SPEAK NOW OR WAIVE IT: PRESERVING ERROR FOR TRIAL LAWYERS

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I. INTRODUCTION

This article seeks to educate the trial lawyer on preservation of error at trial – from the basics to the more advanced issues – with particular emphasis on specialized family law preservation issues. The article also briefly examines the effect of preservation on appeal of a case.

II. PRESERVATION OF ERROR GENERALLY

The following are the general steps to preservation of error:

A. State the specific grounds for the complaint.

Specific grounds for the objection must be stated or must be apparent from the context of the objection. *Ford Motor Co. v. Miles*, 967 S.W.2d 377 (Tex. 1998). The complaint raised on appeal must be the same as that presented to the trial court. *Pfeffer v. Southern Texas Laborers' Pension Trust Fund*, 679 S.W.2d 691 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.). Global objections, profuse objections, or overly general objections preserve no error for review.

B. Assert the objection timely.

Timing is everything. An objection too early is premature and does not preserve error. An objection to late does not preserve error. *House v. State*, 909 S.W.2d 214 (Tex. App. – Houston [14th Dist.]), aff'd 947 S.W.2d 251 (Tex. 1995).

However, with legal arguments, never assume it is too late. Legal arguments raised post-verdict are timely because they do not involve jury issues. *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278 (Tex. 1999).

C. Secure a Ruling

An objection must be overruled in order to preserve error for review. *Perez v. Baker Packers*, 694 S.W.2d 138, 141 (Tex. App. – Houston [14th Dist.] 1985, writ ref'd n.r.e.). However, the trial court's ruling may be express or implicit. Tex. R. App. P. 33.1(a)(2). If the trial court refuses to rule, the objection is still preserved so long as the complaining party objects to the refusal. *Id.*

D. Make a record.

The party complaining on appeal must see that a sufficient record is presented to the appellate court to show error requiring reversal. Tex. R. App. P. 33.1(a). Without a written motion, response, or order, or a statement of facts containing oral argument or objection, the appellate court must presume that the trial court's judgment or ruling was correct and that it was supported by the omitted portions of the record. *Christiansen v. Prezelski*, 782 S.W.2d 842 (Tex. 1990).

E. Waiver Doctrine.

Preservation of complaints and waiver must be carefully distinguished from harm. Simply because a party has failed to preserve a complaint, or has waived it, does not lessen the harm caused by an error. Nonetheless, the unpreserved complaint cannot be reviewed on appeal, regardless of any error which may be present.

Trial lawyers should be particularly mindful of the waiver doctrine in preparing and delivering opening and closing arguments. Further, error in admission of evidence is waived if the complaining party introduces the same evidence. Where a party challenges the admissibility of evidence outside the presence of the jury, then states "no objection" when it is offered to the jury, the party waives the complaint. *Sands v. State*, 64 S.W.3d 488 (Tex. App. – Texarkana 2001, no pet.). Objection to a pleading defect is waived if no special exceptions are lodged. *Vera v. Perez*, 884 S.W.2d 182 (Tex. App. – Corpus Christi 1994, no writ).

III. PLEADINGS

A. Civil Pleadings Generally

A plaintiff's petition must give fair notice of the plaintiff's claims by setting out the elements of the cause of action and the relief sought. *Stoner v. Thompson*, 578 S.W.2d 679 (Tex. 199); *Roarke v. Allen*, 633 S.W.2d 804 (Tex. 1982). Error regarding a pleading that seeks unliquidated damages is waived if no special exceptions are filed. *See Peek v. Equipment Serv. Co.*, 779 S.W.2d 802 (Tex. 1989).

Failure of a defendant to specifically plead the affirmative defenses and failure to verify defensive pleadings results in waiver of the subject matter of the defense at trial and on appeal. *Beacon Nat'l Ins. Co. v. Reynolds*, 799 S.W.2d 390 (Tex. App. – Fort Worth 1990, writ denied). However, plaintiff must object to defendant's failure to verify a defense or the defense will have been tried by consent and error is waived. *Roarke v. Allen*, 633 S.W.2d 804 (Tex. 1982).

Failure to specially except waives pleading

deficiencies that can be cured by repleading, and the issues raised by the defective pleadings will be tried by consent. *Roarke v. Allen*, 633 S.W.2d 804 (Tex. 1982). If the trial court sustains the special exception, the offending party may replead or he may elect to stand on his pleadings, suffer dismissal of the case, and test the trial court's order on appeal. However, the pleader who repleads waives any error by the trial court in sustaining the special exception. *Long v. Tascosa Nat'l Bank*, 678 S.W.2d 699, 703 (Tex. App. – Amarillo 1984, no writ).

Leave of court must be obtained if pleadings are to be amended within seven days of trial. To preserve error when a pleading is untimely filed, a party must move to strike the offending pleading. *See Forscan Corp. Dresser Indus.*, 789 S.W.2d 389 (Tex. App. – Houston [14th Dist.] 1990, writ denied). Where the record fails to show leave of court to amend late-filed pleadings, it will be presumed that leave to file was granted. *Goswami v. Metropolitan Sav. & Loan Ass'n*, 751 S.W.2d 487 (Tex. 1988).

When a party objects to evidence at trial on the grounds that it is not raised by the pleadings, the trial court may permit a trial amendment if amendment would assist presentation of the merits and does not unfairly surprise or prejudice the objecting party. To preserve the right to complain about such trial amendment, the objecting party must move for a continuance alleging surprise and seek attorney's fees. *State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656 (Tex. 1994), cert. denied, 512 U.S. 1236 (1994).

When the trial court grants leave to file a trial amendment, the amended pleading must be tendered before the charge is given to the jury. *Tex. Gen. Indem. Co. v. Ellis*, 888 S.W.2d 830 (Tex. App. – Tyler 1994, no writ).

A post-verdict amendment to conform pleadings to an award of exemplary damages has been held proper where it raises no new matters of substance and where defendant failed to object. Where the record failed to show leave to file, the amended pleading was harmless error. *Tex. Health Enter. v. Krell*, 828 S.W.2d 192 (Tex. App. – Corpus Christi), *writ granted, remand for settlement*, 830 S.W.2d 922 (1992).

B. Pleading Damages.

Damages must be specifically plead. *Geters v. Eagle Ins. Co.*, 834 S.W.2d 49, 50 (Tex. 1992). If the amount of damages sought changes during the course of the litigation, then the pleadings must be amended to reflect the correct amount. Of course, the plaintiff need not plead the amount of unliquidated damages, but only that they are within the jurisdictional limit of the court in which the party has filed. TEX. R. CIV. P. 47(b).

If the damages are not listed specifically, then it is incumbent upon the defendant to specially except. *See* Tex. R. Civ. P. 91; *Fort Bend County v. Wilson*, 825 S.W.2d 251, 253 (Tex. App. Houston [14th Dist.] 1992, no writ). For example, if the pleadings ask for net profits but fails to plead for gross profits, then the plaintiff will not be entitled to the gross profits. *See, e.g., Fubar, Inc. v. Turner*, 944 S.W.2d 64, 66 (Tex. App. Texarkana 1997, no writ).

C. Family Law Pleadings

Case law holds that the strict rules of pleading and practice are relaxed in cases involving child custody and support. However, even the relaxed rules have some requirements that must be met.

1. Mandatory Pleadings

Certain legal remedies are only available to a client if the relief has been requested in a pleading. Obviously, such a requirement can be waived by the opponent if the issue is tried by consent without objection.

a. Separate Property

A pleading must state a claim for confirmation of separate property in order to request such be awarded. Although the Constitution provides that a party cannot be divested of his or her separate property, the failure to plead for such may result in the party's proof at trial being limited.

b. Common Law Reimbursement Claims

If a party claims that one of the marital estates should be reimbursed for funds expended on behalf of another marital estate, such a claim must be plead.

c. Economic Contribution

The statutory claim for economic contribution must be pled for in order to obtain the relief requested. Unlike a disproportionate division, a party cannot try to hide behind the auspices of a "fair and equitable" division of the estate to protect himself from failing to plead economic contribution. Tex. Fam. Code Chapter 3, Subchapter E.

