FINDINGS OF FACT AND CONCLUSIONS OF LAW:
FINDING YOUR WAY THROUGH THE MORASS

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Findings of Fact and Conclusions of Law: *Finding Your Way Through the Morass*

I. INTRODUCTION.

One of the most important—and one of the most complex and misunderstood—procedural steps in many appeals occurs in the trial court: requesting and preparing findings of fact and conclusions of law. This process is full of potential traps, and requires great attention to the elements of the claims and affirmative defenses and to what issues will be addressed in the appeal of the judgment. But findings of fact are critical to the success of an appeal of a case in which findings are proper. The aim of this paper is to assist the practitioner in finding his or her way through the procedural and substantive morass of requesting, preparing, and attacking on appeal findings of fact and conclusions of law, pointing out the hazards frequently encountered along the way.

II. WHAT ARE FINDINGS OF FACT AND CONCLUSIONS OF LAW?

When the trial court, as opposed to a jury, is the fact finder, it may provide the factual and legal bases for its judgment or order by making and filing findings of fact and conclusions of law. Findings of fact in a non-jury trial have the same force and effect as a jury's answers to questions in the court's charge: they resolve factual disputes presented in the case. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). Similarly, they provide the material facts supporting certain trial-court orders, such as special appearance and sanctions rulings. *See infra* Part IV.B. Findings of fact are reviewed on appeal for legal and factual sufficiency. *Anderson*, 806 S.W.2d at 794. Conclusions of law are the court's statement of the legal principles it applied to the facts to resolve the case. *See Dallas Morning News Co. v. Bd. of Trustees of Dallas Indep. Sch. Dist*., 861 S.W.2d 532, 536 (Tex. App.—Dallas 1993, writ denied). Conclusions of law are not binding on the appellate court, but the court may review them de novo, drawn from the facts to determine their correctness. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). Conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Id*.

Findings of fact and conclusions of law are critical to an appellate court's disposition of an appeal, as they inform the court of the factual and legal basis undergirding the judgment or order being appealed. In some instances, the lack of findings may make it nearly impossible to attack the judgment or order on appeal. This is so because **when no findings of fact or conclusions of law are filed, the appellate court must affirm the judgment if it can be upheld on any legal theory supported by the evidence.** *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

Accordingly, although any party may request findings of fact and conclusions of law, the losing party should ***always*** request them because a judgment without findings of fact is more difficult to reverse than one supported by findings of fact. *See infra* Part VI, VII.

III. THE FORM OF FINDINGS AND CONCLUSIONS.

A. Must be Written.

The court's findings of fact and conclusions of law need not be in any particular format, but they must be in writing, filed of record, and served on all other parties to the suit in compliance with Rule 21a. TEX. R. CIV. P. 21a, 296, 297; *Roberts v. Roberts*, 999 S.W.2d 424, 440 (Tex. App.—El Paso 1999, no pet.); *Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120, 124 (Tex. App.—Corpus Christi 1986, no writ).Although the court typically signs a formal, stand-alone document entitled "Findings of Fact and Conclusions of Law," it complies with the requirement if it sets out its findings and conclusions in a letter to counsel that is filed of record, or it signs and accepts a party's filed proposed findings and conclusions. *See Roberts*, 999 S.W.2d at 440; *Villa Nova Resort, Inc.*, 711 S.W.2d at 124; *Holliday v. Henry I. Siegel Co*., 643 S.W.2d 519, 520 (Tex. App.—Houston [14th Dist.] 1982), *aff'd*, 663 S.W.2d 824 (Tex. 1984).

However, a court's oral statements do not constitute findings of fact. *In re Doe 10*, 78 S.W.3d 338, 340 n. 2 (Tex. 2002); *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984). This is so even if they are prepared as a reporter's record and filed as findings of fact and conclusions of law. *Roberts*, 999 S.W.2d at 440; *Nagy v. First Nat'l Gun Banque Corp*., 684 S.W.2d 114, 116 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

