HOW TO DRAFT GOOD FINDINGS OF FACT AND CONCLUSIONS OF LAW

LAURIE RATLIFF, *Austin*
Ikard Ratliff, PC

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CHAPTER 3

Laurie Ratliff

Shareholder, IKARD RATLIFF P.C.
2630 Exposition Blvd., Suite 118, Austin, Texas 78703
Laurieratliff@ikardratliff.com | 512 472 4601

Laurie Ratliff is a board certified civil appellate lawyer who represents clients in appellate matters and partners with trial counsel for presenting legal issues in motion practice, discovery disputes, summary judgments, and other trial court matters.

Drawing on her experience working for two courts of appeals, first as a briefing attorney with the Amarillo Court of Appeals, and later as a staff attorney with the Austin Court of Appeals, and serving as lead counsel in a variety of complex appeals, Laurie represents individuals and companies in all aspects of civil appeals, including original proceedings and amicus curiae briefs. She also assists other counsel with appellate procedural issues, brief writing, and oral argument preparation.

A frequent author and speaker on court of appeals practice and trial procedure, Laurie has written a monthly column for the *Austin Lawyer* magazine for more than seventeen years, which comments on recent Austin Court of Appeals' opinions. She also has co-authored an annual article for more than ten years, the "Texas Supreme Court Update," for *The Appellate Advocate*, a quarterly magazine published by the State Bar Appellate Section.

In addition to her legal work, Laurie serves on the Board of Trustees for St. Andrew's Episcopal School and is an active volunteer at the school. Laurie previously served on the board of The Settlement Club, a non-profit organization that supports a residential care facility for abused children. Laurie has been selected as a "Super Lawyer" in Appellate Law every year since 2005. She has an AV Peer Review Rating by LexisNexis Martindale-Hubbell.

Laurie earned a B.B.A. in 1989 from the University of Texas at Austin and a J.D. in 1992 from Texas Tech University School of Law, where she served as Research Editor on the *Texas Tech Law Review*.

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I. INTRODUCTION

There are many similarities with appeals of jury trials and bench trials. Appeals of bench trials, however, involve a key difference from an appeal of a jury trial – unlike having a jury verdict to illuminate the facts underlying the result, the underlying reasons for a judgment in a bench trial are not apparent. The rules of procedure allow a litigant to obtain factual findings that replace a jury's verdict and to obtain the trial court's legal bases for its rulings. The findings of fact and conclusions of law form the basis for the appeal.

Findings of fact and conclusions of law serve many purposes. They allow litigants to know the reasons for the trial court's ruling. This in turn narrows the issues for appeal, to have a target for appeal. Findings of fact and conclusions of law are also necessary to preserve certain errors.

While findings of fact and conclusions of law provide a roadmap or guide to the trial court's decision – both the factual basis and the legal reasons – they are an important tool for attorneys who take the time to prepare them early in a case. Just like in preparing a proposed jury charge early in a case, having proposed findings of fact and conclusions of law prepared well in advance assists in developing case themes, maintaining focus on the arguments and the evidence to be developed, and guiding the presentation of the evidence at trial.

Understanding the procedure, preservation, and strategy issues can be critical in securing findings of fact and conclusions of law. This article discusses the procedure for obtaining findings of fact and conclusions of law, strategies for requesting additional findings of fact, how to avoid waiver, issues to raise on appeal with findings of fact, and finally appellate review of findings of fact and conclusions of law.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. What Are Findings of Fact and Conclusions of Law and What Is Their Purpose?

Findings of fact take the place of a jury's verdict and provide the factual framework for the court's judgment. In cases tried without a jury, findings of fact delineate the facts that support the judgment. That is, findings of fact are the "who did what, when, where, how, or why." *State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008). As one court described, "findings of fact are ultimate determinations of what specifically occurred, who did or did not do certain acts, what the values of services and property are worth, and the answer to any other specific inquiry necessary to establish conduct or the existence or nonexistence of a relevant matter." *Pacific Emp'rs Ins. Co.*, 86 S.W.3d 353, 356-57 (Tex. App.—Texarkana 2002, no pet.).

As they are often described, findings of fact in a bench trial have the "same force and dignity" as a jury's answers to jury questions. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991); *Mayfield v. Peek*, __ S.W.3d __, 2017 WL 769879, at *4 (Tex. App.—El Paso Feb. 28, 2017, no pet.); *Keisling v. Landrum*, 218 S.W.3d 737, 740 (Tex. App.—Fort Worth 2007, pet. denied).

"Conclusions of law may be a statement of a principle of law or the application of the law to the ultimate facts in the case." *Pacific Employers Ins. Co. v. Brown*, 86 S.W.3d at 357.

Together, findings of fact and conclusions of law provide the trial court's reasoning for a judgment. *Allstate Ins. Co. v. Hegar*, 484 S.W.3d 611, 615 (Tex. App.—Austin 2016, pet. denied).

Which are more important? Given the standard of review of findings of fact and conclusions of law, findings of fact are the more important of the two. Findings of fact are reviewed for sufficiency of the evidence; conclusions of law are reviewed *de novo*. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996); *Perry Homes v. Cull*, 258 S.W.3d 580, 598 (Tex. 2008). That is, the court of appeals treats findings of fact as it would jury findings but does not give any particular weight to the trial court's legal conclusions. When reviewing conclusions of law, the court of appeals will make its own legal determination. *First Trust Corp. TTEE FBO v. Edwards*, 172 S.W.3d 230, 233 (Tex. App.—Dallas 2005, pet. denied).

What is the purpose of having findings of fact and conclusions of law? Findings of fact and conclusions of law have several purposes. First, findings of fact and conclusions of law narrow the issues for appeal and provide a basis for attacking the judgment. *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 252, 255 (Tex. App.—Houston [14th Dist.], pet. denied). In a bench trial, there is a presumption of validity of the judgment and that all evidence necessary to support it was admitted at trial.

Without findings of fact, the court of appeals implies all necessary findings in support of the judgment. *Combs v. Newpark Resources, Inc.*, 422 S.W.3d 46, 49 (Tex. App.—Austin 2013, no pet.); *Burnett v. Motyka*, 610 S.W.2d 735, 736 (Tex. 1980); *Schoeffler v. Denton*, 813 S.W.2d 742, 744 (Tex. App.—Houston [14th Dist.] 1991, no writ). If there are no findings of fact requested and none filed, the appellate court must affirm the judgment if any legal theory is supported by the evidence. *Newpark Resources*, 422 S.W.3d 46, 49; *Schoeffler*, 813 S.W.2d at 744.

To limit the scope of the presumption, an appellant should request findings of fact to narrow the issues on appeal and to reduce the number of issues an appellant must raise on appeal. *Vickery*, 5 S.W.3d at 252; *Larry F. Smith, Inc. v. Weber Co., Inc.*, 110 S.W.3d 611, 614 (Tex. App.—Dallas 2003, pet. denied). That is, findings of fact assist the losing party by ascertaining the true basis for the trial court's decision. *Nicholas v. Env't Sys. (Internat'l) Ltd.*, 499 S.W.3d 888, 894 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

In addition, findings of fact define the parameters of issues tried for purposes of res judicata. *Igal v. Brightstar Information Technology Group, Inc.*, 250 S.W.3d 78, 89-90 (Tex. 2008).

Second, a request for findings of fact extends the appellate deadlines. TEX. R. APP. P. 26.1(a)(4). The extended deadline only applies, however, in Rule 296 findings or in cases where findings of fact may be considered on appeal. *Id.*

Third, preparing findings of fact and conclusions of law early in a case can provide a valuable pretrial tool. It is common to prepare a charge early in a case; it should be no different with a bench trial. Preparing draft findings of fact and conclusions of law early in the case assists with tailoring discovery for the case and with presenting evidence at trial. *See* Hon. Tracy Christopher, *Findings of Fact and Conclusions of Law—Do I Have to?*, 76 THE ADVOCATE (TEXAS) 44, 44 (2016) ("a well done draft [of findings of fact and conclusions of law] can be a blue print for the judge and will help you prepare your case").

Finally, findings of fact allow a party to "tell the story" on appeal. Although findings of fact are intended to be limited to ultimate issues and not merely to detail evidentiary matters, they do often detail the evidence. Well-written findings of fact can often end up in the appellate court's opinion as the statement of facts.

B. When Are Findings of Fact Appropriate and When Are They Not?

Findings of fact and conclusions of law are critical for appeals in bench trials. Not every bench trial or hearing, however, is a candidate for findings of fact and conclusions of law.

1. When Findings of Fact Are Required.

Under Rule 296, "in any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law." TEX. R. CIV. P. 296. Rule 296 gives a party a right to findings of fact and conclusions of law following a final adjudication after a conventional trial on the merits before the court. *IKB Indus. v. Pro-Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997); *Haddix v. American Zurich Ins. Co.*, 253 S.W.3d 339, 345(Tex. App.—Eastland 2008, no pet.).

A case is "tried" when a court holds an evidentiary hearing. *Haddix*, 253 S.W.3d at 345. That is, when there is an evidentiary hearing and the trial court determines questions of fact based on conflicting evidence. *International Union, UAA&AI Workers of America-UAW v. General Motors Corp.*, 104 S.W.3d 126, 129 (Tex. App.—Fort Worth 2003, no pet.). In such cases, findings of fact and conclusions of law are mandatory under Rule 296 and 297. Realize too, that a party cannot compel their preparation. *IKB Indus*, 938 S.W.2d at 442-43; *Haddix*, 253 S.W.3d at 345. *See infra* E.2.a "Remedy." Note that one court of appeals has concluded that findings of fact are not appropriate and a trial court has no duty to file them in a post-judgment hearing. *Murray v. Murray*, 276 S.W.3d 138, 143 (Tex. App.—Fort Worth 2008, pet. dism'd). The court reasoned that a post-judgment hearing is not "tried" to the court within the meaning of Rule 296. *Id*

Many statutes require a trial court to enter findings of fact. For example, in a guardianship proceeding, Probate Code § 693 requires the probate court to make specific findings of fact. TEX. PROB. CODE § 693(a). Similarly, in a divorce proceeding, under Family Code 6.711, if requested by a party, the trial court shall file findings of fact that set out the characterization of each party's assets and liabilities and the community's assets and liabilities. TEX. FAM. CODE §6.711(a), (b).[1]

In addition, findings of fact may be required after a jury trial. If some issues are tried to the court and others to a jury, findings of fact are appropriate. *Toles v. Toles*, 45 S.W.3d 252, 264, n.5. (Tex. App.—Dallas 2001, pet. denied). For example, if attorneys' fees are tried to the court and the merits of the case to the jury, findings of fact and conclusions of law are properly requested and filed on the attorneys' fees issue. *Shenandoah Assocs. v. J&K Properties, Inc*., 741 S.W.2d 470, 484 (Tex. App.—Dallas 1987, writ denied).