A successful claim for economic contribution may provide for a mandatory equitable lien in favor of the party making the claim so failing to make this pleading could be a waste of a potentially valuable benefit to the client.

d. Post-divorce Maintenance

If a party intends to invoke relief under Chapter 8 of the Texas Family Code, seeking maintenance after the divorce, such request must be plead. Many formbooks and practitioners plead generally for relief under Chapter 8; however, the better practice is to plead the specific statutory entitlement applicable to the case.

e. Common Law Marriage

In the event that a party claims that the marriage resulted under the common law marriage statute, as opposed to a ceremonial marriage, such a claim must be plead.

f. Marital Agreements

If a party has entered into any type of agreement with his or her spouse affecting the characterization and/or specifying the award of marital property, either prior to or during the divorce, *and* he or she desires to enforce this agreement, then the pleadings must reference and attach the agreement to the pleadings, request the court enforce the agreement and divide the estate accordingly.

f. Tort Causes of Action

Civil tort causes of actions brought between spouses must be plead to support an award at trial. Examples of such causes of action include: assault, intentional infliction of emotional distress, transmitting sexual disease, unlawful interception of communication, tortious interference with business relations, reimbursement, corporate alter egos, wrongful interference with contract, or interference with child custody.

Third party relief should also be included in the primary lawsuit, including without limitation, third-party co-tenant, third-party financial institution, third-party fraudulent transfer, voiding obligation to third-party, relief from third-party trustee, or civil conspiracy.

2. Verified Denials and Affirmative Defenses

Rule 93 of the Texas Rules of Civil Procedure sets forth a long list of pleadings that need to be verified by affidavit. The list may not appear on its face to be applicable to family law; however, consider the following possible verified defenses:

> Petitioner is not entitled to recover in the capacity in which Petitioner sues, and Respondent is not liable in the capacity in which Respondent is being sued, because there is no existing marriage between the parties.
>
> There is another suit pending in Texas between the same parties involving the same claim. That suit is Cause No. _____ pending in _____ County, Texas, styled "In the Matter of the Marriage of [name] and [name]."
>
> There is a defect of parties. Petitioner has alleged that certain property belongs to the parties that is, in truth, owned in a joint tenancy or by a partnership or corporation. If Petitioner is making claims against this property, then all cotenants, partnerships, or corporations holding record title to the property must be joined as third-party corespondents in this suit.
>
> Respondent denies being a partner in any partnership named in Petitioner's pleading, namely [**name of partnership**].
>
> Respondent denies the existence of any corporation named in Petitioner's pleading, namely [**name**], because the business in question is not incorporated. Respondent is not doing business under an assumed name or trade name as alleged in Petitioner's pleading.

Texas Family Law Practice Manual 3.16.

Affirmative defenses must also be plead to avoid waiver. The following are examples of affirmative defenses that might apply to a family law case:

> offsetting benefits to a reimbursement claim;
> accord and satisfaction;
> contributory negligence;
> duress;
> estoppel;
> failure of consideration;
> fraud;
> illegality;
> laches;
> payment;
> release;
> res judicata;
> statute of frauds;
> statute of limitations;
> waiver;
> arbitration and award;
> assumption of risk; and
> discharge in bankruptcy.

Res judicata is also an affirmative defense, where the burden of proof rests on the proponent. *Welch v. Hrabar*, 110 S.W.3d 601, 606 (Tex. App.-Houston [1st Dist.] 2003, pet. denied). The doctrine of res judicata prohibits re-litigation of issues from the same transaction and parties that have been, or could have been litigated in a prior proceeding. The doctrine of res judicata typically involves both claim preclusion and issue preclusion. The elements of res judicata are:

(a) The existence of a final judgment, *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996);

(b) involving the same parties, *Id*. at 653; and

(c) involving the same or related transaction, *Compania Financiara Libano v. Simmons*, 53 S.W.3d 365, 367 (Tex. 2001).

Where a claim by one party against another was a compulsory counterclaim to a cause of action in which there has been a final judgment between the parties, the defensive use of res judicata must be asserted by pleadings, proved by evidence, and submitted to the trier for a verdict or finding of fact. Tex. R. Civ. P. 97(a); *Worldpeace v. Commission for Layer Discipline*, 183 S.W.3d 451, 458-459 (Tex. App.-Houston [14th Dist.] 2006). The failure to obtain a jury verdict or finding of fact will waive the res judicata defense, since it cannot be raised for the first time on appeal. Tex. R. Civ. P. 279; Lexington Ins. Co. v. Gray, 775 S.W.2d 679, 688-89 (Tex. App.-Austin 1989, writ denied).

IV. EVIDENCE

In order to preserve error in making an offer of evidence, a particularized order of events needs to occur. *See* Tex. R. App. P. 33.1. The trial lawyer must do three things. First, she must meet a particular predicate for entry into evidence. Second, she must obtain a ruling. Third, if the evidence is not admitted, she must preserve a copy of the evidence in the record by making an offer of proof. *Id.*

In order to keep a particular piece of evidence out, opposing counsel must make a timely objection and pursue until an adverse ruling. If the evidence is admitted over the objection, opposing counsel must ensure that the Court's decision to overrule is on the record. The trial attorney must *always* bear in mind that the record is the appellate court's "window" into the trial court. If the attorney fails to ensure that an objection, a ruling, or an offer of proof is on the record, it is as if it never happened. *One Call Sys. v. Houston Lighting & Power*, 936 S.W.2d 673, 677 (Tex. App. Houston [14th Dist.] 1996, writ denied); *Hur v. City of Mesquite*, 893 S.W.2d 227, 231 (Tex. App. Amarillo 1995, writ denied).

A. Predicates: Condition Precedent to Admission of Evidence

To offer evidence at trial, counsel must establish the appropriate predicate for admission. That is, counsel must lay a proper foundation before the evidence can be properly admitted. Tex. R. Evid. 401, 402. Although a piece of evidence may be admitted, without the proper foundation, an appellate attorney can successfully challenge the admission of the evidence on appeal.

The proper foundation is based on the nature of the evidence, such as a photograph and audio recording. The necessary steps required to admit either piece of evidence is tailored to the method in which the evidence is created.

It is also necessary to bear in mind that the proper foundation, or predicate, is simply a threshold inquiry. Other objections, such as hearsay, can also be lodged by opposing counsel, and must also be overcome in order to admit a piece of evidence.

B. Evidentiary Objections

The admission or exclusion of evidence is only error where a substantial right of the party is affected.

Where the complaint is about the improper admission of evidence, a timely objection or motion to strike must appear in the record.

If the complaint is one excluding evidence, the substance of the evidence must be made known to the court by offer of proof or be apparent from the context of the record. The offering party must be allowed to make its offer of proof as soon as practicable, but before the charge is read to the jury.

To be timely, an objection must be made before the admission of evidence. An objection to evidence previously admitted without objection is too late. An objection should be lodged each time the evidence is offered.

A general objection will not suffice to preserve error. A specific objection is one which enables the trial court to understand the precise question and to make an intelligent ruling, affording the offering party the opportunity to remedy the defect if possible. *De Los Angeles Garay v. TEIA*, 700 S.W.2d 657 (Tex. App. – Corpus Christi 1985, no writ).

An objection must be overruled to preserve error for appeal. *Duperier v. Texas State Bank*, 28 S.W.3d 740 (Tex. App. – Corpus Christi 2000, pet. dism'd by agr.).

Where evidence may be partly admissible and partly inadmissible, the objecting party must point out and distinguish the admissible from the inadmissible and direct objections specifically to that point which is inadmissible.

When evidence is admissible for one purpose, but inadmissible for another purpose, it may be admitted for the purpose for which it is competent, but the court must, upon motion of a party, limit the evidence to its proper purpose. In the absence of such a motion, the right to complain of the improper purpose is waived. The objecting party has the obligation to request the court to limit the purpose for which the evidence might be considered. Absent such a limiting instruction, the evidence is received for all purposes. *Cigna Ins. Co. V. Evans*, 847 S.W.2d 417, 421 (Tex. App. – Texarkana 1993, no writ).