B. Must be Separate from the Judgment.

Findings of fact must be in a document separate from—and not included in—the judgment. TEX. R. CIV. P. 299a. Courts of appeals are divided as to whether findings recited only in a judgment and not in a separate document have probative value. Some hold that they do, as long as they do not conflict with findings filed in a separate document. *See Baltzer v. Medina*, 240 S.W.3d 469, 474 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *In re Estate of Jones*, 197 S.W.3d 894, 900 n.4 (Tex. App.—Beaumont 2006, pet. denied); *S. Plains Lamesa R.R., Ltd. v. Heinrich*, 280 S.W.3d 357, 365 (Tex. App.—Amarillo 2008, no pet.); *Martinez v. Molinar*, 953 S.W.2d 399, 401 (Tex. App.—El Paso, 1997, no writ). Other courts disagree and refuse to

consider findings appearing only in the judgment. *See In re S.A.E.*, No. 06-08-00139-CV, 2009 WL 2060087, at *5 n.3 (Tex. App.—Texarkana July 17, 2009, no pet.) (mem. op.); *In re A.A.M.*, No. 14-05-00740-CV, 2007 WL 1558701, at *3 n.3 (Tex. App.—Houston [14th Dist.] May 31, 2007, no pet.) (mem. op.); *Guridi v. Waller*, 98 S.W.3d 315, 317 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Casino Magic Corp. v. King*, 43 S.W.3d 14, 19 n.6 (Tex. App.—Dallas 2001, pet. denied); *Boland v. Natural Gas Pipeline Co. of Am.*, 816 S.W.2d 843, 844 (Tex. App.—Fort Worth 1991, no writ).

**** Hazard Alert! ****

If a judgment contains findings of fact, but the court subsequently files findings of fact in a separate document, the findings in the second document control to the extent of any conflict. TEX. R. CIV. P. 299a; *Moore v. Jet Stream Invs., Ltd.*, 315 S.W.3d 195, 209 n.32 (Tex. App.—Texarkana 2010, pet. denied); *Dickerson v. DeBarbieris*, 964 S.W.2d 680, 684 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

IV. CIRCUMSTANCES IN WHICH FINDINGS SHOULD AND SHOULD NOT BE REQUESTED.

Although in many circumstances it is proper, if not necessary, to request findings of fact, in some situations it is not proper.

A. Trial to the Court on the Merits.

After a conventional trial to the court on the merits, the parties have a right to findings of fact and conclusions of law. TEX. R. CIV. P. 296; *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997). If the request is properly filed, the court must make and file findings of fact. *Gene Duke Builders, Inc. v. Abilene Housing Auth.*, 138 S.W.3d 907, 908 (Tex. 2004).

B. Other Orders and Judgments.

Courts have held that findings of fact and conclusions of law, although discretionary, are proper in the following circumstances:

- **ruling on a plea to the jurisdiction after an evidentiary hearing**, *Goldberg v. Comm'n for Lawyer Discipline*, 265 S.W.3d 568, 578 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).
- **ruling on a special appearance**, *Allianz Risk Transfer (Bermuda) Ltd. v. S.J. Camp & Co.*, 117 S.W.3d 92, 95 n.5 (Tex. App.—Tyler 2003, no pet.).
- **ruling on a contested motion to transfer venue**, *Coke v. Coke*, 802 S.W.2d 270, 278 (Tex. App.—Dallas 1990, writ denied).
- **default judgment on a claim for unliquidated damages**, *IKB Indus.*, 938 S.W.2d at 443.
- **ruling on an application for temporary restraining order or temporary injunction**, *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 884 (Tex. App.—Dallas 2003, no pet.).
- **judgment based on an evidentiary hearing**, *IKB Indus.*, 938 S.W.2d at 443.
- **sanctions order**, *Id.*
- **appealable interlocutory order**, TEX. R. APP. P. 28.1(c); *Tom James of Dallas, Inc.*, 109 S.W.3d at 884.
- **ruling on a motion for new trial after an evidentiary hearing**, *Puri v. Mansukhani*, 973 S.W.2d 701, 707 (Tex. App.—Houston [14th Dist.] 1998, no pet.).[1]

C. After a Jury Trial.

In some cases tried to a jury, the court decides certain fact issues, such as the amount of reasonable and necessary attorney's fees. Also, the court may grant or deny equitable relief based on the jury's findings. A party appealing the portion of the judgment decided by the court should request findings of fact and conclusions of law regarding that portion of the judgment. *See Ritchie v. Rupe*, 339 S.W.3d 275, 283-84 (Tex. App.—Dallas 2011), *aff'd in part, rev'd in part on other grounds*, 443 S.W.3d 856 (Tex. 2014); *Toles v. Toles*, 45 S.W.3d 252, 264 n.5 (Tex. App.—Dallas 2001, pet. denied).