Finally, a trial court's order granting a new trial raises the need for findings. As the Texas Supreme Court has concluded, trial courts must state the specific reason for granting a new trial that sets aside jury verdict. *In re*

[1] There are two excellent articles containing lists of statutes requiring trial courts to enter findings of fact. *See* Rosemary Kanusky, *Nonjury Appeals*, ADVANCED CIVIL APPELLATE PRACTICE COURSE, ch. 3, pp. 4-7 (State Bar of Texas, Sept. 12-13, 2002) & Honorable Eva M. Guzman & Nina Reilly, *"Think Before You Write"—Preparing Findings of Fact and Conclusions of Law*, ADVANCED FAMILY LAW COURSE, ch. 51, pp. 6-10 (State Bar of Texas, Aug. 14-17, 2006).

Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding). A trial court's order granting a motion for new trial may be reviewed by mandamus. *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 688-89 (Tex. 2012) (orig. proceeding). On mandamus review, the court of appeals determines whether the trial court's stated reasons are reasonably specific and based on legally sound rationale. *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 749 (2013) (orig. proceeding); *see also In re City of Houston*, 418 S.W.3d 388, 393 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding) (court reviewed each of trial court's stated reasons for ordering a new trial); *see also In re Jones*, No. 05-16-00081-CV, 2016 WL 3166080 (Tex. App.—Dallas June 7, 2016, no pet.) (mem. op.) (court assumed it could review reasons for granting new trial contained in findings of fact and conclusions of law and found reasons insufficient).

2. When Findings of Fact Are Helpful and May Be Considered on Appeal.

There are instances where findings of fact are not required under Rule 296, but may be helpful and considered on appeal. *IKB*, 938 S.W.2d at 442. The Supreme Court identified the following as proceedings where findings of fact, although not required under Rule 296, could be considered on appeal: a default judgment on a claim for unliquidated damages, judgment rendered as sanctions and any judgment based in any part on an evidentiary hearing. *IKB*, 938 S.W.2d at 443. Given the advantages of having findings of fact and conclusions of law, the best practice is to make the request for findings of fact and encourage the trial court to sign them.

In addition, when appealing an interlocutory order, a party may request the trial court to enter findings of fact and conclusions of law. The filing of findings of fact in an accelerated appeal, however, is not mandatory. TEX. R. APP. P. 28.1(c) ("trial court need not file findings of fact and conclusions of law but may do so within 30 days after the order is signed."); *Niehaus v. Cedar Bridge, Inc.*, 208 S.W.3d 575, 579, n.5 (Tex. App.—Austin 2006, no pet.); *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 884 (Tex. App.—Dallas 2003, no pet.). Also, as discussed *infra* II E.1 & E.2.e, findings of fact in an accelerated appeal do not extend appellate deadlines and are reviewed differently on appeal than Rule 296 findings of fact.

A question arises in having findings of fact in an interlocutory appeal: which rules control? TRAP 28.1 provides that a trial court need not file findings of fact and conclusions of law, but may do so within *30 days* after the order is signed. TEX. R. APP. P. 28.1(c). This deadline is different than the deadline in Rule 297, and the procedure in Rules 296 and 297. *See* TEX. R. CIV. P. 296, 297 (findings of fact are due twenty days after the request or forty days after the judgment or order).

Two appellate courts have concluded that Rule 297's requirement to file a Notice of Past Due Findings of Fact and Conclusions of Law applies in an interlocutory appeal of a special appearance. *Waterman Steamship Corp. v. Ruiz*, 355 S.W.3d 387, 428 & n.18 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *I & JC Corp. v. Helen of Troy, L.P.*, 164 S.W.3d 877, 884-85 (Tex. App.—El Paso 2005, pet. denied). In *Waterman Steamship*, the court of appeals concluded that a trial court had no obligation to file findings of fact because a special appearance was not a conventional trial on the merits. *Waterman Steamship Corp. v. Ruiz*, 355 S.W.3d at 428. The court of appeals then applied the procedure in Rule 297. According to the court, any error with the trial court's failure to file findings of fact was waived because no notice of past due findings was filed. *Waterman Steamship Corp. v. Ruiz*, 355 S.W.3d at 428 & n.18; *Simmons v. Boyd Gaming Corp.*, No. 09-16-00470-CV, 2017 WL 3298233, at *5, n.6 (Tex. App—Beaumont August 3, 2017, pet. denied) (mem. op.).

The court of appeals in *I & JC Corp.* acknowledged the permissive language in Rule 28.1 but advised that when a "trial court rules on a special appearance, the losing party should request findings of fact and conclusions of law." *I & JC Corp. v. Helen of Troy, L.P.*, 164 S.W.3d at 883.

Accelerated appeals where findings of fact may be requested include appeals from interlocutory orders when by statute an appeal is allowed, quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected less than 30 days after the order or judgment. TEX. R. APP. P. 28.1(a). Accordingly, the appealable orders listed in Tex. Civ. Prac. & Remedies Code §51.014(a) are matters where findings of fact could be filed. TEX. CIV. PRAC. & REM. CODE §51.014(a).

Rulings on pleas to the jurisdiction are an example of a frequently appealed interlocutory order that raise findings of fact issues. Findings of fact and conclusions of law can be entered after a plea to the jurisdiction when there has been an evidentiary hearing and when the facts are in dispute. *Goldberg v. Commission for Lawyer Discipline*, 265 S.W.3d 568, 578 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *see Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004). However, if the facts are undisputed, findings of fact would be immaterial. *Goldberg*. 265 S.W.3d at 579, n.14. In a plea to the jurisdiction challenge if there are no disputed facts and the trial court rules as a matter of law, findings of fact have no purpose and are not considered on appeal. *U. Lawrence Boze' & Assocs., P.C. v. Harris County Appraisal Dist.*, 368 S.W.3d 17, 32-33 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *F-Star Socorro, L.P. v. El Paso Cent. Appraisal Dist.*, 324 S.W.3d 172, 175 (Tex. App.—El Paso 2010, no pet.).

Similarly, in *Haddix v. American Zurich Insurance Company*, the trial court granted pleas to the jurisdiction and dismissed. On appeal, Haddix complained of the trial court's failure to file findings of fact. The Eastland Court observed that while the parties reach different conclusions regarding the evidence, the evidence was undisputed. 253 S.W.3d at 346. Thus, the trial court was not required to file findings of fact. *Id.*; *see also Old Republic Nat'l Title Ins. Co. v. Bell*, __ S.W.3d __, 2018 WL 2449360 (Tex. June 1, 2018) (with undisputed facts, court will not consider implied findings; only considered the legal question of whether the undisputed facts establish jurisdiction).

Temporary injunctions are another interlocutory order that raises findings of fact issues. Rule 683 provides that a temporary injunction must set out the *reasons* for its issuance and must be specific. TEX. R. CIV. P. 683. The "reasons" for an injunction are different than "findings of fact" under Rule 296-97. As the Supreme Court has explained, the order should explain the elements necessary for obtaining a temporary injunction. *Transport Co. of Tex. v. Robertson Transps., Inc.*, 152 Tex. 552, 261 S.W.2d 549, 556 (1953). A party can seek Rule 296 findings of fact and conclusions of law if it chooses. *Id.* Findings of fact, however, are not required to challenge the validity of a temporary injunction. *Courtlandt Place Historical Found. v. Doerner*, 768 S.W.2d 924, 926 (Tex. App.—Houston [1st Dist.] 1989, no writ.). If the party enjoined seeks "additional, detailed findings, the party may make a request under the rules of procedure governing findings of fact generally." *Operation Rescue-Nat'l v. Planned Parenthood of Houston & S.E. Tex., Inc.*, 937 S.W.2d 60, 82 (Tex. App.—Houston [14th Dist.] 1996), *aff'd as modified*, 975 S.W.2d 546 (Tex. 1998). Thus, a party in an injunction must decide whether the reasons in the injunction order require additional "findings." If so, then the party must comply with Rules 296-99. *Operation Rescue*, 937 S.W.2d at 82.

Another potential problem with findings of fact in the temporary injunctive context is their location—in the order or in a separate document. Rule 683 provides that the temporary injunction order must "set forth the reasons for its issuance." TEX. R. CIV. P. 683. As set out below in more detail, findings of fact should not be included in a judgment and should be in a separate document. TEX. R. CIV. P. 299a. Findings of fact included in a temporary injunction comply with Rule 683. *El Tacaso, Inc. v. Jireh Star, Inc.*, 356 S.W.3d 740, 745 & n.5 (Tex. App.—Dallas 2011, no pet.). Findings of fact contained in a temporary injunction order, however, have been held to violate Rule 299a. *Tom James*, 109 S.W.3d at 883-84. In *Tom James*, rejected an argument to consider findings in a temporary injunction as Rule 296 findings. The court reasoned that the findings in a temporary injunction do not meet the requirement of Rule 299a that findings of fact are to be separately filed. *Id.* at 884. The court then applied the standard of review applicable to cases were no findings had been requested or filed. *Id.*

The solution: put in both places but make sure they are identical.

3. When Findings of Fact Are Not Appropriate and Should Not Be Requested.

Not all proceedings result in a party being able to obtain findings of fact and conclusions of law. In cases where there are no questions of fact for the trial court to determine and a trial court rules as a matter of law, findings of fact and conclusions of law serve no purpose and should not be requested. *IKB*, 938 S.W.2d at 442; *Haddix*, 253 S.W.3d at 345, n.3. Findings of fact are not appropriate in the following kinds of cases: summary judgments, directed verdicts, j.n.o.v.'s, default judgment awarding liquidated damages, dismissal for want of prosecution without an evidentiary hearing, dismissal based on the pleadings or special exceptions, and any judgment rendered without an evidentiary hearing. *IKB*, 938 S.W.2d at 442; *see also Housing Auth. Of City of El Paso v. Beltran Elec. Contractors, Inc.*, __ S.W.3d __, 2018 WL 1026452, at *3 (Tex. App.—El Paso Feb. 23, 2018, pet. filed).

In addition, there are other cases where findings of fact and conclusions of law are not appropriate. For example, findings of fact are not appropriate in administrative appeals. *Young Chevrolet, Inc. v. Texas Motor Vehicle Bd.*, 974 S.W.2d 906, 912, n.9 (Tex. App.—Austin 1998, pet. denied) (no findings of fact in an administrative appeal unless an issue of procedural irregularities at agency and evidence is offered on that issue). Findings of fact also are not appropriate in an agreed case under Rule 263. No facts are "tried" in an agreed case within the meaning of Rule 296. *Markel Ins. Co. v. Muzyka*, 293 S.W.3d 380, 384 (Tex. App.—Fort Worth 2009, no pet.). If a trial court files findings of fact in an agreed case, the court of appeals will disregard them. *Addison Urban Dev. Partners, LLC v. Alan Ritchey Materials Co., LC*, 437 S.W.3d 597, 600-01 (Tex. App.—Dallas 2014, no pet.).