C. Expert Testimony

Admitting expert testimony has some laborious predicates. This is for good reason considering the weight the evidence is given by the fact-finder. In order to admit expert evidence, over objection, the

proponent must show five things: (1) that the expert is qualified; (2) that the expert's methodology is reliable; (3) that the underlying data is reliable; (4) that the evidence is relevant; and (5) that the expert's opinion would assist the trier of fact.

1. Qualifications

An expert may rely upon personal knowledge, evidence, depositions, reports of other experts, and, in some situations, even inadmissible evidence in forming his expert opinions. Tex. R. Evid. 702. For example, an expert may base his opinion on inadmissible hearsay, provided that it is the type of evidence routinely relied upon by experts in forming such opinions. *Huff v. Harrell*, 941 S.W.2d 230 (Tex. App. Corpus Christi 1997, writ denied).

Experts may state an opinion on the ultimate fact issues. Tex. R. Evid. 704. They may also give opinions on mixed questions of law and fact, as long as the opinion is confined to relevant issues and based upon proper legal concepts. *Louder v. DeLeon*, 754 S.W.2d 148, 149 (Tex. 1988).

Texas Rule of Evidence 702 requires the Court to consider two factors in deciding whether an expert is qualified to testify: (1) whether the expert has the requisite knowledge or skill; and (2) whether that expertise will assist the trier of fact in deciding an issue in the case. Simply having a medical degree does not necessarily qualify an expert to present an opinion on a medical issue. Rather, the testifying expert must possess some particularized knowledge and expertise relating to the specific matter that is before the court. *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996).

2. Reliability

a. Methodology

There are additional considerations when dealing with the admissibility of scientific evidence. The scientific evidence must be generally accepted within the scientific community before it will be admitted. The factors to determine this are: (1) whether the theory or technique can be and has been tested; (2) the extent to which the technique relies upon the expert's subjective interpretation; (3) whether the theory or technique has been subjected to peer review and publication; (4) the known or potential rate of error and standards controlling a techniques operation; (5) general acceptance in the scientific community; and (6) the theory or techniques non-judicial uses. *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995).

In *Daubert*, the Supreme Court gave a nonexclusive list of factors to consider on the admissibility of expert testimony in the scientific realm:
(1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. In *Kumho Tire Co. v. Carmichael,* 526 U.S.137, 11 S. Ct.
1167, 143 L.Ed.2d 238 (1999), the Supreme Court said that the reliability and relevancy principles of *Daubert* apply to all experts, not just scientists, and where objection is made the court must determine whether the evidence has "a reliable basis in the knowledge and experience of [the relevant] discipline." The trial court has broad discretion in determining how to test the expert's reliability. *Id. Kuhmo Tire* acknowledged that the list of factors in *Daubert* did not apply well to certain types of expertise, and that other factors would have to be considered by the court in such instances.

The Texas Supreme Court adopted the U.S. Supreme Court's *Daubert* analysis for TRE 702, requiring that the expert's underlying scientific technique or principle be reliable, in *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995). The Texas Supreme Court listed factors for the trial court to consider: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557.

As with the U.S. Supreme Court, the Texas Supreme Court was required to adapt the *Robinson* "hard science" criteria to other fields of expertise. In *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998), the Texas Supreme Court announced that the reliability and relevance requirements of *Robinson* apply to all types of expert testimony. In *Gammill,* a unanimous Supreme Court said: We conclude that whether an expert's testimony is based on "scientific, technical or other specialized knowledge," *Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it "will have a reliable basis in the knowledge and experience of [the] discipline." After *Gamill*, *Daubert/Robinson* challenges may involve two prongs: (1) establishing the "applicable professional standards outside the courtroom" and (2) establishing that these standards were met by the expert in this instance.

b. Data

The requirement that the expert's underlying data be sufficient is explicitly stated in Texas Rules of

Evidence 705©). This provision requires the trial court to be a gatekeeper regarding the sufficiency of the data underlying an expert opinion.

3. Relevance

Just as every piece of evidence must pass the threshold relevancy test, so must the proposed expert testimony. If the evidence bears no relationship to the issues, then it does not meet Rule 702's relevancy requirement. Thus, the proposed testimony would be found inadmissible.

4. Assisting the Trier of Fact

After all other thresholds have been met, the Court must find that the expert's testimony assists the fact finder. If the fact finder is capable of making a determination without the assistance of an expert's testimony, then the expert testimony is not admissible. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000).

D. Offers of Proof and Bill of Exceptions.

In order to preserve a complaint for appeal that evidence was excluded, an offer of proof or bill of exceptions must be made. Tex. R. Evid. 103(a)(2), (b). An appellate court cannot review whether a piece of evidence was improperly excluded unless the evidence is included in the record through one of these mechanisms. Tex. R. App. Proc. 33.1, 33.2.

1. Offer of Proof

An offer of proof is a procedure conducted during the trial and is the preferable method of preserving the evidence. To preserve evidence through an offer of proof, a party must: (1) offer the evidence at trial; (2) if an objection is lodged, specify the purpose for which the evidence is offered and the reasons why it is admissible; (3) obtain a ruling from the court; and (4) if the court refuses to admit the evidence, make an offer of proof that shows the substance of the evidence that was excluded. Tex. R. Evid. 103(a)(2).

With oral testimony, the excluded evidence is presented in the form of a summary or in question/answer form outside the presence of the jury. Tex. R. Evid. 103. For documentary evidence, the attorney should ask the court reporter to mark the exhibit as an offer of proof and file it with the exhibits in the reporter's record. Tex. R. Civ. P. 75a. An offer of proof must be made before the court reads the charge to the jury so that the court has the opportunity to reconsider its ruling excluding the evidence. An offer of proof is unnecessary only if the substance of the evidence is apparent from the record. *Id.*

2. Bill of Exceptions

A bill of exceptions is a post-trial offer of evidence in written form that is necessary only when the complaint or evidence is not preserved in an offer of proof. Tex. R. App. Proc. 33.2(a). If the parties agree on the contents of the formal bill, then the trial court must sign the bill and file it with the court reporter for inclusion into the record. Tex. R. App. Proc. 33.2(c)(2). If an objection is lodged, specify the purpose for which it is offered and the reasons why it is admissible**.** A formal bill of exceptions must be filed no later than 30 days after the notice of appeal is filed. Tex. R. App. Proc. 33.2(e)(1).

V. PRETRIAL MOTIONS

A. Comply with all prerequisites to filing suit

A global allegation that a plaintiff has complied with all prerequisites to filing the suit, or that all conditions precedent have been performed or have occurred, is sufficient to support a judgment in the absence of special exceptions. Tex. R. Civ. P. 54. A defendant should file special exceptions to object to plaintiff's failure to allege that the required notice has been given or the complaint is waived. Further, a defendant should file a motion to abate to object to plaintiff's failure to give the required notice.

B. Pretrial motions and hearings

The best practice is to request pretrial relief via a written motion. Although many rules require the filing of a written motion to support relief, this practice should be done even in the absence of a specific rule. In order to preserve a request or objection for appeal, file a written motion. In order to oppose relief requested, file a written response.

Where a motion relies on facts outside the record, verify the motion or attach an affidavit, even if not required to do so under the rules.

The general rule is to present or oppose a motion at a hearing and obtain a record. *See Moore v. Wood*, 809 S.W.2d 621 (Tex. App. – Houston [1st Dist.] 1991, orig. proceeding). However, if there is no evidence presented, error is not waived by the failure to obtain a hearing on the motion. *See Martin v. Cohen*, 804 S.W.2d 201, 203 (Tex. App. – Houston [14th Dist.] 1991, no writ). If the motion requires presentation of evidence, and no hearing is held, any error is waived.

A party should obtain a signed order reflecting the court's ruling on a pretrial motion.

C. Motion for Continuance

A motion for continuance must be in writing and must strictly comply with the rules. The failure to verify a motion for continuance is fatal. *City of Houston v. Blackbird*, 658 S.W.2d 269 (Tex. App. – Houston [1st Dist.] 1983, writ dism'd).