D. Family Law scenarios.

1. In contested child-support cases.

In contested child-support cases, the trial court *must* file findings of fact when properly requested "without regard to rules 296 through 299" of the Texas Rules of Civil Procedure. TEX. FAM. CODE

[1] A trial court must provide specific, written reasons for granting a new trial after a jury verdict. *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 212-15 (Tex. 2009). A party may challenge the merits of the trial court's findings by mandamus review. *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 759 (Tex. 2013).

§ 154.130(a). Under this provision, the request may be orally made during the hearing or in writing. If oral, the request must be made on the record. *Id*. § 154.130(a)(2). If in writing, it must be filed within **ten days** after the hearing date. *Id*. § 154.130(a)(1).

2. When the evidence on value and characterization of the marital-estate assets is disputed.

When the court makes its just and right division of the marital estate, and there is disputed evidence regarding the characterization and/or value of certain marital-estate assets, the court *must* file findings of fact and conclusions of law on the characterization and value of those assets upon request by a party. *Id.* § 6.711(a). The request must "conform to the Texas Rules of Civil Procedure." *Id.* § 6.711(b). One court has held that "conform" means the request must be expressly stated in the original request for findings of fact filed 20 days after the final judgment under Rule 296, even when other filed written requests and oral requests are made before that deadline, and when a specific request is made in a timely filed request for additional findings of fact when the court's findings omit specific values. *See Moore v. Moore*, 383 S.W.3d 190, 200-01 (Tex. App.—Dallas 2012, pet. denied); *see also* 2011 WL 1686560, at *7, 8, 44-45 & n.22 (appellant's brief); 2011 WL 2469171, at *23-24 (reply brief).

E. When a Request is Not Proper.

A party should not request findings of fact and conclusions of law in the following circumstances:

- **summary judgment**
- **judgment notwithstanding the verdict**
- **judgment after a directed verdict**
- **dismissal for want of jurisdiction without an evidentiary hearing**
- **dismissal based on the pleadings or special exceptions**
- **default judgment awarding liquidated damages**
- **dismissal for want of prosecution**
- **judgment rendered without an evidentiary hearing**

The Texas Supreme Court has held that findings are improper in the first three listed judgments because they must be rendered as a matter of law based undisputed material facts. *IKB Indus.*, 938 S.W.2d at 442. As to the remainder, the court has determined that findings and conclusions "can have no purpose and should not be requested, made, or considered on appeal." *Id*. at 443.

****Hazard Alert!****

Normally, a request for findings of fact and conclusions of law extends the time period in which to file a notice of appeal from 30 days after the date of the judgment to 90 days. *But see infra* Part VI.B regarding interlocutory appeals. However, a request for findings of fact and conclusions of law does **not** extend the appellate timetable when the request is not proper. *IKB Indus.*, 938 S.W.2d at 441, 443.

V. TIMETABLE FOR REQUESTING.

Rules 296 – 298 of the Texas Rules of Civil Procedure provide the deadlines for requesting and filing findings of fact and conclusions of law. The deadlines apply in all circumstances in which they are proper, not just after a trial to the court. *See* TEX. R. CIV. P. 296; *IKB Indus.*, 938 S.W.2d at 443.

- **Initial request:** 20 days after the date the judgment or order is signed (Rule 296)
- **Deadline for the court's initial findings and conclusions:** 20 days after a timely request is filed (Rule 297)
- **Second request:** 30 days after the initial request, if a court fails to file findings and conclusions—this request is entitled "Notice of Past Due Findings of Fact and Conclusions of Law" (*Id*.)
- **Deadline for the court's past-due findings and conclusions:** 40 days after the initial request (*Id.*)
- **Request for additional or amended findings and conclusions:** 10 days after the court files its findings and conclusions, whenever they are filed—this request is filed if the requesting party believes the court's findings and conclusions are incomplete (e.g., omitting findings on a claim or affirmative defense) or incorrect (e.g., contrary to undisputed evidence) (Rule 298)
- **Deadline for the court's additional or amended findings and conclusions:** 10 days after the request for additional or amended findings and conclusions (*Id.*)