What happens if findings are filed in these kinds of cases? If findings of fact are erroneously filed in a case that does not warrant findings, the error is not reversible. The findings of fact are simply disregarded on appeal. *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994); *Cotton v. Ratholes, Inc.*, 699 S.W.2d 203, 204 (Tex. 1985); *Markel Ins.*, 293 S.W.3d at 384-85. Most importantly, if findings of fact are not appropriate and could not considered in a particular case, filing a request for findings does not extend the appellate deadlines. *IKB*, 938 S.W.2d at 443; *International Union v. General Motors Corp*., 104 S.W.3d 126, 128-29 (Tex. App.—Fort Worth 2003, no pet.)

C. Procedure for Requesting Findings of Fact and Conclusions of Law and Strategies for Both Parties

Having discussed the purposes of findings of fact and conclusions of law and when they are appropriate, how are they obtained from the trial court? The procedure for requesting for findings of fact and conclusions of law is different from all other post-judgment filings in two respects: 1) the deadline for filing the request is shorter than other post-judgment motions, and 2) the process requires the filing of a series of documents to properly preserve error.

Requesting findings of fact and conclusions of law is a three-step process. All three steps are critical in preserving error and in presenting a case on appeal.[2]

Deadlines for findings of fact and conclusions of law:

Step One:

> The "Request for Findings of Fact and Conclusions of Law" is due within **20 days** after the judgment is signed;
>
> The trial court must file Findings of Fact and Conclusions of Law within **20 days** after a timely filed request;

Step Two:

> A "Notice of Past Due Findings of Fact and Conclusions of Law" is due **30 days** after the original request was filed;
>
> The trial court then has **40 days** from the date of the original request to file Findings of Fact and Conclusions of Law;

Step Three:

> After original Findings of Fact and Conclusions of Law are filed, any party may file a request for additional or amended findings or conclusions within **10 days** after the original findings are filed; and
>
> Trial court must file an additional findings and conclusions within **10 days** after the request is filed.

TEX. R. CIV. P. 296-298.

Now to drill down on the specifics of the Rules and these steps.

1. Filing a Request for Findings of Fact and Conclusions of Law and Strategies When Drafting

a. Rule 296 Requirements

The first step in the procedure for obtaining findings of fact and conclusions of law is to file a "Request for Findings of Fact and Conclusions of Law." As Rule 296 provides, any party may file a request for the trial court to state in writing its findings of fact and conclusions of law. TEX. R. CIV. P. 296. The request must be filed with the clerk within twenty days after the judgment is signed and must be served on all parties according to Rule 21a. TEX. R. CIV. P. 296. There is no procedure for extending this 20-day deadline. *Id.* A request for findings of fact can be filed early. A prematurely filed request for findings of fact is effective and deemed filed on the date of but after the signing of the judgment. TEX. R. CIV. P. 306c. The clerk must immediately notify the trial court of the request. TEX. R. CIV. P. 296.

[2] Several years ago, the Supreme Court Advisory Committee debated Rules 296-299a and considered a simplified procedure for obtaining findings and conclusions. The Committee considered proposed amendments that: 1) encouraged broad form findings and avoided voluminous and evidentiary findings; 2) modified the deadline for the original request deadline to conform to other post-judgment preservation rules, and 3) eliminated the requirement for the notice of past due findings of fact, and 4) clarified the scenario when findings are stated in a judgment. SUPREME COURT ADVISORY COMMITTEE Proposed Draft Rules 296-299a (May 28, 2010); SUPREME COURT ADVISORY COMMITTEE *Hearing Transcript* (Feb. 13, 2009); SUPREME COURT ADVISORY COMMITTEE *Hearing Transcript* (April 9, 2010). To date, however, the findings of fact rules have not been amended.

Rule 297 imposes a mandatory duty on the trial court to file properly requested findings of fact. TEX. R. CIV. P. 297. A court "shall file findings of fact and conclusions of law within twenty days after a timely request is filed." *Id.* The court must also send a copy of the findings and conclusions to each party in the suit. TEX. R. CIV. P. 297.

b. Considerations for Both Parties When Drafting Findings of Fact and Conclusions of Law

First, when preparing findings of fact and conclusions of law, look first at the pleadings for the causes of action and defenses. The proposed findings should track the court's judgment and the parties' grounds for recovery and defenses, including all elements. Make sure all elements of each are included if supported by the evidence and the judgment. It is usually best to write the conclusions of law first and then write the findings of fact that support each conclusion.

Second, when drafting findings, consider the trial court's obligations. As the rule directs, findings of fact are supposed to be on "grounds of recovery" or "defenses." TEX. R. CIV. P. 299. Ground of recovery or defense may include legal principles supporting the judgment. *Williams v. Gillespie*, 346 S.W.3d 727, 732-33 (Tex. App.—Texarkana 2011, no pet.) (court characterized the parties' agreement as a "ground of recovery"). Further, a trial court is only required to enter findings (and additional findings) on ultimate or controlling issues. *Flanary v. Mills*, 150 S.W.3d 785, 792 (Tex. App.—Austin 2004, pet. denied); *Lifshutz v. Lifshutz*, 61 S.W.3d 511, 515 (Tex. App.—San Antonio 2001, pet. denied). A trial court is not required to set out in detail every reason and theory on how it made its decision. *H.K. Global Trading, Ltd. v. Combs*, 429 S.W.3d 132, 141 (Tex. App.—Austin 2014 pet. denied); *Nicholas v. Env't Sys. (Internat'l) Ltd.*, 499 S.W.3d at 894-95.

An ultimate issue is one that is essential to the cause of action and that would have a direct effect on the judgment or one that supports a judgment for one party or another. *Flanary*, 150 S.W.3d at 792; *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.); *Cooke County Tax Appraisal Dist. v. Teel*, 129 S.W.3d 724, 731 (Tex. App.—Fort Worth 2004, no pet.) (citing *In re Marriage of Edwards*, 79 S.W3d 88, 94 (Tex. App.—Texarkana 2002, no pet.)). An evidentiary issue is one that the trial court may consider in deciding a controlling issue but is not controlling in itself. *Id.*; *see also York v. Boatman* 487 S.W.3d 635, 645, n.7 (Tex. App.—Texarkana 2016, no pet.).

Finally, a trial court is also not required to make findings of fact on undisputed matters. *Ad Villarai, LLC v. Chan II Pak*, 519 S.W.34d 132, 135 (Tex. 2017); *Limbaugh v. Limbaugh*, 71 S.W.3d 1, (Tex. App.—Waco 2002, no pet.).

While findings of fact typically contain numerous evidentiary findings, the trial court is not required to enter findings of fact on evidentiary issues. An evidentiary issue is one that a trial court considers in making its decision on a controlling issue, but that itself, is not a controlling issue. *Flanary*, 150 S.W.3d at 792-93.

For example, in a case involving division of marital property, the ultimate or controlling issue is whether the division is just and right. *Hill v. Hill*, 971 S.W.2d 153, 155 (Tex. App.—Amarillo 1998, no pet.). The value of the property being divided is not a controlling issue, but rather is an evidentiary matter and one not required for the findings of fact. *Id.*; *see also In re R.E.G.*, No. 13-08-00335-CV, 2009 WL 3778014, at *5-6 (Tex. App.—Corpus Christi November 12, 2009, pet. denied) (mem. op.) (order contained the ultimate issue for determination, any other findings would have been evidentiary; court of appeals rejected argument that appellant was harmed by trial court's failure to enter finding).

Another consideration is raising a *Casteel*-type error in a bench trial. When an appellant wants to raise an issue that the trial court erroneously considered a type of damage for which there is no evidence, an appellant must request the trial court to enter specific findings separating the permissible bases for damages and the impermissible bases. *In re Marriage of C.A.S. & D.P.S.*, 405 S.W.3d 373, 395 (Tex. App.—Dallas 2013, no pet.); *Miranda v. Byles*, 390 S.W.3d 543, 552 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); *Tagle v. Galvan*, 155 S.W.3d 510, 516 (Tex. App.—San Antonio 2004, no pet.).

Third, when drafting conclusions of law, consider their purpose. Conclusions of law state the reasons for the court's judgment based on the findings. In a straightforward case with a single ground of recovery, a trial court need not set out its reasoning in any detail. *Limbaugh* 71 S.W.3d at 6-7. On the other hand, if the case is factually complex and involving multiple grounds for recovery or multiple defenses, the trial court should detail its reasoning in conclusions of law. *Id.* at 7. A trial court places an undue burden on an appellant and forces an appellant to guess the reasons for a trial court ruling against it if conclusions of law are not sufficiently detailed. *Id.*

Finally, if requesting findings of fact and conclusions of law that are contrary to one's position, make it clear that you do not agree with the proposed findings to avoid waiver. For example, a party may have prevailed on the merits, but lost on attorney's fees. Or prevailed on one ground and not on another. As the prevailing party, the trial court will look to that party for preparing proposed findings of fact and conclusions of law. The party will want to provide findings the court will sign so necessarily will be submitting findings contrary to their position on attorney's fees.

The best procedure is to file a motion to submit findings of fact and use the qualifying language set out in *First Nat'l Bank v. Fojtik* and attach the proposed findings of fact and conclusions of law to the motion. *See First Nat'l Bank v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989) (motion indicated disagreement with the findings, alleged the ruling was erroneous and stated disagreement with the content and result); *see also Hooks v. Samson Lone Star, LP*, 457 S.W.3d 52, 67 (Tex. 2015) (citing *Fojtik* as means of avoiding waiver of appeal); *Smith v. East*, 411 S.W.3d 519, 529 (Tex. App.—Austin 2013, pet. denied) (instructing that best strategy in reserving right to appeal is to follow *Fojtik* language); *Bray v. Tejas Toyota, Inc.*, 363 S.W.3d 777, 787 (Tex. App.—Austin 2012, no pet.) (same); *Beal Bank, SSB v. Biggers*, 227 S.W.3d 187, 190-91 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (same).[3] This is the same procedure used with filing a motion for judgment when a party did not prevail on all matters. Without qualifying the findings in this manner, a party waives taking a position on appeal contrary to the findings it requested. *General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993) (party cannot challenge on appeal the very issue it requested); *Bluestar Energy, Inc. v. Murphy*, 205 S.W.3d 96, 101 (Tex. App.—Eastland 2006, pet. denied) (party cannot agree to omission of a cause of action and then object to the omission).

c. Strategy Considerations and Practical Points for the Appellant

First and foremost, be aware of the very short deadline for requesting findings of fact and conclusions of law: *twenty* days after the judgment is signed. This is a commonly missed deadline. The typical post-judgment deadlines are 30 days after the judgment is signed. TEX. R. CIV. P. 329b(a). The failure to timely request findings of fact waives the right to complain of the trial court's failure to file findings of fact and conclusions of law. *Morrison v. Morrison*, 713 S.W.2d 377, 381 (Tex. App.—Dallas 1986, writ dism'd w.o.j.). Note that the rule has no procedure for a late-filed request for findings of fact. TEX. R. CIV. P. 296.