Any opposition to a motion for continuance should be affirmatively reflected in the record by filing a written response, appearing at the hearing, and arguing against the continuance on the record.

VI. BURDENS OF PROOF

A family law trial judge may be called upon to apply just about every burden of proof available under Texas law.

The standard burden of proof is "preponderance of the evidence". *See* Tex. Fam. Code §105.005. The term "preponderance of the evidence" refers to the greater weight and degree of credible evidence. *Davenport v. Cabell's, Inc.*, 239 S.W.2d 833, 835 (Tex. Civ. App. – Texarkana 1951, no writ). The term denotes that degree of proof that is sufficient to satisfy the jury to a reasonable certainty of the existence or truth of the facts to be proved. *State Farm Mut. Auto. Ins. Co. v. Davis*, 576 S.W.2d 920 (Tex. Civ. App. – Amarillo 1979, writ ref'd n.r.e.). A party who does not establish his or her case by a preponderance of the evidence is not entitled to recover. Accordingly, a plaintiff cannot prevail where the evidence presented is evenly balanced. Not only is the plaintiff in a civil case required to establish his or her cause of action by a preponderance of the evidence, but the defendant also must establish by a preponderance of the evidence any affirmative defenses to the plaintiff's cause of action.

Some situations require an elevated burden of proof, that of "clear and convincing evidence". "Clear and convincing evidence" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Tex. Fam. Code Ann. §101.007. The standard is an intermediate standard of proof, falling between the preponderance standard and the reasonable doubt standard. *Williams v. Williams*, 150 s.W.3d 436 (Tex. App. – Austin 2004, pet denied); *In Interest of R.R.F.*, 846 S.W.2d 65 (Tex. App. – Corpus Christi 1992, writ denied). It requires greater persuasive force than the preponderance of the evidence standard, but less persuasive force than the reasonable doubt standard. While the proof must weigh heavier than merely the greater-weight-of-the-credible-evidence, there is no requirement that the evidence be unequivocal or undisputed. *R.R.F.*, 846 S.W.2d at 65; *Swinney v. Mosher*, 830 S.W.2d 187 (Tex. App. – Fort Worth 1992, writ denied).

The following situations fall under the clear and convincing standard:

1. Economic contribution claim;
2. Overcoming community property presumption/Separate character of property ;
3. Parental rights involuntary termination;
4. Rebutting presumption of sole management community property (in discussing whether spouse had authority to transfer community property without other spouses consent);
5. Denial of presumption of parentage;
6. A voluntary affidavit of relinquishment was executed according to terms of family code;
7. Presumption of gift of marital property;
8. Rebutting a presumption that a certified copy of a foreign judgment is valid and entitled to full faith and credit;
9. Civil contempt of a court order;
10. Fraud or mistake when used to justify reformation of a contract;
11. Economic contribution and Reimbursement claims;
12. Fraud claims;
13. Enforceability of Prenuptial and Partition Agreements
14. Any other claims where a spouse may be liable.

There are even rare occasions where criminal standard of beyond a reasonable doubt applies. For example, termination of parental rights involving an American Indian child requires, by federal mandate, proof beyond a reasonable doubt. James W. Paulsen, *Family Law: Parent and Child*, 54 SMU L. Rev. 1417, 1469-70 (2001). Further, a criminal contempt conviction also requires proof of the disobedience beyond a reasonable doubt (although the respondent's defenses only must be proven by preponderance of the evidence). *Ex parte Chambers*, 898 S.W.2d 2257 (Tex. 1995); *Ex parte McIntyre*, 730 S.W.2d 41 (Tex. App. – San Antonio 1987, orig. proceeding).

VII. NONJURY TRIAL

Most family law cases are tried to the trial court without a jury.

A. Just and right division standard

It is the trial court and not the jury that is charged with the responsibility of making a division of the property. *Murff v. Murff*, 615 S.W.2d 696 (Tex. 1981); *Grant v. Grant*, 351 S.W.2d 897 (Tex. Civ. App. – Waco 1961, writ dism'd); *Carter v. Carter*, 231 S.W.2d 791 (Tex. Civ. App. – Galveston 1950, no writ); *Bagby v. Bagby,* 186 S.W.2d 702 (Tex. Civ. App. – Amarillo 1945, no writ); *Saylor v. Saylor*, 20 S.W.2d 229 (Tex. Civ. App. – Austin 1929, no writ); *Becker v. Becker*, 299 S.W. 528 (Tex. Civ. App. – El Paso 1927, no writ). Thus, where a divorce suit is submitted to the jury, its verdict as to dividing the spouses' estate is advisory only, and the trial court may, in its discretion, disregard the jury findings and divide the property in such manner as seems just and right under the facts as they appear to the court. *Rodriguez v. Rodriguez*, 616 S.W.2d 383 (Tex. Civ. App. – Houston [14th Dist.] 1981, no writ); *Hopkins v. Hopkins*, 540 S.W.2d 783

(Tex. Civ. App. – Corpus Christi 1976, no writ). The trial court is generally not bound by the verdict of the jury in dividing the estate of the parties in a just and right manner, and it may proceed on independent and additional determinations of its own. Otherwise, the court could not exercise its statutory discretion in fulfilling its duty to divide the property in a just and rightful manner. *Bagby v. Bagby*, 186 S.W.2d 702 (Tex. Civ. App. – Amarillo 1945, no writ); *Becker*, 299 S.W. at 528.

The court is also empowered to utilize jury findings as to the nature of the property as a basis for ascertaining what is a just and right division. For example, in a divorce suit brought on the ground of insupportability of the marriage, the trial court is authorized to consider the jury's finding of cruel treatment on the part of one spouse in connection with the court's duty to divide the estate of the parties in a manner that the court deems just and right. *Clay v. Clay*, 550 S.W.2d 730 (Tex. Civ. App. – Houston [1st Dist.] 1977, no writ).

B. Best Interest of Child

Texas statutory and case law reveal that Texas courts' primary consideration in determining child custody is the best interest of the child. *In re Marriage of Bertram*, 981 S.W.2d 820, 822 (Tex. App. – Texarkana 1998, no pet.); *Doyle v. Doyle*, 955 S.W.2d 478, 480 (Tex. App. – Austin 1997, no pet.); Tex. Fam. Code §153.002. When a court seeks to determine the best interest of the child, the court possesses both a right and a duty to inquire into all circumstances relating to a disposition of the child. *Conley v. St. Jacques*, 110 S.W.2d 1238, 1242 (Tex. Civ. App.-- Amarillo 1937, writ dism'd w.o.j.).

The best interest standard in Texas has developed from factors established by the Texas Supreme Court in *Holley v. Adams*, a 1976 parental rights termination case. *Holley v. Adams*, 544 S.W.2d d367 (Tex. 1976). In reaching its best interest determination in *Holley*, the Texas Supreme Court considered several factors applied by other courts when determining the best interest of a child. *Id.* at 371-72. These factors were then compiled into a list for Texas courts to consider when evaluating the best interest of the child. *Id.* at 372. The factors set forth in Holley are:

> A) the desires of the child; B) the emotional and physical needs of the child now and in the future; C) the emotional and physical danger to the child now and in the future; D) the parental abilities of the individuals seeking custody; E) the programs available to assist these individuals to promote the best interest of the child; F) the plans for the child by these individuals or by the agency seeking custody; G) the stability of the home or proposed placement; H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and I) any excuse for the acts or omissions of the parent.

Id. at 372. The Texas Supreme Court indicated that this list was not exhaustive and that the factors were "considerations which either have been or would appear to be pertinent." *Id.*

C. Findings of Fact and Conclusions of Law

1. Generally

A party can request that the trial court make findings of fact in support of the judgment after a nonjury trial. Tex. R. Civ. P. 296. The request must be made within 20 days of the judgment and the failure to request findings by the deadline waives complaint as to the failure to file findings.

If findings are timely requested but not filed by the court within 20 days after the request, the requesting party must file a reminder of the duty to file findings. Tex. R. Civ. P. 297. Otherwise, the right to complain on appeal about the lack of findings is waived.

