OF LEGAL SPECIALIZATION
 FELLOW, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

JENNIE R. SMITH
 JERYL A. GOLUB

ANA L. GALVAN*
 KAREN B. HOWARD*
 PILAR GIRON

*BOARD CERTIFIED-FAMILY LAW PARALEGAL
 TEXAS BOARD OF LEGAL SPECIALIZATION

WRITER'S DIRECT DIAL
 (713) 622-8733 ext.25

EMAIL
 apengland@tindallengland.com

Letter to Court Reporter to Prepare Reporter's Record

Date

**CERTIFIED MAIL
 RETURN RECEIPT REQUESTED**

Name of court reporter

Address of court reporter

Re: Cause No. ; In the Matter of the Marriage of Husband and Wife and in the Interest of Minor Children.

Dear Court Reporter:

Appellant, HUSBAND, intends to appeal from the *name of order being appealed* signed on *date* to the *1st or 14th Court of Appeals in Houston, Texas*. Accordingly, I am requesting that you prepare an **original and one copy, with ASCII disks**, of the reporter's record, with exhibits, for the following:

1. Trial held on *date(s)*.

I specifically request that you include *portion of record and exhibits needed*. *Include if applicable*: Appellant requests a partial reporter's record for the presentation of the following issues on appeal:

- a. *list points on appeal*
- b.

Please advise me immediately if you encounter problems with the preparation of this record, including the loss or inaudibility of any testimony or argument or the loss of any exhibits admitted or excluded. If, in preparing the reporter's record, you have original exhibits that cannot be released to the court of appeals without an order from the trial court, please advise me immediately, and I will submit the appropriate motion and order to the trial court for consideration.

Please contact me on receipt of this letter to discuss the anticipated preparation time you will require. At that time, please also let me know the fee or deposit you will require to prepare this record, and I will make prompt arrangements for payment of that amount. Once the reporter's record is completed, please let me know the balance due, if any, and I will make prompt arrangements for payment of that amount.

The reporter's record must be filed with the court of appeals on or before *date*. If you are unable to complete the reporter's record in time to file it as required, please notify the appellate court clerk of your estimate of when the record will be filed and send me a copy of your notice to the clerk.

By copy of this letter, I am notifying all other parties through their counsel of record of this request. I will also file the original of this letter with the clerk of this Court. If you have any questions, please feel free to call me.

Thank you in advance for your cooperation and assistance with this matter.

Sincerely,

Angela Pence England

Enc.: check

cc: Opposing Counsel
District Clerk

Form P

TINDALL & ENGLAND, P.C.

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 1300 POST OAK BLVD., SUITE 1550
 HOUSTON, TEXAS 77056-3081
 TELEPHONE: (713) 622-8733
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HARRY L. TINDALL

BOARD CERTIFIED - FAMILY LAW
 TEXAS BOARD OF LEGAL SPECIALIZATION
 FELLOW, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

ANGELA PENCE ENGLAND

BOARD CERTIFIED - FAMILY LAW
 TEXAS BOARD OF LEGAL SPECIALIZATION
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JENNIE R. SMITH
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 PILAR GIRON

*BOARD CERTIFIED-FAMILY LAW PARALEGAL
 TEXAS BOARD OF LEGAL SPECIALIZATION

WRITER'S DIRECT DIAL
 (713) 622-8733 ext.25

EMAIL
 apengland@tindallengland.com

Letter to District Clerk to Include Material in Clerk's Record

Date

**CERTIFIED MAIL
 RETURN RECEIPT REQUESTED**

Name of District Clerk

Address of District Clerk

Re: *Re: Cause No.* ; *In the Matter of the Marriage of Husband and Wife and in the Interest of
 Minor Children.*

Dear District Clerk:

Enclosed is the original and one copy of the Designation of Clerk's Record in this case. Please file the original and return a file-stamped copy to me in the envelope I have provided for your convenience. If a deposit is required, please inform me, and I will remit to you. When the clerk's record has been prepared, please forward it to the court of appeals. The clerk's record must be filed on or before *date*. If you are not able to prepare the record by that date, please notify the appellate court clerk of your estimate of when the record will be filed and send me a copy of your notice to the clerk. Thank you for your cooperation.

Sincerely,
 Angela Pence England

Enc.: Designation of Record and envelope
 cc: [name of opposing counsel]

DESIGNATION OF CLERK'S RECORD

TO THE CLERK OF THE COURT:

HUSBAND requests the clerk of the Court to prepare a record of these proceedings, including all matters required by rule 34.5(a) of the Texas Rules of Appellate Procedure and specifically including the following documents:

TINDALL & ENGLAND, P.C.

Angela Pence England
State Bar Card: 00794920
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Certificate of Service

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure on *date*.

Angela Pence England
Attorney for HUSBAND