VI. BENEFITS OF REQUESTING.

A. Narrowing the issues on appeal.

The most important benefit of requesting findings and conclusions is to narrow the scope of issues that the court of appeals will need to decide in the appeal. *See Larry F. Smith, Inc. v. Weber Co.*, 110 S.W.3d 611, 614 (Tex. App.—Dallas 2003, pet. denied); 6 ELAINE G. CARLSON, MCDONALD & CARLSON, TEX. CIV. PRAC. § 18:3 (2d ed. updated 2016). As stated above, like jury findings, findings of fact provide the court with the factual basis supporting the judgment; conclusions of law inform the court of the legal grounds upon which judgment was granted. The pleadings of both sides may have raised more causes of action and affirmative defenses than ultimately supports the judgment. Findings and conclusions focus the appeal to those claims and defenses that form the basis for the judgment.

B. Extending the appellate timetable.

When findings of fact and conclusions of law are required or otherwise proper, a timely request extends the time period in which to file the notice of appeal from 30 days to 90 days after the judgment is signed. TEX. R. APP. P. 26.1(a)(4).

> ****Hazard Alert****
>
> However, in an appeal of an interlocutory order, a request for findings and conclusions will *not* extend the 20-day deadline in which to file the notice of appeal. *See* TEX. R. APP. P. 28.1(c).

VII. HOW FINDINGS AND CONCLUSIONS AFFECT PRESUMPTIONS ON APPEAL.

To achieve one of the most crucial benefits of requesting findings and conclusions, the appealing party needs to not only ensure that it timely complies with the deadlines for requesting findings and conclusions, but also it must (1) ensure that the proceeding—trial or evidentiary hearing—is taken on the record, (2) timely request the reporter's record for the appeal, (3) make financial arrangements with the court reporter for the cost of the record, and (4) ensure that all of the requested record is filed in the court of appeals. As shown below, whether a reporter's record is filed will affect whether presumptions in favor of the judgment will exist.

A. No Findings or Conclusions and No Reporter's Record.

If the trial court does not file findings of fact or conclusions of law, and there is no reporter's record, the appellate court (i) must presume that the trial court made all findings necessary to support the judgment, and (ii) will indulge every presumption in favor of the judgment. *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003). Accordingly, the necessary findings to support the judgment will be implied. *Id.*

B. No Findings or Conclusions, But Reporter's Record is Filed.

The implied findings that result when the trial court does not file findings or conclusions are not conclusive when a reporter's record is filed. *Id.* In that case, the appellant may challenge the implied findings for legal and factual insufficiency. *Id.*

C. Findings and Conclusions, But No Reporter's Record Requested.

When the trial court files findings and conclusions, but the reporter's record is not requested, the appellate court will indulge every presumption in favor of the trial court's findings. *Bryant v. United Shortline Inc. Assurance Servs., N.A.*, 972 S.W.2d 26, 31 (Tex. 1998).

D. The Problem with Omitted Findings and Requesting Additional Findings.

Rule 299 expressly addresses omitted findings, and its provisions are so important as to justify being quoted in full:

> When findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment. Refusal of the court to make a finding requested shall be reviewable on appeal.

TEX. R. CIV. P. 299. From Rule 299 come these critical points about omitted findings and requests for additional findings.

- If the court's original findings of fact do not include *any* findings on a ground of recovery or defense, the party relying on that ground of recovery or defense must

timely request additional findings of fact or the ground is waived.

- When the court's findings of fact include one or more elements of a claim or defense, but omits others, the omitted elements will be presumed (if supported by the evidence) unless a party timely files a request for additional findings of fact asking the court to make findings regarding the omitted elements.