If findings are given, but they do not address all issues important to the requesting party, the requesting party can, within 10 days of the filing of the findings, file a request for amended or additional findings. Failure to request additional findings waives the right to complain about the failure to find a certain matter.

If findings of fact and conclusions of law are neither filed nor requested, all necessary findings in support of the judgment will be implied. *Osteen v. Osteen*, 38 S.W.3d 809 (Tex. App. – Houston [14th Dist.] 2001, no pet.) The implied findings may be challenged for legal and factual sufficiency only if a reporter's record is included in the record on appeal. *Casino Magic Corp. v. King*, 43 S.W.3d 14 (Tex. App. – Dallas 2001, pet. denied).

2. Family Law Findings

In a suit for dissolution of marriage in which the court has rendered a judgment dividing the estate of the parties, the court, on request of a party must state in writing its findings of fact and conclusions of law. Tex. Fam. Code Ann. §6.711. Where findings of fact filed after judgment are in conflict with that judgment, the findings of fact are controlling. *Keith v. Keith*, 763 S.W.2d 950 (Tex. App. – Fort Worth 1989, no writ). The findings of fact must include the characterization of each party's assets, liabilities, claims and offsets on which disputed evidence was presented and the value of the community estate's assets, liabilities, claims and offsets on which disputed evidence was presented.

Tex. Fam. Code ann. §6.711. Therefore, the trial court is not required to make findings on facts that were not contested or presented to court with respect to value of community estate's assets, for purposes of division of marital estate. *Deltuva v. Deltuva*, 113 S.W.3d 882 (Tex. App. – Dallas 2003, no pet.). It is not reversible error as a matter of law for the trial court to fail to file findings of fact and conclusions of law, and the trial court will not be reversed for such failure unless a party demonstrates that he or she has been deprived of the opportunity to properly present the case on appeal. *Guzman v. Guzman*, 827 S.W.2d 445 (Tex. App. – Corpus Christi 1992), *writ denied* 843 S.W.2d 486 (Tex. 1992); *Alsenz v. Alsenz*, 101 S.W.3d 648 (Tex. App. – Houston [1st Dist.] 2003, pet. denied); *Tenery v. Tenery*, 932 S.W.2d 29 (Tex. 1996); *Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex. App. – Fort Worth 2004, no pet.).

A party to a divorce suit who fails to make a demand for findings as to the nature or character of the property waives any error committed by the trial court in failing to make such findings. *Keith*, 763 S.W.2d at 950; *Elrod v. Elrod*, 517 S.W.2d 669 (Tex. Civ. App. – Corpus Christi 1974, no writ); *Caldwell v. Caldwell*, 423 S.W.2d 140 (Tex. Civ. App. - Waco 1967, no writ). The trial court's error, if any, in failing to state specifically in its findings that certain property is a spouse's separate property, is immaterial and harmless where the court awards such property to the spouse as his or her separate property. *Spiller v. Spiller*, 535 S.W.2d 683 (Tex. Civ. App. – Tyler 1976, writ dism'd); *Gendebien v. Gendebien*, 668 S.W.2d 905 (Tex. App. – Houston [14th Dist.] 1980, no writ); *Thomas v. Thomas*, 603 S.W.2d 356 (Tex. Civ. App. – Houston [14th Dist.] 1980, writ dism'd).

3. Child Support Findings

Without regard to the civil rules regarding findings of fact and conclusions of law, in rendering an order of child support, the court must make specified findings if:

1. a party files a written request not later than ten days after the date of the *hearing*;
2. a party makes an oral request in open court during the hearing; or,
3. the amount of child support ordered by the court varies from the amount computed by applying the percentage guidelines.

Tex. Fam. Code §154.130.

The trial court was not required to make findings of fact on an order of child support contained in a final divorce decree, where the husband filed his written request for findings of fact and conclusions of law more than 10 days after hearing, the record did not reflect an oral request for findings, the jury found that the husband's net yearly earnings were $125,000, and entry of $1,800 per month in child support was within the child support guidelines for three children for a parent with over $6,000 in net monthly resources. *Deltuva v. Deltuva*, 113 S.W.3d 882 (Tex. App. – Dallas 2003, no pet.); *see also Friermood v. Friermood*, 25 S.W.3d 758 (Tex. App. – Houston [14th Dist.] 2000, no pet.); *Carson v. Hathaway*, 997 S.W.2d 760 (Tex. App. – El Paso 1999, no writ) .

Because the percentage child support guidelines do not apply to net monthly resources exceeding $6,000, the statute requiring the court to make findings when the child support award varies from the percentage guidelines does not apply to child support awarded from those resources. *Yarbrough v. Yarbrough*, 151 S.W.3d 687 (Tex. App. – Waco 2004, no pet.).

4. Possession Order Findings

Where the possession times by each parent are contested, and the court's order varies from the standard possession schedule set out in the Texas Family Code, findings must be requested orally in open court or not later than 10 days after the date of the *hearing*. Tex. Fam. Code §153.258.

VIII. JURY TRIAL

In a suit for dissolution of a marriage, either party may demand a jury trial unless the action is a suit to annul an underage marriage. Tex. Fam. Code §6.703. In a family law jury trial involving children, a party is entitled to a verdict by the jury and the court may not contravene a jury verdict on the issues of:

(1) the appointment of a sole managing conservator;

(2) the appointment of joint managing conservators;

(3) the appointment of a possessory conservator;

(4) the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child;

(5) the determination of whether to impose a restriction on the geographic area in which a joint managing conservator may designate the child's primary residence; and

(6) if a restriction on geographic area is imposed, the determination of the geographic area within which the joint managing conservator must designate the child's primary residence.

Tex. Fam. Code §105.002; *see also Lenz v. Lenz*, 79 S.W.3d 10 (Tex. 2003). The court retains the power to grant a motion for a directed verdict. *T.A.B. v. W.L.B.*, 598 S.W.2d 936 (Tex. Civ. App. – El Paso 1980), *writ ref'd n.r.e.*, 606 s.W.2d 695 (Tex. 1980). Furthermore, in circumstances under which the court may not enter an order that contravenes the verdict of a jury, the trial court may exercise its discretion to grant a new trial.

Wenske v. Wenske, 776 S.W.2d 779 (Tex. App. – Corpus Christi 1989, no writ).

A party is not entitled to a jury verdict on the issues of child support, a specific term or condition of possession of or access to the child, or any right or duty of a possessory or managing conservator, other than the issue of primary residence. Tex. Fam. Code §105.002. However, the court may submit any of these issues to the jury, but such a jury verdict is advisory only. *Id.* A party may not demand a jury trial in either a suit in which adoption is sought, including a trial on the issue of denial or revocation of consent to the adoption by the managing conservator; or, a suit to determine parentage. *Id.* When the jury's verdict is merely advisory, as in issues of property division, child support, or possession, there is no right to a jury trial, there is no absolute right to a jury. *Martin v. Martin*, 776 S.W.2d 572 (Tex. 1989).

Further, a party is entitled to a jury trial on the following issues unrelated to children:

(1) Fault in the breakup of the marriage;
(2) Characterization of marital property;
(3) Valuation of marital property;
(4) Declaration that marriage is void;
(5) Common law marriage determination;
(6) Suit for annulment, except for underage marriage;
(7) qualification for maintenance award.

A. Request for Jury Trial

To preserve the right to a jury trial, a timely written request must be filed and the jury fee paid within a reasonable time before the case is set on non-jury docket, and in any event, no later than 30 days prior to the trial setting. *Halsell v. Dehoyos*, 810 S.W.2d 371 (Tex. 1991). A request made 30 or more days in advance of the trial setting raises a rebuttable presumption that the demand was made within a reasonable time. *Id.* The adverse party may rebut this presumption by showing that the granting of a jury trial would operate to injure the adverse party, disrupt the court's docket, or impede the ordinary handling of the court's business, provided such evidence appears in the record. *Taylor v. Taylor*, 63 S.W.3d 93 (Tex. App. – Waco 2001, no pet.).