The appellant should always request findings of fact and conclusions of law. Hon. Tracy Christopher, *Findings of Fact and Conclusions of Law—Do I Have to?*, 76 THE ADVOCATE (TEXAS) 44, 44 (2016). This is true even if the decision on whether to appeal the judgment has been made or not. The trial court will ask the prevailing party to prepare the findings of fact and conclusions of law.

There is a situation when a non-prevailing party may need to submit proposed findings of fact—when a party prevails on the merits of a case, but loses on attorney's fees or some other issue. The trial court will expect the prevailing party to prepare all findings and conclusions. But even on the issue on which a party lost, she will want to prepare findings that support the judgment and in a form that the court will sign. Because the findings on attorney's fees are contrary to the prevailing party's interest, the request needs to include qualifying language from *Fojtik*. *See supra* II. C, 1 b.

An appellant's real strategy is in the request for additional finding of fact and conclusions of law. As discussed below, it is in the request for additional findings where the losing party has the obligation to preserve error.

d. Strategy Considerations and Practical Points for the Appellee

While the losing party files the request for findings of fact and conclusions of law, the trial court looks to the prevailing party to prepare findings of fact and conclusions of law. After a request for findings of fact and conclusions of law is filed, the prevailing party should prepare and submit findings of fact and conclusions of law to the court. Contact the court to find out the trial judge's preferences when submitting findings of fact and conclusions of law. Some prefer, for example, an electronic version for the judge to use to revise.

The prevailing party should start with the parties' pleadings to prepare findings that address each claim and defense.

Finally, in addition to preparing and filing findings of fact and conclusions of law, the appellee should also request that all parties' proposed findings of fact and conclusions of law that were submitted to the trial court be included in the clerk's record. It is not uncommon to find one's opponent taking an inconsistent position on appeal from proposed findings of fact that were requested in the trial court.

2. Notice of past Due Findings of Fact and Conclusions of Law and Strategy Considerations

The second step in the procedure for obtaining findings of fact and conclusions of law is to file a "Notice of Past Due Findings of Fact and Conclusions of Law" if the trial court fails to timely file them. Unlike most preservation

[3] The motion for judgment in *Fojtik* stated:

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

First Nat'l Bank v. Fojtik, 775 S.W.2d 632, 633 (Tex. 1989).

rules, the rules on findings of fact require a reminder notice if the trial court misses its deadline to file findings of fact and conclusions of law. The notice has two purposes: 1) it extends the trial court's deadline for filing findings of fact and conclusions of law, and 2) it is mandatory for an appellant to avoid waiver of the trial court's failure to file findings of fact.

a. Rule 297 Requirements

Rule 297 provides the procedure for filing a notice of past due findings of fact. If the court fails to timely file findings of fact and conclusions of law within 20 days after the request is filed, the party who requested findings of fact must file a "Notice of Past Due Findings of Fact and Conclusions of Law." The notice of past due must be filed within thirty days after the original request was filed. TEX. R. CIV. P. 297. The notice of past due findings must state the date the original request was filed and the date the findings and conclusions were due. TEX. R. CIV. P. 297. The clerk is required to immediately inform the court of the late notice. *Id*

The filing of the late notice extends the time for the trial court to file findings of fact and conclusions of law. TEX. R. CIV. P. 297. With the filing of past due notice, the trial court's deadline to file findings and conclusions is extended to forty days from the date the original request was filed. *Id.*

b. Strategy Considerations and Practical Points for the Notice of past Due Findings of Fact

Rule 297's requirement of filing a past due notice of findings is frequently missed but it is a critical step in preserving error on the court's failure to file findings and conclusions. The failure to timely file a notice of past due findings waives the right to complain about the failure to file findings. *Watts v. Oliver*, 396 S.W.3d 124, 130 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Gnerer v. Johnson*, 227 S.W.3d 385, 389 (Tex. App.—Texarkana 2007, no pet.); *Haining v. Haining*, No. 01-08-00091-CV, 2010 WL 1240752, at *4 (Tex. App.—Houston [1st Dist.] March 25, 2010, pet. denied) (mem. op.).

When filing a notice of past due findings, do not file the notice early. Some courts of appeals have concluded that a notice of past due findings request filed early is *not* timely and an appellant waived complaint regarding the trial court's failure to file findings of fact. *Estate of Gorski v. Welch*, 993 S.W.2d 298, 301 (Tex. App.—San Antonio 1999, pet. denied); *Echols v. Echols*, 900 S.W.2d 160, 161-62 (Tex. App.—Beaumont 1995, writ denied). The courts reasoned that Rule 306c lists only the request for findings of fact, not the notice of past due findings of fact, as a document that can be filed early and still be effective. TEX. R. CIV. P. 306c.

Note too, that late-filed findings of fact are better than none at all. The rules do not prohibit a trial court from entering findings of fact after the deadline. *Davey v. Shaw*, 225 S.W.3d 843, 852 (Tex. App.—Dallas 2007, no pet.). Even if the trial court misses the extended deadline, the trial court can still file findings and conclusions. The expiration of the trial court's plenary power does not affect the trial court's ability to file findings of fact. *In re Gillespie*, 124 S.W.3d 699, 703 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *Jaramillo v. Portfolio Acquisitions, LLC*, No. 14-08-00939-CV, 2010 WL 1197669 (Tex. App.—Houston [14th Dist.] no pet.) (mem. op.).

A trial court may file findings late because the findings and conclusions do not operate to change the judgment; rather, they merely explain the court's reasoning. *Gillespie*, 124 S.W.3d at 703. If the trial court enters findings of fact after the deadline, the only issue is whether an appellant is harmed. If a party can show harm by the late-filed findings of fact, the party should request the court of appeals to abate the appeal to allow the party to request additional or amended findings. *Davey v. Shaw*, 225 S.W.3d at 852. The late-filed findings and conclusions are considered on appeal. *Id*.

The Beaumont Court of Appeals, however, has concluded that a trial court's findings of fact and conclusions of law signed after the court of appeals obtains exclusive jurisdiction over the case are a nullity. *Sonnier v. Sonnier*, 331 S.W.3d 211, 215-16 (Tex. App.—Beaumont 2011, no pet.); *see also Naime v. Soliman*, No. 04-11-00865-CV, 2012 WL 2835161 at *3, n.2 (Tex. App.—San Antonio 2012, no pet.) (refusing to consider findings filed after appellate briefs were filed). The decision in *Sonnier* conflicts with an earlier Beaumont Court decision in which the court considered late-filed findings of fact. *Jefferson County Drainage Dist. No. 6 v. Lower Neches Auth.*, 876 S.W.2d 940, 959 (Tex. App.—Beaumont 1994, writ denied).

3. Request for Additional Findings of Fact and Conclusions of Law and Strategies When Drafting

The final step in the process: once findings of fact and conclusions of law are filed, both parties must consider whether additional or amended findings of fact and conclusions of law are necessary for their respective appeals. The request for additional findings is in reality a misnomer. There is little chance that a trial court will sign additional findings and conclusions. The point of the request is to "object" to the findings that have been signed and thereby preserve error. For example, findings of fact and conclusions of law may omit elements of a ground of recovery or a defense. Findings of fact and conclusions of law may omit an entire ground of recovery or a defense. A request for additional findings points out these omissions and preserves arguments for appeal.

a. Rule 298 Requirements

Rule 298 sets out the procedure for filing additional or amended findings of fact once the trial court files its original findings and conclusions. After findings are filed, any party may request additional or amended findings or conclusions. TEX. R. CIV. P. 298. A request for additional findings of fact and conclusions of law must be made within ten days after the original findings and conclusions are filed by the court. TEX. R. CIV. P. 298. The failure to timely request additional findings and conclusions waives the right to complain on appeal of the trial court's refusal to enter additional findings. *In re Marriage of C.A.S. & D.P.S.*, 405 S.W.3d 373, 381 (Tex. App.—Dallas 2013, no pet.). The court then has ten days to file additional findings and conclusions. TEX. R. CIV. P. 298 ("court shall file any additional or amended findings and conclusions that are appropriate within ten days after such request is filed.") The rule also provides that no findings or conclusions "shall be deemed or presumed by any failure of the court to make additional findings or conclusions." *Id.*

b. Omitted Findings—Rule 299 Requirements

A request for additional findings turns on what the trial court omitted from the findings.

Bottom line for preservation of error: To raise an issue on appeal, it must be in the trial court's findings of fact or in a request for additional findings of fact.

Rule 299 sets out the presumptions when there are omissions from the trial court's findings of fact. Findings of fact filed by the trial court shall form the basis of the judgment. TEX. CIV. P. 299. The judgment may not be supported on appeal by a presumed finding on any ground of recovery or defense if no element has been included in the findings. *Id.* However, when one or more elements have been found, then omitted, unrequested elements that are supported by the evidence will be presumed in support of the judgment. *Id.* A trial court's refusal to make a requested finding shall be reviewable on appeal. *Id.*

Rule 299 has been interpreted to require parties to request findings of fact and conclusions of law relevant to a theory of recovery or defense that they intend to assert on appeal. *MCG Drilling Invs., LLC v. Double M Ranch, Ltd.*, No. 11-14-00299-CV, 2018 WL 2022590, at *5 (Tex. App.—Eastland April 30, 2018, no pet.) (mem. op.); *Park v. Payne*, 381 S.W.3d 615, 618 (Tex. App.—Eastland 2012, no pet.).

c. Considerations for Both Parties When Drafting Additional Findings of Fact and Conclusions of Law

The request for additional or amended findings of fact and conclusions of law serves three purposes: 1) point out omitted elements of grounds of recovery or defenses that are partially included to avoid deemed findings under Rule 299; 2) point out entirely omitted grounds of recovery or defenses; and, 3) limit an appellee from expanding issues on appeal to avoid presumptions in support of judgment

While the request for additional findings applies to both parties, for the appellant, the request for additional findings of fact is critical and the primary avenue to preserve error. A request for additional findings is similar to an objection. *Vickery*, 5 S.W.3d at 255-56. Thus, the request for additional findings, like an objection, needs to be specific. *Id.* Further, a request for additional findings of fact and conclusions of law "should sharpen not obfuscate, the issues for appeal." *Id.* at 255. A request for additional findings of fact has significance unrelated to the trial court actually filing additional findings of fact. To raise an issue on appeal, a party must have requested a finding of fact on the issue or the issue must be in the court's findings.