How are these omissions addressed practically? First, the usual procedure is for the losing party in the trial court—the eventual appellant—to make a general request for findings under Rule 296. *See Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); 4 MCDONALD & CARLSON, § 20.4. Then typically the trial court asks the prevailing party to draft and submit to the court proposed specific findings that will support the judgment. *Id.* Sometimes the losing party has an opportunity to review and comment on them; often, the losing party does not have that opportunity. Once the trial court enters its findings, often the losing party—the eventual appellant—files a request for additional or amended findings regarding omitted elements of a cause of action or defense to preserve the record and prevent deemed findings on appeal. This procedure has been developed to bridge the often-narrow line between the appellant's need to narrow and preserve appellate complaints and its need to avoid findings that would otherwise be implied to support the judgment.

1. <u>When the court's findings and conclusions omit an entire claim or defense.</u>

The first scenario often occurs when the prevailing party inadvertently omits an *entire* claim or defense on which it is relying. In that event, that party must timely file a request for additional findings of fact on *each* element of that claim or defense. For example, assume the court's findings of fact include findings on all elements of the plaintiff's fraud cause of action, but no findings regarding the plaintiff's breach-of-contract claim, which the plaintiff believes is supported by the evidence and upon which it believes the court also based its judgment. In that circumstance, the plaintiff would need to request *and submit* additional (and specific) findings on each element of the contract claim to avoid waiver of that ground of recovery. *See Heard v. City of Dallas*, 456 S.W.2d 440, 445 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.) (proposed additional findings must be submitted). The same procedure would apply if the court's findings of fact completely omit all elements of an affirmative defense upon which the court based its judgment.

2. <u>When the court's findings and conclusions omit an element of a claim or defense.</u>

This scenario most often occurs when the prevailing party drafts findings and conclusions that inadvertently omit an element of a claim or defense. To avoid the presumption of that omitted finding (if supported by the evidence), the losing party must timely file a request for additional findings regarding the omitted elements. TEX. R. CIV. P. 298. Although the rule does not expressly require the requesting party to distinctly point out the omitted elements to the trial court, one court held it is "logically required." *Vickery*, 5 S.W.3d at 254. Rule 298 does say that the additional or amended findings requested must be "specified." Courts construe this language as requiring that "the request for further additional or amended findings ... shall specify the further additional or amended findings that the party making the request desires the trial court to make and file." *Wagner v. Riske*, 178 S.W.2d 117, 119–20 (Tex. 1944); *Alvarez v. Espinoza*, 844 S.W.2d 238, 243 (Tex. App.—San Antonio 1992, writ dism'd); *Heard v. City of Dallas*, 456 S.W.2d 440, 445 (Tex. Civ. App.—Dallas 1970, writ ref'd n.e.r.). A general request for additional or amended finding is not sufficient. The request for additional findings must be timely filed before that party may attack the court's error in failing to make those findings. *Vickery*, 5 S.W.3d at 254-55; *see Gentry v. Squires Constr., Inc*., 188 S.W.3d 396, 408 (Tex. App.—Dallas 2006, no pet.).

This is an odd procedure, as the requested element by the losing party actually *supports* the prevailing party's claim or defense. But this is what is required. If, in the rare instance, the prevailing party files proposed findings on each element of a claim or defense, but the trial court deletes one of the elements, that element cannot be supplied by implication on appeal. *See Davey v. Shaw*, 225 S.W.3d 843, 857 (Tex. App.—Dallas 2007, no pet.); *Vickery*, 5 S.W.3d at 253. The court's omission is the equivalent of a "refusal" to make that finding, and this "refusal" is reviewable on appeal. *Vickery*, 5 S.W.3d at 253; TEX. R. CIV. P. 299. However, if the refusal to file additional findings does not prevent a party from adequately presenting an argument on appeal, there is no reversible error. *Johnston v. McKinney Am., Inc*., 9 S.W.3d 271, 277 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

**** Hazard Alert!****

If you must file a request for additional findings of fact and you submit a finding that supports the judgment you plan to appeal, you should include in that request language similar to the following:

"Defendant makes this request because there are material, disputed issues that arose during the trial that were not properly addressed in the findings of fact. Defendant is required to request specific, additional findings on these issues that are consistent with the final judgment. Although Defendant does not agree with these requested additional findings of fact, the request is necessary so Defendant may challenge these findings or the lack of these findings on appeal if the Court does not make these findings."

