EL PASO BAR ASSOCIATION
Founded in 1897

EL PASO BAR JOURNAL

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An Update of Events and Information

June 2013

My Family, ASARCO, and Death

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President's Page

This Bar's For You!

The theme for this Bar year was carried through the Journal issues as we highlighted various practice areas and several of the specialty/minority Bar organizations, and their goals and events. It was also kept alive in the events we coordinated from the mentoring program and socials, including the Holiday party and mixer with members of the Juarez Bar. Importantly, we had an active Criminal Law Section and collaborated with various prosecuting and defending offices as well as criminal law associations to mark the 50th anniversary of the U.S. Supreme Court's decision in *Gideon v. Wainwright*.

But in this, my last President's page, I am taking the privilege to discuss the theme in light of my personal challenge as your president this year. Well known to me and all of the leadership of the El Paso Bar is the *perception* that the El Paso Bar Association is not the place for solo practitioners, criminal defense or family law lawyers, or government lawyers. This should sound much like the rhetoric of the campaigns for president of the State Bar of Texas. I must admit the reality of this for many lawyers (including me). However, my Bar theme and my response to the claims that the Bar doesn't represent you or do anything for you is to participate myself, to encourage **you** to participate, to keep your voice and place at the table so that different perspectives are kept in mind, and to keep challenging the Bar to have relevant CLE and events for all lawyers.

In that light, in this last Journal of the 2012-2013 year, we end with one more piece of great self-indulgence. This month's cover entitled, "Girl of the Millennium (Admit One to the Twenty-First Century)" is a print of the folk art by Mo Malone, my 5th grade teacher, who dedicates the print—in part: My Folk Art, showing a young girl looking out on the first day of the 21st century and dreaming of a chance to make a difference in the new millennium, is in honor of and greatly influenced by my former student Maria Salas Mendoza…

I am greatly honored by the opportunity to serve you.

I hope I have made a difference.

Judge Maria Salas Mendoza,
President

Cover Photo: Girl of the Millennium (Admit One to the Twenty-First Century), folk art, printed with permission of the artist Mo Malone.

El Paso Bar Association

June Bar Luncheon

Tuesday, June 11, 2013

El Paso Club • 201 E. Main, 18th Floor, Chase Bank - $20 per person, 12:00 Noon

Election and Swearing In of 2013-2014 Officers and Directors

Randy Grambling – President
Laura Enriquez – President-Elect
Myer Lipson – Vice President
Christopher Antcliff – Treasurer
Mark D. Dore – Secretary

Board of Directors
(1 year term)
Jessica Vazquez
Philip E. Mullin

Board of Directors (3 year term)
Melissa A. Baeza
Daniel H. Hernandez
Judge Miguel A. Torres
Felix Valenzuela
Sean C. White

Awards and Recognition presentation

Please make your reservations by Monday, June 10, 2013 at 1:00 p.m. at nancy@elpasobar.com or ngallego.epba@sbcglobal.net

We anticipate a very large turnout, so please make sure you RSVP.

HELP!

The editors of the El Paso Bar Journal solicit your contributions dealing with substantive legal subjects or issues. We believe the interests of El Paso lawyers will be advanced by the publication of at least one or two articles dealing with legal subjects and issues, such as the series published this year by Chief Justice Ann McClure

Good articles, of course, take time, thorough research and clear writing. In some instances, the research may be a product of your daily legal work.

We invite you to share your work with the legal community in El Paso and wherever the internet may travel. If issues of confidentiality are involved, the work can be sanitized to comport with ethical requirements, to permit sharing your brilliant work with the larger broader community.

Articles should be submitted by e-mail to **Nancy Gallego, Executive Director of the El Paso Bar Association**, at ***nancy@elpasobar.com.*** They must be submitted at least one month prior to the proposed publication date and should not exceed 2,500 words unless the article is to be published in more than one issue.