Like original findings of fact, a request for additional findings must be on ultimate issues, not evidentiary matters. *Vickery* 5 S.W.3d at 255; *Flanary*, 150 S.W.3d at 792 (trial court must only file additional findings if original findings do not succinctly relate the ultimate findings of facts and law necessary to apprise the appellant of adequate information to prepare an appeal). To be effective, a request for additional findings must specifically point out the defects and not hide them among numerous unnecessary requests. *Vickery* 5 S.W.3d at 254; *Stuckey Diamonds, Inc. v. Harris County Appraisal Dist.*, 93 S.W.3d 212, 213 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (request for additional findings containing 103 findings obfuscated any valid findings).

A trial court does not have to sign additional findings that are inconsistent with or contrary to the original findings. *Johnston v. McKinney American, Inc.*, 9 S.W.3d 271, 277 (Tex. App.—Houston [14th Dist.] 1999, pet. denied.) (citing *Tamez v. Tamez*, 822 S.W.2d 688, 692-93 (Tex. App.—Corpus Christi 1991, writ denied). If the requested additional findings would not result in a different judgment, the trial court need not make them. *Johnston*, 9 S.W.3d at 277; *Tamez*, 822 S.W.2d at 693. That means, if the trial court's findings omit an element of a party's defense for example, that party must request an additional finding on the omitted element that is consistent with the judgment, that is, supporting the rejection of the affirmative defense. That preserves error to complain about the element on appeal.

Finally, as with the submission of original findings of fact, if requesting additional or amended findings that are contrary to your position (as in example just given), state that you disagree with the submission and use the language from *Fojtik*. *See supra* II. C. 1. b.

d. Strategy Considerations and Practical Points for Both Parties

Note that Rule 298 starts the deadline to file a request for additional findings from a different date than most rules. Rule 298 ties the deadline for requesting additional or amended findings to the date the trial court *files* it findings of fact, not the day the court signs the findings. TEX. R. CIV. P. 298. Failing to timely request additional findings of fact and conclusions of law waives the right to complain of the trial court's failure to enter the additional findings. *Heritage Res., Inc. v. Hill*, 104 S.W.3d 612, 620 (Tex. App.—El Paso 2003, no pet.) (appellant waived complaint regarding trial court's failure to segregate attorney's fees when appellant failed to request an additional finding on the issue); *Knight v. Knight*, 301 S.W.3d 723, 733, n.10 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (appellant failed to request additional findings regarding the characterization of certain property and waived her right to complain on appeal); *Smith v. Abbott*, 311 S.W.3d 62, 73 (Tex. App.—Austin 2010, pet. denied) (appellants waived complaint by failing to request additional findings of fact); *Schneider v. Whatley*, 535 S.W.3d 236, 241 (Tex. App.—El Paso 2017, no pet.) (waiver by failing to request additional findings).

The request for additional findings of fact does not result in a presumed finding by the trial court's failure to sign additional findings. TEX. R. CIV. P. 298. There is no presumption that in refusing to sign the additional findings that the trial court resolved a factual dispute contrary to appellant's position. *Vickery*, 5 S.W.3d at 258. An appellant can request findings contrary to the judgment "without fear that the court's failure to make such findings will itself be interpreted as a finding against the appellant." *Id.* Note that Rule 298's provision that no findings are deemed or presumed only applies after original findings of fact and conclusions of law are filed. *International Metal Sales, Inc. v. Global Steel Corp.*, No. 03-07-00172-CV, 2010 WL 1170218, at *3 (Tex. App.—Austin March 24, 2010, on pet. h.) (mem. op.). If no findings are filed, Rule 298 does not apply and all findings are inferred in support of the judgment. *Id.*

e. What Findings Were Omitted?

Requesting additional findings of fact depends on the omission, whether an omitted element or an entirely omitted cause of action. The guiding principle is this: if you want to raise an issue on appeal, it needs to be in the findings of fact or in a request for additional findings of fact. *Century Indem. Co. v. First Nat'l Bank of Longview*, 272 S.W.2d 150, 156 (Tex. Civ. App.—Texarkana 1954, no writ); *Townson v. Liming*, No. 06-10-00027-CV, 2010 WL 2767984, at *2, n.2 (Tex. App.—Texarkana July 14, 2010, no pet.) (mem. op.). Although summarized here, it is worth reading *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) before preparing additional or amended findings of fact. It contains a comprehensive discussion of requests for additional findings and conclusions.

If an element is omitted. If there is an omission, it must first be determined whether the trial court deliberately or inadvertently omitted the element. *Vickery*, 5 S.W.3d at 252.

If findings of fact are entered but inadvertently omit an essential element of a ground of recovery or defense, the omitted element is supplied by implication or deemed. *Id.*, *Seger v. Yorkshire Ins. Co., Ltd.*, 503 S.W.3d 388, 401 (Tex. 2016); *In re Estate of Miller*, 446 S.W.3d 445, 450 (Tex. App.—Tyler 2014, no pet.); *Hailey v. Hailey*, 176 S.W.3d 374, 383-84 (Tex. App.—Houston [1st Dist.] 2004, no pet.). The reason for implying omitted elements is that when a ground of recovery or defense is partially included in the findings of fact, this is some evidence that the trial court relied on it in making its decision. *Vickery*, 5 S.W.3d at 253. As Rule 299 states, "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." TEX. R. CIV. P. 299; *Howe v. Howe*, __ S.W.3d __, 2018 WL 1737083, at *3 (Tex. App.—El Paso April 11, 2018, no pet.).

To avoid deemed findings when an element has been omitted, a party should request an additional finding on the omitted element. *In re Estate of Miller*, 446 S.W.3d at 450; *Vickery*, 5 S.W.3d at 253-54; TEX. R. CIV. P. 298, 299. The failure to do so waives a party's right to complain on appeal of the presumed finding. *In re Estate of Miller*, 446 S.W.3d at 450. The appellant, however, must specifically make the trial court aware of the omitted element and indicate the party does not agree. *Vickery*, 5 S.W.3d at 254.

When deemed findings of fact arise, an appellee has no burden to request further findings of fact or to complain of the other findings made. *Howe v. Howe*, __ S.W.3d ___, 2018 WL 1737083, at *3. It is appellant's burden to attack both the express and implied findings of fact. *Id.*

If the record, however, demonstrates that the trial court deliberately omitted the element, there is no presumption to supply the missing element. *Vickery*, 5 S.W.3d at 252. For example, if the prevailing party submits proposed findings that includes all elements and the trial court omits a ground or defense, it is apparent that the omission was deliberate and that the element was requested and refused. *Id.* at 253. In this situation, there is no supplied element by implication. *Id.* Unlike the requirement in Rule 299 to deem omitted elements, the omitted element in this scenario is not "unrequested."

The party relying on the omitted element should file a request for additional findings including the omission to argue the issue on appeal.

Vickery demonstrates the need to clearly identify the omitted element. Vickery complained about an omitted element from the findings of fact, but never alerted the trial court to the omitted elements. Instead, Vickery submitted negative findings and hid the two omitted elements among 44 other additional findings, making it impossible for the trial court to realize the omission. *Vickery*, 5 S.W.3d at 254-55. The court of appeals presumed that the trial court impliedly found the omitted elements. *Id.* at 258.

The court of appeals also described the use of negative findings. A party that requests findings that are contrary to the judgment is said to have requested "negative" findings. While a trial court is not required to enter findings that are contrary to the judgment, there are occasions when negative findings must be filed to avoid waiver. If findings support plaintiff but are silent on defendant's affirmative defense, defendant must file additional findings on its affirmative defense, which would be contrary to the judgment, but critical for defendant's appeal. *Vickery*, 5 S.W.3d at 255.

In *Vickery*, appellant's negative findings did not avoid the omitted findings from being deemed. If an appellant chooses to request negative additional findings contrary to the judgment, an appellant does not avoid deemed findings on omitted elements unless appellant had specifically identified the true issue – that is, the omitted necessary elements. *Id.* at 256.

If an omission of an entire ground or defense. If a trial court's findings of fact omit an entire ground of recovery or defense, the party relying on the ground or defense must request additional findings to preserve error. *Howe v. Howe*, __ S.W.3d __, 2018 WL 1737083, at *5; *Briggs Equipment Trust v. Harris County Appraisal Dist.*, 294 S.W.3d 667, 674 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *Limestone Group, Inc. v. Sai Thong, L.L.C.*, 107 S.W.3d 793, 799 (Tex. App.—Amarillo 2003, no pet.). Failing to do so waives the complaint about the unmentioned ground or defense. *Howe v. Howe*, __ S.W.3d __, 2018 WL 1737083, at *5; *Briggs*, 294 S.W.3d at 674.

When a ground of recovery or defense is entirely omitted, the presumption is that the trial court did not rely on that ground or defense and the omission is deliberate. *Vickery*, 5 S.W.3d at 252. Under Rule 299, a judgment cannot be supported by a ground or defense that has been entirely excluded from the findings of fact. TEX. R. CIV. P. 299; *Vickery*, 5 S.W.3d at 252.

To properly raise an omission of an entire ground of recovery or defense, the party relying on the omitted ground must file a request for additional findings including the omitted ground or defense.

A party waives for appellate purposes a theory of recovery or defense unless the proponent of the theory secures a finding on the theory or an element of it. *Hill v. Hill*, 971 S.W.2d at 156. This waiver applies to both appellants and appellees. If an appellant contends the trial court erred in rejecting her defense, she must make sure that she requests the court to make a finding upon that defense. *Id.* at 156-57. If she does not, the defense is waived. *Id.* An appellee suffers the same waiver if she fails to request findings upon all of her theories of recovery. If an appellee fails to request findings on all her theories of recovery, she is precluded from arguing that the trial court erred in failing to grant relief on the theories omitted from the findings. *Id.* at 157; *see also Midland Cent. Appraisal Dist. v. BP America Prod. Co.*, 282 S.W.3d 215, 224, n.3 (Tex. App.—Eastland 2009, pet. denied) (error waived when appellant attempted to raise on appeal a statutory ground on which it failed to request a finding).

Prevent an appellee from expanding issues on appeal. By requesting additional findings, an appellant can prevent an appellee from expanding its arguments on appeal that support the judgment. For example, assume an appellee pleaded negligence, breach of fiduciary duty, and fraud causes of action. The findings of fact include all of the necessary elements for the fraud claim, but include only some of the elements for the negligence and breach of fiduciary claims. Further assume that the evidence was disputed on the negligence and breach of fiduciary duty claims. An appellant should request additional findings of fact on the negligence and breach of fiduciary claims consistent with the judgment but point out that the appellant is opposed to the finding but is simply making the request for preservation purposes. *See supra* II.C.1.b. That allows an appellant to argue the sufficiency of the evidence on the negligence and breach of fiduciary claims and prevents deemed findings on those claims for the appellee.