Although the right to a jury trial is constitutional, the right can be waived when the requesting party fails to object to conducting the trial without a jury. In order to preserve error when the trial court undertakes to try a case before the bench, despite a proper request for jury, the party must object on the record to the trial court's action or indicate affirmatively in the record that it intends to stand on its perfected right to jury trial.

B. Voir Dire

1. Challenges to the Makeup of the Jury

The jurors originally summoned for jury service can be challenged either by challenging the array or by requesting a jury shuffle. The "array" is the group drawn from the jury wheel and summoned for jury service; the "panel" means the individuals assigned to a particular case before voir dire; "jury" refers to the 12 or 6 individuals selected through the voir dire process.

To preserve a complaint about the array – a defect in the juror selection and summons procedure or violation of the statute pertaining to jury summons – a party must make the challenge in writing, setting forth distinctly the grounds of the challenge supported by affidavit. Tex. R. Civ. P. 221. The motion should be addressed to the particular judge in charge of the local jury system. *Martinez v. City of Austin*, 852 S.W.2d 71, 73 (Tex. App. – Austin 1993, writ denied).

Challenges to the array must be made before voir dire begins. For counties that operate under a system where one judge is designated to organize and impanel all jurors for the week, the challenge must be made before or at the time the designated judge empanels the prospective jurors. *State ex rel. Hightower v. Smith*, 671 S.W.2d 32, 36 (Tex. 1984). Challenges made for the first time to the judge assigned to try the case or in a motion for new trial come too late. *Benevides v. Soto*, 893 S.W.2d 69, 70-71 (Tex. App. – Corpus Christi 1994, no writ). If the movant is successful, the entire array is dismissed and a new array summoned.

When the panel selected for voir dire does not fairly represent a cross-section of the community, a party may demand a shuffle. Tex. R. Civ. P. 223. The result is that the panel is randomly rearranged. The demand for a shuffle must be made before voir dire and is limited to one shuffle per case. Tex. R. Civ. P. 223.

2. Challenges for cause

A prospective juror who admits bias or prejudice should be struck for cause. If the trial court denies a challenge for cause after bias or prejudice has been established, the movant must preserve error *before* exercising peremptory challenges by advising the trial court that (1) its denial of the challenge for cause will for the party to exhaust peremptory challenges, and (2) specific objectionable jurors (identified by name/number) will remain on the panel after peremptory challenges are exercised. *Shepherd v. Ledford*, 962 S.W.2d 28, 34 (Tex. 1998). Additional peremptories should be requested to make up for the ones used on target panel members.

Making a record is crucial in preserving error in challenges for cause.

3. Peremptory challenges

In multi-party cases, the trial court must, if

timely requested, equalize the number of peremptory strikes to avoid giving one side or one party an unfair advantage. First, the trial court must align the parties by grouping the litigants who share essentially common interests. *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914 (Tex. 1979). The determination is made after voir dire and prior to the exercise of strikes.

Second, the court must equalize the strikes, not necessarily numerically, according to what the ends of justice require to prevent an unequal advantage. *Id.* at 918.

The proper time to object to the trial court's allocation of peremptory strikes is after voir dire and prior to the exercise of the challenges allocated by the court. *Van Allen v. Blackledge*, 35 S.W.3d 61, 65 (Tex. App. – Houston [14th dist.] 2000, pet denied).

C. Argument

To complain about improper jury argument on appeal, it is necessary to show an error, not invited or provoked, that was preserved by proper trial predicate (objection, request for instruction, motion for mistrial) that was not curable by instruction, withdrawal of the statement or reprimand by the judge, and that the argument by its nature constituted reversibly harmful error. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979). Failure to timely follow these procedures results in waiver. *Miller v. Bock Laundry Mach. Co.*, 568 S.W.2d 648, 653 (Tex. 1977).

D. Charge

A trial court must submit broad form questions to the jury unless extraordinary circumstances exist. Tex. R. Civ. P. 277. The pleadings and evidence determine which questions are properly presented to the jury. Tex. R. Civ. P. 278. As long as matters are timely raised and properly requested as a part of the trial court's charge, a judgment must be reversed when a party is denied proper submission of a valid theory of recovery or a vital defensive issue raised by the pleadings and evidence. *Exxon Corp. v. Perez*, 842 S.W.2d 629, 631 (Tex. 1992).

However, the Supreme Court has recently begun a trend away from broad form submission in certain cases. In *Crown Life Ins. v. Casteel*, the supreme court determined that "it may not be feasible to submit a single broad-form liability question that incorporates wholly separate theories of liability." *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d278, 290 (Tex. 2000). Thus, when "a single broad-form liability question erroneously commingles valid and invalid liability theories and the appellant's objection is timely and specific, the error is harmful when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding." *Id.* at 389. Although Rule 277 says broad form is clearly the preferred method of submission, "when the trial court is unsure whether it should submit a particular theory of liability, separating liability theories best serves the policy of judicial economy underlying Rule 277 by avoiding the need for a new trial when the basis for liability cannot be determined." *Id.* at 390.

Prior to *Casteel*, courts rarely saw "extraordinary circumstances" that made broad-form infeasible. "The fact that a jury question contains more than one factual predicate to support an affirmative answer to a controlling question, or more than one element of a cause of action, does not render it defective." *Mo. Pac. R.R. Co. v. Lemon*, 861 S.W.2d 501, 509 (Tex. App. – Houston [14th Dist.] 1993, writ dism'd by agr.); *see also Tex. Dept. Of Mental Health and Mental Retardation v. Petty*, 848 S.W.2d 680, 682 n.2 (Tex. 1992). In short, before *Casteel*, invalid theories of recovery rarely produced any error.

After *Casteel*, the commingling of valid and invalid theories of liability within a single broad-form question represents reversible error-- although the trial court may not know of or agree with the invalidity at the time of submission. Because the jury was not asked separately about each of the plaintiff's thirteen theories of liability in *Casteel*, the supreme court concluded that the jury could have based its affirmative answer solely on one or more of the erroneously submitted theories. *Casteel*, 22 S.W.3d at 387-88. As a result, the court held that "when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory." *Id.* at 388. Likewise, "[w]hen the trial court is unsure whether it should submit a particular theory of liability, separating liability theories best serves the policy of judicial economy underlying Rule 277 by avoiding the need for a new trial when the basis for liability cannot be determined." *Id.* at 390. Since the holding in *Casteel*, harmful error may exist when the appellate court cannot determine whether the same ten jurors followed the same path to a verdict, based upon a legally valid theory with support in the evidence.

The submission of controlling issues in the case is a question of law and reviewable by the appellate courts under the de novo standard. *Continental Cas. Co. v. Street*, 379 S.W.2d 648, 651 (Tex. 1964). Whether a trial court should submit a theory by questions or instructions is reviewable by abuse of discretion. Tex. R. Civ. P. 277; *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990).

The trial court should generally explain to the jury any legal or technical terms contained in instructions and definitions. Tex. R. Civ. P. 277. Whether to submit a particular instruction or definition is review under abuse of discretion. *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 451 (Tex. 1997).

When instructions or definitions are actually given, the question on review is whether the instruction or definition is "proper". Tex. R. Civ. P. 277; *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 791 (Tex. 1995).

When a party complains about the court's refusal to submit a requested instruction or definition, the question on review is whether the request was "reasonably necessary to enable the jury to render a proper verdict." *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 405 (Tex. App. – Houston [14th Dist.] 1997, writ dism'd by agr.).

The harmless error rule applies when evaluating whether an alleged error in the submission of instructions or definitions is reversible. *St. James Transp. Co. v. Porter*, 840 S.W.2d 658, 664 (Tex. App. – Houston [14th Dist.] 1995, writ dism'd).

IX. DEFAULT JUDGMENTS

At first glance, a default judgment appears to be an "easy" way to win a case, but it is subject to strict rules and is often reversed on appeal. To ensure that a default judgment sticks, it is incumbent upon counsel to meticulously preserve this for appeal.

A plaintiff may take a no-answer default judgment if the defendant has been properly served and the proper time has passed by which the defendant must file an answer. Additionally, the plaintiff must establish that the citation with the officer's return has been filed with the clerk for at least 10 days, exclusive of the day it was filed and the judgment day. Tex. R. Civ. P. 239.