CALENDAR OF EVENTS

PLEASE NOTE: Please check the Journal for all the details regarding all above listed events. If your club, organization, section or committee would like to put a notice or an announcement in the Bar Journal for your upcoming event or function for the month of September, 2013, please have the information to the Bar Association office by Friday, August 9, 2013. In order to publish your information we must have it in writing. WE WILL MAKE NO EXCEPTIONS. We also reserve the right to make any editorial changes as we deem necessary. Please note that there is no charge for this service: (915) 532-7052; (915) 532-7067-fax; nancy@elpasobar.com - email. If we do not receive your information by the specified date please note that we may try to remind you, but putting this journal together every month is a very big task and we may not have the time to remind you. So please don't miss out on the opportunity to have your event announced.

June 2013

Tuesday, June 4
EPBA BOD Meeting
Sunday, June 9
EPYLA Run for Justice
Tuesday, June 11
EPBA Monthly Luncheon
Wednesday, June 12
EPCLSA Monthly Luncheon
Wednesday, June 19
EPBA Office Closed
Juneteenth Day
Thursday, June 20
EPPA Monthly Luncheon
Saturday, June 22
EPBA Board Retreat

July 2013

Thursday, July 4
EPBA Office Closed
Independence Day

El Paso Bar Association
2013-2014 Membership Dues Statements have been mailed out. Please fill out, and send to our office by July 1, 2013.

We have many great plans for this bar year, including FREE CLEs for members, the Annual Holiday Party, the Annual Civil Practice Seminar and MUCH MORE!!!

Have a great summer and if you are traveling out of town, be safe!!!

Nancy Gallego,
Executive Director
El Paso Bar Association

BE OUR COVER:

The El Paso Bar Journal is accepting submissions of photos or other art by its members to serve as the cover of the Bar Journal. This is an exciting opportunity for El Paso lawyers to exhibit their artwork and is designed to inspire and expose the talents of El Paso Bar members. To have your art considered, please send your submission to Nancy Gallego, 500 E. San Antonio, L 112, El Paso, Texas 79901 or e-mail it to her at ngallego.epba@sbcglobal.net, no later than the 10th day of the month preceding publication.

EPBA/County Holiday

The El Paso Bar Association and the El Paso County Courthouse will be closed on the following dates:

Wednesday, June 19, 2013 – Juneteenth Day
Thursday, July 4, 2013 – Independence Day

Avoiding a Permanent "Waive": Preservation of Error

Part V

By Chief Justice Ann McClure
8th Court of Appeals

Chief Justice Ann McClure
8th Court of Appeals

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This really falls under Preserving Error Post Trial, but to insert it as "D" in that category simply dilutes its importance. So, in fervent hope that this stylistic approach grabs your attention, a level one heading is devoted to the topic. Make no mistake about it -- more appeals from nonjury trials are lost here than anywhere else. Are you listening?

Findings of fact and conclusions of law reflect the factual and legal basis for the trial court's judgment after a nonjury trial. If there is only one theory of liability or defense, the basis of the court's judgment can be inferred from the judgment itself, even without findings and conclusions. However, if more than one legal theory, or more than one set of factual determinations, could serve as the basis for the trial court's judgment, then it can be very difficult to brief the appellate attack on the judgment, since you must handle several different approaches to the case in 50 pages. Because the party wishing to appeal the trial court's judgment must request findings of fact and conclusions of law within 20 days of the date the judgment is signed, the trial attorney must be conscientious about requesting findings and conclusions in a timely way. It sometimes happens that a trial lawyer does not bring an appellate lawyer into the case until just before the motion for new trial is due, or until after the motion for new trial has been overruled. In such a situation, if the trial lawyer has not timely requested findings of fact and conclusions of law, and if the trial court does not permit a late request, or elects not to give findings and conclusions because there is no obligation to do so, then the ability to successfully pursue an appeal could already be impaired. And the appeal has not even yet commenced.