D. Proper Form of the Trial Court's Findings of Fact and Conclusions of Law

Rule 296 and 299a prescribe the form for the trial court's findings of fact and conclusions of law. The rules require that findings of fact and conclusions of law be in writing and in a separate document from the judgment. TEX. R. CIV. P. 296, 299a. The trial court's finding of fact "shall not be recited in a judgment." TEX. R. CIV. P. 299a. Findings of fact shall be filed with the district clerk separate and apart from the judgment. *Id.* While the rule requirements are straightforward they raise several issues.

1. In Writing, but What About Oral Statements?

Findings of fact and conclusions of law must be in writing and cannot be made orally on the record. TEX. R. CIV. P. 296, 299a; *In re Doe 10*, 78 S.W.3d 338, 340, n.2 (Tex. 2002). The court of appeals must ignore oral pronouncements as they do not constitute findings of fact and conclusions of law. *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984); *Heritage Gulf Coast Props, Ltd. v. Sandalwood Apartments, Inc.*, 416 S.W.3d 642, 657-8 (Tex. App.—Houston [14 Dist.] 2013, no pet.); *Celestine v. Department of Family & Protective Servs.*, 321 S.W.3d 222, 232 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *In re Estate of Wallis*, No. 12-07-00022-CV, 2010 WL 1987514 at *6 (Tex. App.—Tyler May 19, 2010, no pet.) (mem. op.).

While the rule is clear that findings of fact must be in writing, cases appear to consider oral statements at least in part. For example, the Dallas Court of Appeals recently noted that a trial judge's comments from the bench are not a substitute for findings of fact and conclusions of law. *Kaur-Gardner v. Keane Landscaping, Inc.*, 05-17-00230-CV, 2018 WL 2191925, at *4 (Tex. App.—Dallas May 14, 2018, no pet.) (mem. op.). But the court then appeared to consider them. According to the court of appeals, a trial court's written findings *supersede* any oral statements. *Id.* Further, any *conflict* with an oral pronouncement and written findings of fact, the written instruments control. *Id.*

In another case, the Austin Court considered oral pronouncements when ruling on an appellant's complaint about lack of findings of fact. In *Burnet Central Appraisal District v. Millmeyer*, 287 S.W.3d 753, 759-60 (Tex. App.—Austin 2009, no pet.), appellant complained about the trial court's failure to enter findings of fact and conclusions of law. In deciding whether appellant suffered harm by the lack of findings, the Austin Court referred to the trial court's statements on the record at end of trial that explained the reasons for its ruling. According to the Austin Court, the trial court's oral pronouncements negated any harm in the failure to file findings of fact. *Id.*; *see also Pope v. Pope*, No. 03-06-00550-CV, 2007 WL 2010766 (Tex. App.—Austin July 12, 2007, no pet.) (mem. op.) (court looked to trial judge's comments from the bench to determine if appellant was harmed by the trial court's failure to file findings of fact).

2. In Writing, but Does a Letter Suffice?

The rule requires findings to be written and separate from the judgment but does not otherwise prescribe the format. TEX. R. CIV. P. 296, 299a.

A problem occurs when a trial court sends a letter ruling that contains findings of fact and conclusions of law. The Supreme Court rejected an attempt to alter formal findings of fact with a pre-judgment letter ruling. *Cherokee Water Co. v. Gregg County Appraisal Dist.*, 801 S.W.2d 872, 878 (Tex. 1990). The Court's reasoning appeared to be based on the fact that the letter was prepared before the judgment and thus did not constitute post-judgment Rule 296-99a findings of fact. *Id.*

Several courts of appeals have applied *Cherokee Water* and concluded that pre-judgment letter rulings do not constitute findings of fact. *Alan Reuber Chevrolet, Inc. v. Grady Chevrolet, Ltd.*, 287 S.W.3d 877, 883 (Tex. App.—Dallas 2009, no pet.); *Mondragon v. Austin*, 954 S.W.2d 191, 193 (Tex. App.—Austin 1997, pet. denied); *Gupta v. Gupta*, No. 03-09-00018-CV, 2010 WL 2540487, at *7 (Tex. App.—Austin June 24, 2010, no pet.) (mem. op.); *Castillo v. August*, 248 S.W.3d 874, 880 (Tex. App.—El Paso 2008, no pet.); *Coleman v. Coleman*, No. 09-06-00171-CV, 2007 WL 1793756, at *2, n.2 (Tex. App.—Beaumont 2007, pet. denied) (mem. op); *but see Barry v. Jackson*, 309 S.W.3d 135, 138-39, n.4 (Tex. App.—Austin 2010, no pet.) (court agreed letter ruling was not a finding of fact but "we believe it is nonetheless instructive background regarding the court's reasoning").

Other courts have construed letter rulings as findings of fact, noting that the rules do not require any particular form. *Rose v. Woodworth*, No. 04-08-00382-CV, 2009 WL 97256, at *1 (Tex. App.—San Antonio Jan. 14, 2009, no pet.) (mem. op.); *Senora Res., Inc. v. Kouatli*, No. 01-00-00264-CV, 2000 WL 1833771, at *2-3 (Tex. App.—Houston [1st Dist.] Dec. 14, 2000, no pet.) (mem. op); *Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120, 124 (Tex. App.—Corpus Christi 1986, no pet); *Duddlesten v. Klemm*, No. 06-08-00106-CV, 2009 WL 635153, at *2 (Tex. App.—Texarkana March 13, 2009, no pet.) (mem. op.) (trial court's letter expressed findings and conclusions and court of appeals treated as official findings), *but see Moore v. Jet Stream Investments, Ltd.*, 315 S.W.3d 195, 208-09 (Tex. App.—Texarkana June 3, 2010, pet denied) (letter ruling stated "below are my findings" but court of appeals refused to treat as findings when subsequent judgment conflicted with letter); *but see AIMS ATM, LLC v. Sanip Enters, Inc.*, 01-13-00155-CV, 2014 WL 810839, at *1, n.1 (Tex. App.—Houston [1st Dist.] Feb. 27, 2014, no pet.) (mem. op.) (letter ruling did not constitute findings of fact).

The Houston Fourteenth Court questioned the applicability of *Cherokee Water* when a letter ruling matches the judgment. *Chenault v. Banks*, 296 S.W.3d 186, 190 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

The Eastland Court distinguished *Cherokee Water* and construed a pre-order letter ruling as findings of fact. The Eastland Court noted that unlike *Cherokee Water*, the trial court did not file formal finding of fact and expressly indicated in the letter ruling that it intended the letter to constitute findings of fact. *Kendrick v. Garcia*, 171 S.W.3d 698, 701-02 (Tex. App.—Eastland 2005, pet denied); *see also Long Term Care Pharmacy Alliance v. Texas Health*

& Human Servs. Comm'n, 249 S.W.3d 471, 476-77 (Tex. App.—Eastland 2007, no pet.) (construed letter as findings of fact, but pointed out the court of appeals' own conflicting authority).

The Tyler Court of Appeals also distinguished *Cherokee Water* and concluded that a prejudgment letter satisfied the purpose of Rule 296. *In re Estate of Miller*, 446 S.W.3d 445, 451 (Tex. App.—Tyler 2014, no pet.). In *Miller*, the trial court's letter ruling was dated before the order, but the letter and the order were filed together. The letter included the court's ruling, "findings," and the controlling authority. Appellant complained of the trial court's failure to file formal findings of fact and conclusions of law.

The Tyler Court rejected the argument that, to be effective as findings of fact, the letter must state that it is intended to be findings of fact and conclusions of law. *Id.* According to the court of appeals, the trial court's prejudgment letter provided an extensive explanation of the basis for the ruling, "which satisfies the purpose of Rule 296." *Id.* at 451. Further, upon receipt of the letter, appellant could have requested additional findings of fact and conclusions of law. *Id.* at 452; *see* TEX. R. CIV. P. 298. The appellant failed to file a request for additional findings—in response to the trial court letter—and thus waived any complaint of the implied findings presumed in support of the judgment. *Id.*

3. Separate from the Judgment, but . . .

Rule 299a makes clear that findings of fact should be in a document separate from the judgment, however, the rule also contemplates that findings will often end up in a judgment: "if there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298 the latter findings will control for appellate purposes." TEX. R. CIV. P. 299a; *Redman*, 401 S.W.2d at 894.

Courts of appeals split on how to consider findings of fact contained in a judgment. The Amarillo Court has concluded that findings in a judgment have probative value as long as they do not conflict with separately filed findings of fact. *Archer v. DDK Holdings LLC*, 463 S.W.3d 597, 609, n.7 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *South Plains Lamesa R.R., Ltd.*, 280 S.W.3d 357, 365 (Tex. App.—Amarillo 2008, no pet.); *Hill v. Hill*, 971 S.W.2d at 157. The court reasoned that findings recited in the judgment reveal the basis for the trial court's decision and should be considered. *South Plains Lamesa R.R.*, 280 S.W.3d at 365; *Hill*, 971 S.W.2d at 157; *see also James J. Flanagan Shipping Corp. v. Del Monte Fresh Produce N.A.*, 403 S.W.3d 360, 364-65 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (findings of fact in a judgment given probative value); *Martinez v. Molinar*, 953 S.W.2d 399, 401 (Tex. App.—El Paso 1997 no writ) (findings in a judgment serves the underlying purpose of Rule 296 of allowing the parties to know the court's findings); *In re U.P.*, 105 S.W.3d 222, 229, n.3 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (findings in a judgment have probative value if not in conflict with separately filed findings); *In re Sigmar*, 270 S.W.3d 289, 295, n.2 (Tex. App.—Waco 2008, orig. proceeding) (findings of fact in an order given probative value so long as not in conflict with separately filed findings).

Other courts of appeals have concluded that findings in a judgment cannot be considered on appeal. *Guridi v. Waller*, 98 S.W.3d 315, 317 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Salinas v. Beaudrie*, 960 S.W.2d 314, 317 (Tex. App.—Corpus Christi 1997, no pet.); *Sutherland v. Cobern*, 843 S.W.2d 127, 131, n.7 (Tex. App.—Texarkana 1992, writ denied.). If findings of fact in the judgment are not considered, then the court of appeals reviews as though no findings were made. *Sutherland*, 843 S.W.2d at 131, n.7.