3. Additional issues regarding requesting additional findings and conclusions.

Rule 298 of the Texas Rules of Civil Procedure provides that the court "shall file any additional or amended findings and conclusions that are *appropriate*." TEX. R. CIV. P. 298 (emphasis added). "Additional findings are not required if the original findings and conclusions "properly and succinctly relate the ultimate findings of fact and law necessary to apprise [the party] of adequate information for the preparation of [the party's] appeal." *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 612 (Tex. App.—Fort Worth 2006, pet. denied) (quoting *Balderama v. W. Cas. Life Ins. Co*., 794 S.W.2d 84, 89 (Tex. App.—San Antonio 1990), *rev'd on other grounds*, 825 S.W.2d 432 (Tex. 1991). An "ultimate fact" is one that "would have a direct effect on the judgment." *Main Place*, 192 S.W.3d at 612. The court should make additional findings of fact "only if they have some legal significance to an ultimate issue in the case." *Vickery*, 5 S.W.3d at 255.

VIII. DRAFTING ORIGINAL AND ADDITIONAL FINDINGS OF FACT.

1. Practical suggestions.

If you are the prevailing party and the trial court has requested that you draft and submit proposed findings and conclusions:

- Pull a copy of the judgment and the live pleadings at trial.
- Determine which causes of action, counter-defenses, etc., were proven by the evidence.
- Write out the elements of each and other controlling issues.
- Draft findings that address each of these elements and other controlling issues.

If you need to request additional findings of fact and conclusions of law:

- Be specific about what the trial court omitted and request specific additional findings, *Vickery*, 5 S.W.3d at 256 (appellant's request did not specifically and clearly inform the trial court that it had omitted two essential elements in its original findings—thus, appellant was prevented from attacking specific omissions in the original findings).

2. Controlling issues; not evidentiary issues.

The trial court is required only to make findings or additional findings on controlling factual issues. *In re Marriage of Grossnickle*, 115 S.W.3d 238, 253 (Tex. App.—Texarkana 2003, no pet.). A controlling issue is one that is essential to the cause of action or defense and which has a direct effect on the judgment. *Pakdimounivong v. City of Arlington*, 219 S.W.3d 401, 412 (Tex. App.—Fort Worth 2006, pet. denied). On the other hand, a trial court is not required to make findings on evidentiary issues. *Rich v. Olah*, 274 S.W.3d 878, 886 (Tex. App.—Dallas 2008, no pet.). An evidentiary issue "is one that the jury may consider in deciding the controlling issue, but that is not a controlling issue itself." *Clear Lake City Water Auth. v. Winograd*, 695 S.W.2d 632, 639 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). Similarly, the court is not required to explain what it relied on or how it arrived at a particular finding or conclusion, as such would be evidentiary. *Dura-Stilts Co. v. Zachry*, 697 S.W.2d 658, 661 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

3. Findings and conclusions that support the judgment.

A trial court is not required to make and sign a finding that is contrary to the judgment or an additional finding that is inconsistent with its original findings. *Vickery*, 5 S.W.3d at 254; *Hunter v. NCNB Tex. Nat'l Bank*, 857 S.W.2d 722, 727 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

4. Undisputed facts.

A trial court is not required to make findings on facts that are undisputed. *Barker v. Eckman*, 213 S.W.3d 306, 310 (Tex. 2006).

IX. RESPONDING TO THE COURT'S FINDINGS AND CONCLUSIONS OR ITS FAILURE TO FILE THEM.

1. Objecting to the court's findings of fact and conclusions of law.

The Rules do not expressly provide that a party must object to a finding of fact or conclusions of law. In fact, after a bench trial, a complaint regarding the legal or factual insufficiency of the evidence may be made for the first time on appeal in the complaining party's brief. *See* TEX. R. APP. P. 33.1(d).