The pleadings must provide the defendant with fair notice of the cause of action and relief sought. Generally, an answering defendant will specially except and request the plaintiff plead with particularity. In a default judgment, however, the failure to specially except is not waived and may be raised on appeal for the first time.

The Court can grant a default judgment based on the pleadings if the proper steps are taken. The defendant's failure to answer admits all the allegations in the plaintiff's petition except for unliquidated damages. If the plaintiff pleads for unliquidated damages, then she must present evidence of those damages before they can be awarded. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80 (Tex. 1992). If the plaintiff files a petition for liquidated damages, then no evidence or record is necessary. If the plaintiff wants the Court to award unliquidated damages a record must be made. *Alvarado v. Reif*, 783 S.W.2d 303, 304−05 (Tex. App.—Eastland 1989, writ denied).

However, in a divorce, a defendant's failure to answer does not admit the issues of best interest of the child or just and right property division. Therefore, evidence must be submitted during the default hearing to support the trial court's independent judgment on those issues.

X. JUDGMENT

A decree must set out the division of property and each party's duties and obligations related to the division of property in clear, specific and unambiguous terms. The parties must be able to determine from the decree the obligations they have under its terms. *Ex parte Slavin*, 412 S.W.2d 43 (Tex. 1967). A well-drafted decree is one that should be enforceable by contempt, regardless of whether the decree is based upon an agreement or a judge's ruling. *McCray v. McCray*, 584 S.W.2d 279 (Tex. 1979).

However, orders for the payment of debts are not enforceable by contempt. Tex. Const. art. I, §18; *Ex parte Yates*, 387 S.W.2d 377 (Tex. 1965). Also a person cannot be held in contempt for failure to perform an act he is incapable of performing. *Ex part Gonzales*, 414 S.W.2d 656 (Tex. 1967). Even if contempt is not available as a remedy, contractual remedies may exist to enforce the terms of an agreed decree. *Robbins v. Robbins*, 601 S.W.2d 90 (Tex. Civ. App. – Houston [1st Dist.] 1980, no writ).

The Texas Family Law Practice Manual offers suggested language and forms for preparation of final judgments. These forms are intended merely as guidelines and are not a substitute for specifically tailoring a decree to a client's particular needs.

For example, assets should be described in such detail that a third party (such as a banker, broker, title company representative) who reads the document has sufficient proof that an asset was awarded to the client.

XI. POST-JUDGMENT

Preservation of error after verdict and judgment focuses on the distinctions among the various post-trial motions.

A. Motion for Judgment

A motion for judgment asks the trial court to render judgment on the jury's verdict. Tex. R. Civ. P. 300. Such a motion adopts all findings of the jury. A party who obtained judgment in its favor should be wary of moving for judgment based on a verdict if there are any contrary or ambiguous findings in order to avoid waiver of objection to those findings on appeal. In such instance, the motion for judgment should clearly reserve any points to be challenged and disclaim adoption of any part of the verdict or findings that are unfavorable or objectionable.

B. Motion for Judgment Notwithstanding the Verdict (JNOV)

A motion for JNOV raises legal sufficiency, no evidence or matter of law arguments and preserves the right to request the trial and appellate courts to render judgment. Tex. R. Civ. P. 301.

A motion for JNOV may be filed before

judgment or no later than 30 days after the signing of the judgment.

C. Motion to Disregard Jury Findings

A motion to disregard jury findings challenges specific findings, not the entire verdict, and preserves the right to request the trial and appellate courts to render judgment. Tex. R. Civ. P. 301. Specifically, it raises the points that there is no evidence or legally insufficient evidence to support the finding; the finding is immaterial; or the opposite finding is established as a matter of law.

A motion to disregard may be filed before the judgment or no later than 30 days after the signing of the judgment.

D. Motion for New Trial

A motion for new trial raises factual insufficiency and against the great weight of the evidence arguments, and preserves the right to request the trial and appellate courts to order a new trial. Tex. R. Civ. P. 324, 329b. A motion for new trial raises complaints on jury misconduct, newly discovered evidence, failure to set aside default judgment. It also raises a complaint of factual insufficiency of the evidence to support a jury finding, or a complaint that a jury finding is against the overwhelming weight of the evidence. A complaint regarding inadequacy or excessiveness of damages found by a jury can be raised via motion for new trial.

Failure to assert these grounds in a motion for new trial waives them. Other grounds not proper in another type of post-trial motion can be included in a motion for new trial to preserve error.

A motion for new trial must be filed within 30 days after the signing of the judgment. A new motion may be filed within 30 days after the signing of a corrected or modified judgment.

E. Motion to Modify, Correct or Reform Judgment

A motion to modify, correct or reform judgment challenges errors in the judgment but does not seek to vacate the verdict or findings. Tex. R. Civ. P. 329b.

A motion to modify, correct or reform must be filed within 30 days after the signing of the judgment. A new motion may be filed within 30 days after the signing of a corrected or modified judgment.

XII. APPEAL

Understanding the methods of review by the appellate courts is essential in determining how to present evidence at trial.

A. Standards of Review

1. Abuse of Discretion

The standard of review for most decisions in a family law case is abuse of discretion. The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985). Rather, a trial court abuses its discretion if its decision is "arbitrary, unreasonable, and without reference to guiding principles." The El Paso Court of Appeals applies a two-pronged inquiry to the abuse of discretion standard:

(1) Did the trial court have sufficient information upon which to exercise its discretion; and

(2) Did the trial court err in its application of that discretion?

Lindsay v. Lindsay, 965 S.W.2d 589, 592 (Tex. App. – El Paso 1998, no pet.). The reviewing court may not substitute its own judgment for the trial judge's judgment. *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 41 (Tex. 1989)(orig. proceeding).

There are at least two instances in which a perceived error does not constitute an abuse of discretion. First, a mere error of judgment is not an abuse of discretion. *Loftin v. Martin*, 776 S.W.2d 145, 146 (Tex. 1989)(orig. proceeding). Second, a trial court does not abuse its discretion if it reaches the right result for the wrong reason. *Bruce Terminix Co. v. Carroll*, 953 S.W.2d 537, 540 (Tex. App. – Waco 1997, no writ). In other words, the standard of review permits a trial judge the limited right to be wrong without being reversed.

The first prong of the two-pronged test for abuse of discretion involves an analysis of the sufficiency of the evidence. Thus, sufficiency of the evidence is not a separate review in family law cases, but part of the abuse of discretion standard.

2. Legal Insufficiency

Where a trial is held to a jury on one of the issues where the jury's verdict cannot be contravened, sufficiency review continues to apply.

Legal insufficiency complaints on appeal are either designated as "no evidence" points or "matter of law" points, depending on whether the appellant had the burden of proof at trial. *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275 (Tex. App. – Amarillo 1988, writ denied).

a. No evidence

Where the appellant is challenging an adverse finding on a matter where he did not have the burden of proof, he or she must demonstrate that there is no evidence to support the adverse finding. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). No evidence issues will be sustained only when the record discloses (1) a complete absence of evidence on a vital fact; (2) the court is barred by a rule of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or, (4) the evidence

established conclusively the opposite of the vital fact. *Juliette Fowler Homes, Inc. v. Welch Assoc., Inc.*, 793 S.W.2d 660, 666 n. 9 (Tex. 1990); *Cridern v. Naaman*, 83 S.W.3d 241, 244 (Tex. App. – Corpus Christi 2001, pet. pending).

The scope of review for a no evidence issue requires the appellate court to consider only the evidence and inferences that tend to support the finding, ignoring all evidence and inferences to the contrary. *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996).

b. Matter of law

When attacking the legal sufficiency of an adverse finding of an issue upon which the appellant had the burden of proof at trial, the appellant must demonstrate that the evidence conclusively established his issue as a matter of law. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989).