A. TEXAS RULES OF CIVIL PROCEDURE, RULE 296: Findings and Conclusions

Requesting findings of fact and conclusions of law is one of the most frequently overlooked steps in preparing the nonjury case for appeal. It is the first step you should take after an adverse judgment is signed by the trial court.

1. ENTITLEMENT

Findings of fact and conclusions of law as a general rule are not available after a jury trial. Texas Rules of Civil Procedure, Rule 296 provides that findings and conclusions are available in any case tried in the district or county court without a jury. *See Roberts*, 433 (Tex. App. –El Paso 1999, no pet.). In *Baley v. W/W Interests, Inc.,* 754 S.W.2d 313, (Tex. App.--Dallas 1988, no writ), the appellate court concluded that it is not reversible error for the trial court to refuse a request for findings after a jury trial where the complaining party suffers no injury. *See also, Cravens v. Transport Indem. Co.,* 738 S.W.2d 364 (Tex.App.--Fort Worth 1987, writ den.).

In a jury trial, the answers to the questions posed contain the findings on disputed factual issues. When a case is tried to the court, however, there is no ready instrument by which one can determine how the trial court resolved the disputed fact issues. Nor can the appellate court determine upon which of the alternate theories of recovery or defense the trial court rested the judgment.

Given the assumption that findings and conclusions are appropriate in a bench trial but not in a jury trial, what happens when the two are combined? Perhaps the suit involves domestic torts and the jury will determine the personal injury or fraud issues while the judge will decide the ultimate division of property. Also, it is not unusual for the court to permit separate trials on the issues of property and custody, with a jury deciding issues of conservatorship and the judge deciding issues of characterization, valuation and division of property. If one party chooses to appeal from the property division, is it entitled to findings and conclusions? If the jury and nonjury portions of the case are conducted via separate trials, findings and conclusions are available in the nonjury trial. *Roberts,* at 433; *Operation Rescue - National v. Planned Parenthood of Houston and Southeast Texas, Inc.,* 937 S.W.2d 60 (Tex.App. -- Houston [14th Dist.] 1996), *aff'd. as modified*, 975 S.W.2d 546 (Tex. 1998); *Shenandoah Associates v. J & K Properties, Inc.* 741 S.W.2d 470, 484 (Tex.App.--Dallas 1987, writ den.).

In *Roberts*, the trial court submitted questions to the jury concerning the grounds for divorce, the validity of a deed executed by the wife to the husband and a percentage distribution of the community estate. 999 S.W.2d at 428-29. After the trial court entered the divorce decree, the husband filed his initial request for findings of fact and conclusions of law pursuant to Rule 296 of the Texas Rules of Civil Procedure. In response, the trial court advised the parties that it would be inappropriate for him to enter findings at all since the matter had been tried to a jury. *Id.* at 430. The El Paso Court of Appeals disagreed, stating:

> In this case, the jury findings on the grounds for divorce and the validity of deed were binding on the court while the percentage distribution of the community estate was merely advisory. We conclude that Husband was entitled to findings of fact relating to the property division.

Id. at 434. In addition, when the judgment of the court differs substantially from or exceeds the scope of the jury verdict, findings are also available. *See Rothwell v. Rothwell,* 775 S.W.2d 888 (Tex.App.--El Paso 1989, no writ). These cases are a departure from the earlier view espoused in *Conrad v. Judson,* 465 S.W.2d 819 (Tex.Civ.App.--Dallas 1971, writ ref'd n.r.e.) and *Aubey v. Aubey,* 264 S.W.2d 484 (Tex.Civ.App.--Beaumont 1954, no writ). In *Aubey,* the court noted that it makes no difference that the issues submitted

to the jury were advisory only, holding that Rule 296 does not require a trial court to split a trial and make findings on the issues as to which the verdict may be advisory. If at least one of the issues tried in the court below was tried to the jury, the entire trial was to a jury within the meaning of the rules. One more recent opinion has specifically distinguished *Conrad* and *Aubey.* In *Heafner & Associates v. Koecher, 851* S.W.2d 309, 312-13 (Tex.App.--Houston [1st Dist.] 1992, no writ), the appellee relied upon the older cases to persuade the trial court that there was no need to make findings on an intervention for attorneys' fees because the divorce case had been tried to a jury. The appellate court disagreed:

> Both cases cited by husband are distinguishable from the case at bar. In Conrad, no issues were submitted to the judge; the case was strictly a jury trial. The appellant requested findings of fact and conclusions of law, arguing that the court's judgment went beyond the jury findings. The court held that the appellant's argument was without merit in a jury trial. . . In Aubey, also a jury trial, the trial court refused to file findings of fact and conclusions of law. Even though the jury verdict may have been advisory only, the judgment was consistent with the verdict and the Aubey court concluded it was not reversible error for the trial court to refuse to file findings of fact and conclusions of law . . .
>
> In the case at bar, the judgment regarding attorney's fees resulted from findings made By the trial court, after a bench trial, independent of the jury's verdict. Therefore, Heafner & Associates has a right to have the trial court file findings of fact and conclusions of law in order to urge error on appeal.

In the event the trial court does give findings of fact in a jury case, those findings will be considered by the court of appeals only for the purpose of determining whether facts recited are conclusively established and support the decree as a matter of law. *Holloway v. Holloway,* 671 S.W.2d 51 (Tex. App.--Dallas 1984, writ dism'd). Thus, if the evidence does not support the jury verdict, the judgment cannot be supported merely by the findings of fact and conclusions of law submitted by the trial court.

Findings and conclusions are not authorized in some nonjury cases. Courts have held that findings are **not** authorized in the following circumstances:

• when the cause is dismissed without a trial. *Eichelberger v. Balette,* 841 S.W.2d 508, 510 (Tex.App.--Houston [14th Dist.] 1992, writ denied); *Timmons v. Luce,* 840 S.W.2d 582, 586 (Tex.App.--Tyler 1992, no writ); *Kendrick v. Lynaugh,* 804 S.W.2d 153 (Tex. App.--Houston [14th Dist.] 1990, no writ);

• when the cause is withdrawn from the jury by directed verdict due to the general rule that the trial court can grant an instructed verdict only where there are no fact issues to be resolved by the jury. *Yarbrough v. Phillips Petroleum Co.,* 670 S.W.2d 270 (Tex.App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Spiller v. Spiller*. 535 S.W.2d 683 (Tex.Civ. App.--Tyler 1976, writ dism'd).

• when a judgment notwithstanding the jury verdict is entered. *Fancher v. Cadwell,* 159 Tex. 8, 314 S.W.2d 820 (1958);

• when a summary judgment is granted. *Linwood v. NCNB Texas,* 885 S.W.2d 102, 103 (Tex. 1994); *Chavez v. El Paso Housing Authority,* 897 S.W.2d 523 (Tex.App.--El Paso 1995, writ denied); *Chopin v. Interfirst Bank,* 694 S.W.2d 79 (Tex.App.--Dallas 1985, writ ref'd n.r.e.); *City of Houston v. Morgan Guaranty International Bank,* 666 S.W.2d 524 (Tex.App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.);

• in an appeal to district court from an administrative agency. *Valentino v. City of Houston,* 674 S.W.2d 813 (Tex.App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.);

• when a default judgment is granted. *Wilemon v. Wilemon,* 930 S.W.2d 295 (Tex. App.--Waco 1996, no writ); *Harmon v. Harmon,* 879 S.W.2d 213 (Tex.App.--Houston [14th Dist] 1994, writ denied); and

• when a case is dismissed for want of subject matter jurisdiction, without an evidentiary hearing. *Zimmerman v. Robison,* 862 S.W.2d 162 (Tex.App.--Amarillo 1993, no writ).