If a court's finding or conclusion is incorrect—e.g., it provides an incorrect material date or the wrong rate of prejudgment interest—the complaining party can point out the error to the court by filing a request for amended findings or conclusions that submits the correct finding or conclusion. *See Anzaldua v. Anzaldua*, 742 S.W.2d 782, 783 (Tex. App.—Corpus Christi 1987, writ denied) (noting party did not have the opportunity to object and request additional findings of fact). Some courts have held that a party that did not object to filed findings or otherwise inform the court of an alleged error in a finding waived the complaint. *See Best Bumper Supply, Inc. v. Coterill*, No. 08-02-00021-CV, 2004 WL 2067598, at *8 (Tex. App.—El Paso 2004, no pet.) (mem. op.) ("A party has an obligation to point out deficiencies in the filed findings of fact or conclusions of law or any complaints regarding same are waived."); *McClary v. Thompson*, 65 S.W.3d 829, 833 (Tex. App.—Fort Worth 2002, pet. denied) (wife's motion for new trial that complained about court's finding of fact characterizing husband's retirement plan as separate property preserved complaint, notwithstanding no objection to that finding).

But an objection separate and apart from a request for additional or amended findings and conclusions might be beneficial in some instances. For example, say the prevailing party (who is your opponent) submits numerous proposed findings of fact, most of which are evidentiary in nature and otherwise immaterial. You should object as soon as possible, before the court signs the proposed findings and conclusions, and point out the unnecessary findings and conclusions (and perhaps identify the controlling findings and conclusions). This might prevent the court from making these findings, resulting in a more concise, and appropriate, set of findings and conclusions. In any event, findings that are purely evidentiary, not on controlling issues, on undisputed facts, and otherwise immaterial, need not be challenged on appeal.

2. If the court fails to file findings and conclusions after a timely request.

If a court does not file findings and conclusions on or before the 20th day after the timely request is filed, the requesting party *must* timely file a notice of past-due findings. TEX. R. CIV. P. 297. If the party fails to file this notice, a complaint that the court failed to file findings and conclusions is waived on appeal. *Las Vegas Pecan & Cattle Co. v. Zavala Cnty*, 682 S.W.2d 254, 255 (Tex. 1984).

3. If the court untimely files findings and conclusions.

Nothing in the rules prohibits a court from filing findings and conclusions after the appropriate deadline. Therefore, some courts have held that a court may file late findings and conclusions. *E.g.*, *Davey*, 225 S.W.3d at 852; *In re A.S.C.*, 157 S.W.3d 9, 14-15 (Tex. App.—Waco 2004, no pet.); *Silbaugh v. Ramirez*, 126 S.W.3d 88, 91 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Jefferson Cnty. Drainage Dist. No. 6 v. Lower Neches Valley Auth.*, 876 S.W.2d 940, 959-60 (Tex. App.—Beaumont 1994, writ denied). Because additional or amended findings do not affect the judgment, a court may file such findings under Rule 298 after its plenary power over its judgment has expired. *Robles v. Robles*, 965 S.W.2d 605, 610-11 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *Jefferson Cnty. Drainage Dist.*, 876 S.W.2d at 959.

4. Remedy for any harm.

After a bench trial, the trial court is required to file findings of fact and conclusions of law if timely requested. *See supra* Part IV.A. Accordingly, the court's failure file them is presumed harmful, unless the appellate record demonstrates the complaining party sustained no harm. *Cherne Indus., Inc. v. Magallenes*, 763 S.W.2d 768, 772 (Tex. 1989).

Harm is demonstrated if the appealing party is left to "guess" the ground(s) upon which the adverse judgment was rendered, which adversely affects the appellant's ability to effectively appeal the judgment, as well as the appellate court's ability to review the judgment. *Larry F. Smith, Inc.*, 110 S.W.3d at 614. This type of harm also applies to the court failing to file additional findings of fact when timely and properly requested. *City of San Antonio v. El Dorado Amusement*

Co., 195 S.W.3d 238, 244 (Tex. App.—San Antonio 2006, pet. denied). While easily established in cases involving multiple grounds for recovery or multiple defenses, harm may not exist in cases involving only one ground of recovery or defense. *See Larry F. Smith, Inc*., 110 S.W.3d at 614.

If the appellant establishes such harm, the appropriate and preferable remedy is abatement of the appeal and remand to the trial court for entry of findings of fact and conclusions of law. *Cherne Indus.*, 763 S.W.2d at 773; *Liberty Mut. Fire Ins. v. Laca*, 243 S.W. 791, 795-96 (Tex. App.—El Paso 2007, no pet.). However, in some circumstances, a remand for new trial is more appropriate, such as when the trial judge who tried the case and made the findings has been replaced after an election, the trial record has been lost precluding the entry of findings, there has been a significant passage of time, or "other inescapable difficulties." *See Laca*, 243 S.W.3d at 796, *Brooks v. Housing Auth. of City of El Paso*, 926 S.W.2d 316, 321 (Tex. App.—El Paso 1996, no writ).