The scope of review in a matter of law issue first examines the record to determine that there is no evidence to support the trial court's adverse finding; then, the entire record is examined regarding evidence to support the contrary position. *In Re Doe 2*, 19 S.W.3d at 288 (J. Owen concurring); *Curtis v. Curtis*, 11 S.W.3d 466, 472 (Tex. App. – Tyler 2000, no pet.).

2. Factual sufficiency

Factual sufficiency concedes that there is conflicting evidence on an issue. The appellate court should only sustain a factual sufficiency complaint when it is necessary to prevent a manifestly unjust result.

The courts of appeals are the final arbiter of factual sufficiency; the Supreme Court has no jurisdiction to consider the questions of fact, and it may not consider any issue challenging the factual sufficiency. *Dyson v. Olin*, 692 S.W.2d 456 (Tex. 1985). However, the Supreme Court does have jurisdiction to determine whether the court of appeals used the correct standard of review in reaching its conclusion on an insufficient evidence point. *Hannon v. Sohio Pipeline Co.*, 623 S.W.2d 314, 315 (Tex. 1987).

a. Insufficient evidence

Where the party without the burden of proof is complaining of the trial court's findings, the issue is insufficient evidence. *Raw Hide*, 766 S.W.2d at 275-76. Under this review, the appellant will succeed only if the evidence supporting the finding is so slight, or the evidence against it is so strong, that the finding is clearly wrong and manifestly unjust. *Id.*; *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

b. Great weight and preponderance of the evidence

When the party having the burden of proof complains of an unfavorable finding, the issue should allege that the finding is against the great weight and preponderance of the evidence. *Croucher*, 660 S.W.2d at 58. The finding should be sustained if there is some probative evidence to support it and provided it is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *Lindsey v. Lindsey*, 965 S.W.2d 589, 592 (Tex. App. – El Paso 1998, no pet.).

In reviewing a great weight and preponderance challenge, the scope of review requires the court of appeals to examine all of the evidence, both that which tends to prove the existence of a vital fact and evidence which tends to disprove its existence. *Id.*

B. How to Avoid Waiver

The most important thing a trial attorney must remember is that the record is the appellate court's eyes into the trial court. As such, it is fundamental to ensure that the error is preserved for the appellate court to "see." The first step is to state the specific grounds for the complaint. Unless the attorney provides a clear reason why the court should rule in his or her favor, then there is no reason for the court to do so. Tex. R. App. P 33.1(a); *In re Bates*, 555 S.W.2d 420, 432.

Second, the objection must be timely. Tex. R. App. P 33.1(a)(1); *Bushnell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991). An objection made too early or too late waives the objection. The only exception is in the case of fundamental error, which no trial attorney should rely upon. In the instance of fundamental error, the party need not object because the error is on the face of the record. *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982).

The next step is to obtain a ruling from the judge. Tex. R. App. P 33.1(a)(2). It is the attorney's duty as an advocate to persist until the judge either makes a ruling or refuses to do so. In either situation, an attorney has his or her ruling. Tex. R. App. P 33.1(a)(2).

Finally, the ruling must be made on the record. Tex. R. App. P 33.1(a)(2); *State Farm Ins. Co. v. Pults*, 850 S.W.2d 691, 693 (Tex. App. Corpus Christi 1993, no writ). If the ruling is not on the record, then it is as if it never occurred and the appellate attorney has nothing to complain about on appeal. Before a judgment can be reversed, the challenging party must show that the error amounted to such a denial of the appellant's rights as was reasonably calculated to cause and probably did cause the rendition of an improper judgment. *Walker v. Tex. Employers Ins. Assoc.*, 291 S.W.2d 298, 301 (Tex. 1956)

C. Harmless Error Rule

The appellate courts will apply the harmless error rule in the instance it finds evidence was improperly admitted or excluded. Tex. R. App. P

44.1(a). Even if the trial court erred, if the error did not cause harm, then the reviewing court will not reverse.

The standard used by the appellate courts in deciding whether the error is harmful requires the appellant show the error caused the trial court to render an improper judgment or prevented him or her from presenting evidence necessary to the case. Tex. R. App. P. 44.1(a). The standard of review has caused a great deal of confusion. Thus, it is imperative for the appellate attorney to ensure that the proper standard is applied. *Compare McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex. 1992) *with City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753−54 (Tex. 1995).

1. No Harm Found

Generally speaking, the trial court has the discretion to admit or deny evidence; it is one of the primary functions of the court. *See Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989). It is necessary for the challenging party to show that the error, either in admitting or excluding evidence, resulted in an improper judgment. Tex. R. App. P. 61.1; *Alvarado*, 897 S.W.2d at 753; *McCraw v. Maris*, 828 S.W.2d 756, 758 (Tex.1992). The appellate court will review the entire record to determine whether an improper judgment was made based on the evidence's exclusion. *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001). *McCraw,* 828 S.W.2d at 756; *Gee*, 765 S.W.2d at 396.

To successfully challenge the trial court's evidentiary rulings, the complaining party need demonstrate that the judgment turns on the particular evidence excluded or admitted. *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000); *Alvarado*, 897 S.W.2d at 753–54. As such, the evidence in question needs to be dispositive on the issue in question and not merely cumulative. *Able*, 35 S.W.3d at 617–18; *Reina v. Gen. Accident Fire & Life Assurance Corp.*, 611 S.W.2d 415, 417 (Tex. 1981).

2. Harm Established

In order to show harm in a trial court's decision, the challenging party must show that the excluded evidence affected a material issue and was not cumulative of other evidence. *See Williams Distrib. Co. v. Franklin*, 898 S.W.2d 816, 817 (Tex. 1995) (per curiam); *Estate of Puentes v. HCCI-San Antonio, Inc*., 131 S.W.3d 113, 119 (Tex. App.—San Antonio 2004, pet. filed).

The appellate court cannot render a judgment contrary to the verdict. Rather, if a verdict is set aside because of an erroneous ruling excluding evidence, the reviewing court must remand for trial in order allow the opposing party to impeach the evidence or present rebuttal evidence. *Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 275 (Tex. 1995).

XIII. CONCLUSION

One of the steps in advising a client of his or her options prior to trial is to explore the remedies available both at trial and after the trial is over. Considerations such as the likelihood of success at trial, what issues are available for appeal, and what are the chances of success on appeal all factor in the risk analysis of evaluating pretrial settlement offers and possible trial outcomes.

The client's best chance of getting close to what he or she wants is in settlement prior to trial. If settlement is not an option, then trial is the best option. Once the decision is rendered from the trial, whether by jury or judge, the chances of success decrease dramatically.

Consider these statistics compiled from the 12-month period ending August 31, 2002:

- The statewide reversal rate in civil cases is approximately one in three.
- In appeals from judgments entered on jury verdicts, the reversal rate was 25%.
- In appeals following bench trials, the reversal rate was 22%.
- In appeals from summary judgments, the reversal rate was 33%.
- When the courts of appeals reversed judgments on jury verdicts, they most often did so on the basis that the evidence was legally insufficient to support the verdict or because one party was entitled to judgment as a matter of law. These reasons accounted for 60% of the reversals.
- Charge error accounted for 14% of the reversals from jury verdicts.
- Factual insufficiency points accounted for just 4% of the reversals from jury verdicts.
- Rulings concerning the erroneous admission or exclusion of evidence accounted for less than 1% of reversals from jury verdicts.
- Appeals from no-answer default judgments had one of the highest rates of reversal at 79%.
- The reversal rate was 48% for post-answer default judgments.
- The most common reason for reversal following a bench trial was that the evidence was legally insufficient to support the judgment or one party was entitled to judgment as a matter of law. These grounds accounted for 72% of the reversals.
- 14% of the reversals following bench trials were based on determinations that the trial court's findings were supported by factually insufficient evidence or were against the great weight and preponderance of the evidence.
- Family law cases formed the largest group of appeals following bench trials.
- In family cases, the reversal rate was 32%.
- In divorce cases, including actions to enforce

or modify existing decrees, the reversal rate was 24%.

- In suits affecting the parent-child relationship, the reversal rate was 34%.
- In child support cases, including actions to collect or modify support, the reversal rate was 42%

Lynn Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. Tex. L. Rev. 431 (2003).