The court in *Guridi* demonstrates the significance of this problem. In that case, the First Court refused to consider findings of fact recited in a judgment when separate findings of fact were filed. The separately filed findings did not contain any mention of fraud; the judgment, however, recited findings relating to fraud. Because the separately filed findings contained no element of fraud and the court refused to consider the findings on fraud contained in the judgment, thus no presumed findings on fraud could be supplied on appeal. *Guridi*, 98 S.W.3d at 317.

The best procedure is to encourage the trial court to sign findings of fact and conclusions of law that are in a separate document from the judgment.

4. Who Can File Findings of Fact After the Original Judge Leaves Office?

The Texas Supreme Court recently addressed the issue of whether a newly elected district-court judge or the former judge she replaced could file findings of fact from a trial over which the former judge presided before his term expired. *Ad Villarai, LLC v. Chan II Pak*, 519 S.W.3d 132 (Tex. 2017).

In *Villarai*, Judge Lowy conducted a bench trial on Villarai's claims in October 2014 and signed a final judgment on November 24, 2014. Judge Lowy had lost his primary election in March 2014 to Judge Williams. Although appellant timely requested findings of fact and filed a notice of past due findings, Judge Lowy did not file findings of fact. Judge Williams timely filed findings of fact and conclusions of law on January 12, 2015. *Id.* at 136.

Pak appealed, contending Judge Williams's findings were invalid because she lacked authority to file them. *Id.* The Dallas Court of Appeals agreed and concluded that Judge Lowy could not file them since he was no longer available to respond to an order of the court. *Id.* The court of appeals reversed and remanded.

On petition for review, the Supreme Court first addressed whether Pak preserved error on Judge Williams's authority to file findings because he did not object in the trial court on this basis. *Id.* at 136-37. According to the Supreme Court, when a party challenges a lack of findings of fact, "it is immaterial whether the court literally filed no findings or filed something that amounts to no findings authorized by law." *Id.* at 137. In either case, the trial court has failed to provide findings as the rule requires. An appellant's only "objection" was to file a notice of past due findings, which he did; there was no obligation to further object to preserve error. *Id.* If Judge Williams lacked authority to file findings, then the findings she filed were void. *Id.*

The Supreme Court rejected several arguments, including Rule of Civil Procedure 18 and Civil Practice and Remedies Code § 30.002, that Villarai contended granted successor judges authority to file findings on behalf of predecessor judges removed from office by election. *Id.* 138-40.

But what is the remedy? The Court looked to Civil Practice and Remedies Code § 30.002(a). *Id.* at 140-41. Section 30.002(a) provides that if a judge's term of office expires during the period for filing findings of fact, the judge may still file findings in the case. Because Judge Lowy's term expired during the period for filing findings of fact, § 30.002(a) authorized him to file findings even after his term expired.

The Court further noted that the expiration of plenary power had no impact on Judge Lowy's ability to file findings of fact. *Id.* 141. Findings can be issued late—either own the court's own volition or at the request of a court of appeals. *Id.*; *see Cherne*, 763 S.W.2d at 773.

The Supreme Court held that Judge Williams's findings were invalid and that only the former judge had authority to file findings of fact. *Id.* at 142. The record did not bear out why Judge Lowy did not file findings. *Id.* As the Court explained, "because we do not *know* that he refused to file findings—which would leave Villarai without recourse—the trial court should request that he file findings before ordering a new trial." *Id.* at 142.

The Court then ordered an "extraordinary solution." *Id.* at 142. Judge Williams was ordered to request Judge Lowy to file findings. If Judge Lowy fails or refuses to file them, then the court of appeals may remand for a new trial. *Id.* at 142-43.

E. Appellate Issues Relating to Findings of Fact and Conclusions of Law

1. Effect on Appellate Deadlines

A request for findings of fact and conclusions of law made in an appropriate case (required under Rule 296 or when can be considered on appeal) will extend the deadlines for perfecting an appeal. TEX. R. APP. P. 26.1(a)(4); *see IKB*, 938 S.W.2d at 442-43. If unsure if findings of fact will extend the appellate deadlines, do not rely on a request for findings of fact and conclusions of law. Instead, file a motion for new trial. *See, e.g.*, *Ford v. City of Lubbock*, 76 S.W.3d 795, 798 (Tex. App.—Amarillo 2002, no pet.) In *Ford*, appellant appealed the trial court's granting of a plea to the jurisdiction and filed a request for findings of fact and conclusions of law. *Id.* at 796. Appellant filed her notice of appeal 90 days after the trial court signed its order of dismissal, relying on the request for findings of fact to extend her appellate deadlines. *Id.* The court of appeals granted appellee's motion to dismiss. The court of appeals concluded that because there were no facts in dispute in the plea to the jurisdiction, findings of fact served no purpose and thus, the request for findings did not extend appellate deadlines. *Id.* at 796-98. The court dismissed the appeal. *Id.*; *see also Black v. Shor*, 443 S.W.3d 154, 166 (Tex. App.—Corpus Christi 2013, pet. denied) (findings of fact appropriate only when trial court is called upon to determine questions of fact upon conflicting evidence).

Accelerated appeals are different. A request for findings of fact and conclusions of law in an accelerated appeal does not extend the time to perfect an accelerated appeal. TEX. R. APP. P. 28.1(b). Accelerated appeals include appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected less than 30 days after the order or judgment. TEX. R. APP. P. 28.1(a).

While a request for findings of fact in an appropriate case extends the appellate deadlines, a request for findings of fact does not extend plenary power. *See* TEX. R. CIV. P. 329b; *HSBC Bank USA, N.A. v. Watson*, 377 S.W.3d 766, 772 (Tex. App.—Dallas 2012, pet. dism'd). File a motion for new trial or a motion to modify the judgment if seeking to extend the court's plenary power. TEX. R. CIV. P. 329b(e), (g).

2. Appellate Review of Bench Trials

Appellate complaints relating to findings of fact and conclusions of law fall into three categories: 1) the absence of findings of fact; 2) the sufficiency of the evidence supporting the findings of fact and correctness of conclusions of law, if findings are filed; and 3) the omissions or lack of completeness of the findings of fact, if filed.

a. In the Absence of Findings of Fact.

If findings of fact are not requested and none are filed. If no findings of fact and conclusions of law are filed or requested, all questions of fact will be presumed and found in support of the judgment. *Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 666 (Tex. 1987); *Treuil v. Treuil*, 311 S.W.3d 114, 130 (Tex. App.—Beaumont 2010, no pet.)

If there are no findings of fact and conclusions of law filed, the court of appeals infers that the trial court made all the necessary findings of fact necessary to support the judgment. *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 480 (Tex. 2017); *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003); *Rourk v. Cameron Appraisal District*, 305 S.W.3d 231, 234-35 (Tex. App.—Corpus Christi 2009, pet. denied). If there is a reporter's record, the implied findings are not conclusive and may be challenged by raising both legal and factual sufficiency of the evidence issues on appeal. *Shields Ltd. P'ship*, 526 S.W.3d at 480; *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002); *In re Estate of Henry*, 250 S.W.3d 518, 522 (Tex. App.—Dallas 2008, no pet.). If course the Texas Supreme Court only has jurisdiction to legal sufficiency challenges. *Shields Ltd. P'ship*, 526 S.W.3d at 480.

When there is no reporter's record and no findings of fact have been requested or filed, the court of appeals implies all necessary findings in support of the judgment. *Waltenburg v. Waltenburg*, 270 S.W.3d 308, 312 (Tex. App.—Dallas 2008, no pet.). In that case, every reasonable presumption consistent with the record will be indulged in favor of the judgment. *Ette v. Arlington Bank of Commerce*, 764 S.W.2d 594, 595 (Tex. App.—Fort Worth 1989, no writ). An appellant is entitled to reversal only if she can show fundamental error. *Id.*

If findings of fact are requested, but none are filed. To raise a complaint about the lack of findings of fact and conclusions of law, an appellant must have filed a timely request for findings of fact and conclusions of law and a timely notice of past due findings of fact and conclusions of law. TEX. R. CIV. P. 296, 297.

If properly requested and in an appropriate case, it is mandatory for the trial court file findings of fact and conclusions of law. *Cherne*, 763 S.W.22d at 772. When a trial court fails to file findings, it is presumed harmful, unless the record affirmatively shows no harm. *Ad Villarai, LLC v. Chan II Pak*, 519 S.W.3d at 135; *Cherne*, 763 S.W.22d at 772. An appellant is harmed if there are two or more possible grounds on which the trial court could have ruled and an appellant has to guess at the court's basis for its ruling. *Zieba v. Martin*, 928 S.W.2d 782, 786 (Tex. App.—Houston [14th Dist.] 1996, no writ); *see also In re Marriage of Grossnickle*, 115 S.W.3d 238, 253 (Tex. App.—Texarkana 2003, no pet.).

The failure to make findings of fact, however, does not compel reversal if the record affirmatively demonstrates that the complaining party suffered no harm. *Graham Central Station, Inc. v. Pena*, 442 S.W.3d 261, 263 (Tex. 2014); *Las Vegas Pecan & Cattle Co. v. Zavala County*, 682 S.W.2d 254, 256 (Tex. 1984); *Martinez v. Molinar*, 953 S.W.2d at 401. Where there is only one theory of recovery or defense, there is no injury. *Martinez*, 953 S.W.2d at 401; *see also General Elec. Capital Corp. v. ICO, Inc.*, 230 S.W.3d 702, 711 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (only one argument raised thus appellant knew the basis for trial court's ruling). The test for whether the complaining party has suffered harm is whether the appellant is forced to guess at the reason or reasons the trial court ruled against it. *Martinez*, 953 S.W.2d at 401; *Burnet Cent. Appraisal Dist. v. Millmeyer*, 287 S.W.3d at 760 (trial court's statements on the record at end of trial sufficiently explained reasons for its ruling and negated any harm in the failure to file findings of fact); *see also Midwest Med. Supply Co. v. Wingert*, 317 S.W.3d 530, 535(Tex. App.—Dallas July 20, 2010, no pet.) (no harm in having no findings of fact when only issue is a legal one).

Other cases support an appellant's argument of harm when no findings of fact are filed. When there are multiple possible bases on which the trial court could have relied in making its decision, an appellant is harmed by the lack of findings of fact. *Liberty Mut. Fire Ins. v. Laca*, 243 S.W.3d 791, 795 (Tex. App.—El Paso 2007, no pet.). The El Paso Court reasoned that without findings, appellant was forced to appeal under a more onerous standard of review even though the party properly requested findings of fact. Without findings of fact, appellant was forced to expend resources to brief all issues, rather than those forming the basis of the trial court's decision. *Id.*; *see also Vargas v. Texas Dep't of Protective & Regulatory Servs.*, 973 S.W.2d 423, 426-27 (Tex. App.—Austin 1998, pet. granted, judgm't vacated w.r.m.) (forcing appellant to challenge sufficiency of each ground for termination put appellant at disadvantage without findings of fact; court remanded based on changed circumstances).