X. THE STANDARDS OF REVIEW FOLLOWING A BENCH TRIAL.

A. Findings of Fact.

In an appeal from a bench trial, a trial court's findings of fact have the same weight as a jury's verdict. *Anderson*, 806 S.W.2d at 794. When findings of fact are challenged, the court reviews the sufficiency of the evidence supporting the findings by applying the same standards it used in reviewing the legal or factual sufficiency of the evidence supporting jury findings. *Id.*

1. Legal sufficiency.

When reviewing a record for legal sufficiency the court of appeals views the evidence in the light most favorable to the court's finding to determine whether the evidence would allow reasonable and fair-minded people to reach the finding under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). The court "must credit favorable evidence if reasonable [fact finders] could, and disregard contrary evidence unless reasonable [fact finders] could not." *Id*. The court will sustain a challenge to the legal sufficiency of evidence only if: (a) there is "'a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; [or] (d) the evidence establishes conclusively the opposite of the vital fact.'" *Id*. at 810 (quoting Robert W. Calvert, *"No Evidence" & "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-63 (1960)). More than a scintilla of evidence exists, and the evidence is therefore legally sufficient, "if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about a vital fact's existence." *Lee Lewis Constr. Co. v. Harrison*, 70 S.W.3d 778, 782-83 (Tex. 2001). However, "'when the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence.'" *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (quoting *Kindred v. Con/Chem, Inc*., 650 S.W.2d 61, 63 (Tex. 1983)).

When a party challenges the legal sufficiency of an adverse finding of fact on which it had the burden of proof at trial, it must establish that the evidence proves all vital facts in support of the finding, as a matter of law. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001).

2. Factual sufficiency.

As with a legal-sufficiency standard of review, all of the evidence must be considered when reviewing for factual sufficiency. *Plas-Tex, Inc. v. U.S. Steel Corp*., 772 S.W.2d 442, 445 (Tex. 1989). A party attacking the factual sufficiency of an adverse finding on which it did not have the burden of proof at trial must demonstrate that the evidence supporting that finding is so weak that the finding should be set aside and a new trial ordered. *City of Keller*, 168 S.W.3d at 826. A party attacking the factual sufficiency of an adverse finding on which it did have the burden of proof at trial must demonstrate that "the adverse finding is against the great weight and preponderance of the evidence." *Dow Chem.*, 46 S.W.3d at 242. The appellate court first examines the entire record to determine if there is some evidence to support the finding. *Id*. at 241–42. If there is, the court must then determine whether "'the finding is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, or if the great preponderance of the evidence clearly supports its non-existence.'" W. Wendell Hall, et al., *Hall's Standards of Review in Texas*, 42 ST. MARY'S L.J. 3, 42 (2010) (quoting *Castillo v. U.S. Fire Ins. Co.*, 953 S.W.2d 470, 473 (Tex. App—El Paso 1997, no writ)). The appellate court may reverse and remand for new trial only if it concludes that the court's failure to find is against the great weight and preponderance of the evidence. *Ames v. Ames*, 776 S.W.2d 154, 158 (Tex. 1989).

B. Conclusions of Law.

A trial court's conclusions of law are reviewed *de novo*. *BMC Software*, 83 S.W.3d at 794. They are not binding on the appellate court; it is free to draw its own legal conclusions and may uphold the court's conclusions of law under any legal theory supported by the evidence. *Sharifi v. Steen Auto., LLC*, 370 S.W.3d 126, 148 (Tex. App.—Dallas 2012, no pet.).

XI. CONCLUSION.

It is imperative that a party who plans to appeal a judgment following a bench trial request findings of fact and conclusions of law. The benefits are many, including the very ability to attack the grounds upon which judgment was rendered. But the process is a morass full of hazards, requiring acute attention to the various requests required, deadlines, avoidance of presumed findings, what the controlling issues are, and the standards of review.