Remedy. The remedy for a trial court's failure to file findings of fact when required is to ask the court of appeals to abate the appeal and direct the trial court to correct the error. *Ad Villarai, LLC v. Chan II Pak*, 519 S.W.3d at 136; *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d at 773; TEX. R. APP. P. 44.4(a). If a trial court still fails to file findings, the appellate court "must reverse the trial court's judgment and remand the case for a new trial." *Ad Villarai, LLC v. Chan II Pak*, 519 S.W.3d at 136; TEX. R. APP. P. 44.1(a)(2). Mandamus is not an available remedy to compel a trial court to file findings of fact and conclusions of law. *In re Martin*, No. 06-09-00099-CV, 2009 WL 4281276, at *1-2 (Tex. App.—Texarkana Dec. 2, 2009, orig. proceeding) (mem. op.) (recognizing there is an appellate remedy for failure to file findings of fact – abate the appeal and order the trial court to file findings of fact

and conclusions of law); *In re Sheshtawy*, 161 S.W.3d 1, 2 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (same).

b. Review of Findings of Fact.

It is imperative to challenge the court's findings of fact and conclusions of law. When a party appeals from a non-jury trial, it must complain of specific findings of fact and conclusions of law. *Mayfield v. Peek*, 2017 WL 769879, at *5. A general complaint about the trial court's judgment does not present a justiciable question. *Id.*

Findings of fact are reviewable for legal and factual sufficiency of the evidence under the same standards applied with reviewing a jury's answers.[4] *Ortiz v. Jones*, 917 S.W.2d at 772; *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). Similarly, implied findings can and should be challenged for insufficiency the same as if actual findings. *Vickery*, 5 S.W.3d at 258; *Sutherland*, 843 S.W.2d at 131.

A challenge to the sufficiency of the evidence in a bench trial can be raised for the first time in appellant's brief. There is no need to file a post-judgment motion raising it. TEX. R. APP. 33.1(d). It is important to note, however, that raising sufficiency of the evidence does not expand to challenging an omitted finding. *Long v. Long*, 234 S.W.3d 34, 42 (Tex. App.—El Paso 2007, pet. denied). Challenging omitted elements requires filing a request for additional findings of fact. *Id.*

Appellate review of findings of fact and conclusions of law depends on whether there is a reporter's record on file at the court of appeals.

Reporter's record on file. If there is a reporter's record, the trial court's findings are not conclusive if the contrary fact finding is established as a matter of law or if there is no evidence to support the finding. *Middleton v. Kawasaki Steel Corp.*, 687 S.W.2d 42, 44 (Tex. App.—Houston [14th Dist.] 1985), *writ ref'd n.r.e. per curiam*, 699 S.W.2d 199 (Tex. 1985); *Johnston v. McKinney American, Inc.*, 9 S.W.3d at 276. With a reporter's record, findings of fact (and implied findings) are reviewable for legal and factual sufficiency. *Ortiz v. Jones*, 917 S.W.2d at 772.

Be aware of "unchallenged" findings of fact. With voluminous findings, it is important to confirm that all relevant findings are challenged. Unchallenged findings of fact with a reporter's record are binding on an appellate court unless the contrary is established as a matter of law or if there is no evidence to support the finding. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696-97 (Tex. 1986); *Odessa Tex. Sheriff's Posse, Inc. v. Ector County*, 215 S.W.3d 458, 467 (Tex. App.—Eastland 2006, pet. denied). The appellate court must overrule challenges to findings of fact that support a legal conclusion when other unchallenged findings of fact also support the legal conclusion. *Britton v. Texas Dep't of Criminal Justice*, 95 S.W.3d 676, 682 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

No reporter's record on file. If there is no reporter's record, the court of appeals is bound by the findings of fact and must presume that the evidence was sufficient and that every fact necessary to support the findings and judgment were proved at trial. *Redman v. Bennett*, 401 S.W.2d 891, 894 (Tex. App.—Tyler 1966, no writ). Without a reporter's record, the court of appeals indulges every presumption in favor of the trial court's judgment. *Jahan Tigh v. De Lage Landen Fin. Servs.*, 545 S.W.3d 714 (Tex. App.—Fort Worth 2018, no pet.).

With unchallenged findings of fact, and when there is no reporter's record, findings of fact are conclusive on appeal. *Rapp Collins Worldwide, Inc. v. Mohr*, 982 S.W.2d 478, 481 (Tex. App.—Dallas 1998, no pet.).

The obvious lesson—pay for a reporter's record if you want any chance on appeal to challenge the sufficiency of the evidence.

c. Review of Conflicting Findings of Fact

As provided in Rule 299, findings of fact shall form the basis of the judgment. What about conflicting findings? An appellate court will not set aside a judgment because of conflicting findings of fact if the conflict can be

[4] When reviewing findings of fact under a legal sufficiency challenge, the appellate court determines whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. *Midland Cent. Appraisal Dist. v. BP America Prod. Co.*, 282 S.W.3d at 219-20; *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). The appellate court reviews the evidence in a light most favorable to the challenged finding, crediting any favorable evidence if a reasonable factfinder could and disregarding any contrary evidence unless a reasonable factfinder could not. *Keller*, 168 S.W.3d at 821-22; 827. A no-evidence or legal sufficiency challenge is sustained only when: 1) the record discloses the complete absence of a vital fact; 2) the court is barred by the rules of evidence or other law from giving weight to the only evidence offered to prove a vital fact; 3) the only evidence is no more than a scintilla; or 4) the evidence conclusively establishes the opposite fact. *Keller*, 168 S.W.3d at 810; *BP America*, 282 S.W.2d at 220. When reviewing a factual sufficiency challenge, the appellate court considers all the evidence and determines whether the evidence supporting a finding is so weak as to be clearly wrong and unjust or whether the evidence is so against the great weight and preponderance of the evidence to be clearly wrong and manifestly unjust. *BP America*, 282 S.W.3d at 220; *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

reconciled. *Yazdani-Beioky v. Sharifan*, __ S.W.3d __, 2018 WL 2050450, at *5 (Tex. App.—Houston [14th Dist.] May 3, 2018, no pet. h.). If findings of fact cannot be reconciled with the conclusions of law, the findings of fact control. *Id.*

An appellate court applies a *de novo* standard of review when attempting to reconcile findings. *Id.* If two possible interpretations exist, the appellate court will use the interpretation that will harmonize the judgment with the findings of fact and conclusions of law upon which it is based. *Id.*; *Grossnickle v. Grossnickle*, 935 S.W.2d at 841. The reviewing court does not determine whether the findings reasonably may be viewed as conflicting; instead, the question is whether there is any reasonable basis upon which the findings may be reconciled. *Yazdani-Beioky v. Sharifan*, 2018 WL 2050450, at *5.

An erroneous finding of fact does not warrant reversal unless the erroneous finding is on an ultimate fact issue. *Yazdani-Beioky v. Sharifan*, 2018 WL 2050450, at *5. Immaterial findings of fact are harmless and are not grounds for reversal even if conflicting. *Id.*

d. Review of Incomplete Findings of Fact

If complaining of omissions, i.e., an element of or an entire cause of action or defense has been omitted, a party must file a request for additional findings of fact to raise the defect and avoid deemed findings. *See supra* II. C. 3.

To obtain a reversal based on the failure to enter additional findings of fact, the appellant must demonstrate that it was prevented from adequately presenting its case on appeal. *Johnston*, 9 S.W.3d at 277. Complaints about the trial court's failure to file additional findings as preventing an appellant from adequately presenting its appeal must detail how a party was prevented from being able to appeal. *Stuckey Diamonds*, 93 S.W.3d at 213.

e. Review of Conclusions of Law.

A challenge to a conclusion of law can be raised for the first time on appeal. As with findings of fact, there may be instances where additional or amended conclusions of law must be requested to preserve error.

Conclusions of law have less impact on an appeal than findings of fact. On appeal, courts of appeals re-determine the legal questions. Conclusions of law are review *de novo* to determine their correctness as applied to the facts. *Perry Homes v. Cull*, 258 S.W.3d at 598; *Curocom Energy LLC v. Young-Sub Shim*, 416 S.W.3d 893, 896 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *Keisling*, 218 S.W.3d at 741. Erroneous conclusions of law are not binding on an appellate court. *Chavez v. Chavez*, 148 S.W.3d 449, 456 (Tex. App.—El Paso 2004, no pet.). Conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Johnston*, 9 S.W.3d at 277. That is, an incorrect conclusion of law will not require reversal if the controlling findings of fact support a correct legal theory. *Johnston*, 9 S.W.3d at 277.

Frequently findings of fact will include statements that are conclusions of law. Even when conclusions of law are mislabeled as findings of fact, the court of appeals reviews them *de novo*. *BP America*, 282 S.W.3d at 220; *see BMC Software*, 83 S.W.3d at 794.

f. Review of Non-Rule 296 Findings of Fact

Findings of fact filed in interlocutory appeals and other non-Rule 296 cases are reviewed differently than Rule 296 findings. For findings made in cases where the trial court standard is abuse of discretion, the findings are helpful and aid in the court's review on appeal, but are not "binding" in the same manner as findings under Rule 296. *IKB*, 938 S.W.2d at 442; *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 852-53 (Tex. 1992). Unlike review of Rule 296 findings where findings are tested for legal and factual sufficiency, in an abuse of discretion review, an appellate court can reverse even if the findings and evidence support a trial court's order. *IKB*, 938 S.W.2d at 442; *Chrysler Corp.*, 841 S.W.2d at 852-53; *see also Doran v. ClubCorp USA, Inc.*, 174 S.W.3d 883, 887 (Tex. App.—Dallas 2005, no pet.) (in an interlocutory appeal, findings do not carry the same weight as findings under Rule 296; court makes an independent review of the evidence); *Tom James*, 109 S.W.3d at 884 (in an interloctory appeal, findings are "helpful," but "they do not carry the same weight on appeal as findings made under rule 296, and are not binding when we are reviewing a trial court's exercise of discretion.")

III. CONCLUSION

Obtaining findings of fact and conclusions of law is critical for a successful appeal of a bench trial. Knowing the requirements of the rules is imperative. The deadlines and requirements for securing findings of act are unlike other preservation rules – shorter, with a reminder notice, and with a requirement to follow up if there are omissions. Requests for additional findings are important for both appellant and appellee for preservation purposes to avoid waiver if elements or entire grounds are omitted. Best practices dictate filing draft findings of fact and conclusions of law before trial. After findings are filed, review the trial court's findings and compare to the pleadings and trial

evidence. Focus on the need for additional findings for preservation purposes. And, finally, secure a reporter's record for sufficiency challenges.