Rule 385(b) of the Texas Rules of Civil Procedure provides for an option on the part of the trial judge in appeals from interlocutory orders. The court is not required to file findings and conclusions, but may do so within thirty days after the judgment is signed. *Smith Barney Shearson, Inc. v. Finstad,* 888 S.W.2d 111 (Tex.App.--Houston [1st Dist.] 1994, no writ) (involving interlocutory appeal of denial of motion for arbitration). One court of appeals has admonished trial courts to give findings and conclusions to aid the appellate court in reviewing class certification decisions. *Franklin v. Donoho, 774* S.W.2d 308, 311 (Tex. App.--Austin 1989, no writ).

2. <u>IMPORTANCE OF OBTAINING</u>

Many practitioners fail to obtain findings of fact and conclusions of law. In the absence of findings and conclusions, the judgment of the trial court must be affirmed if it can be upheld on any available legal theory that finds support in the evidence. *Point Lookout West, Inc. v. Whorton,* 742 S.W.2d 277 (Tex. 1987), *In re W.E.R.,* 669 S.W.2d 716 (Tex. 1984); *Lassiter v. Bliss,* 559 S.W.2d 353 (Tex. 1977); *Temperature Systems, Inc. v. Bill Pepper, Inc., 854* S.W.2d 669 (Tex.App.--Dallas 1993, no writ). Absent findings of fact, it doesn't make any difference whether the trial court selected the right approach or theory. If the appellate court determines the evidence supports a theory raised by the pleadings or tried by consent, then it is presumed that the trial court made the necessary findings and conclusions to support a recovery on that theory. *Lemons v. EMW Mfg. Co.,* 747 S.W.2d 372 (Tex. 1988). These presumptions are tantamount to implied findings. These implied findings can be challenged by legal and factual insufficiency points, provided a reporter's record is brought forward. Further, presumptions will not be imposed if findings are properly requested but are not given.

It is far better to tie the judge to a specific theory and to challenge the evidentiary support for that theory, than it is to engage in guesswork about implied findings.

3. <u>FILING REQUEST FOR FINDINGS OF FACT AND CONCLUSION OF LAW EXTENDS APPELLATE DEADLINES</u>

The timely filing of a request for findings of fact and conclusions of law extends the time for perfecting appeal from 30 days to 90 days after the judgment is signed by the court. Tex.R.App.P. 26.1(a)(4). The timely filing of a request for findings and conclusions also extends the deadline for filing the record from the 60th to the 120th day after judgment was signed. Tex.R.App.P. 35.1(a). A timely request for findings and conclusions does **not** extend the trial court's period of plenary power. *See* Tex.R.Civ.P. 329b (no provision is made for an extension of plenary power due to the filing

of such a request).

The foregoing rules regarding the extension of appellate deadlines by filing a timely request for findings and conclusions **do not apply** where findings and conclusions cannot properly be requested. For example, findings of fact are not available on appeal from a summary judgment. Where a party appeals from the granting of a summary judgment, files a request for findings of fact and conclusions of law, but files no motion for new trial, the filing of the request for findings will not extend the appellate timetable. *Linwood v. NCNB of Texas,* 885 S.W.2d 102, 103 (Tex. 1994) ("[T]he language 'tried without a jury' in rule 41(a)(1) does not include a summary judgment proceeding."). *See also, Chavez v. El Paso Housing Authority,* 897 S.W.2d 523 (Tex. App.--El Paso 1995, writ denied). Another case holds that a matter which is dismissed for lack of subject matter jurisdiction, or in which there has been no evidentiary hearing, has not been "tried without a jury" as used in the rule, so that a request for findings does not extend the 30-day deadline for perfecting appeal. *Zimmerman v. Robinson,* 862 S.W.2d 162 (Tex.App.--Amarillo 1993, no writ). *Accord, O'Donnell v. McDaniel,* 914 S.W.2d 209 (Tex. App.--Fort Worth 1995, writ requested)(where appeal is from dismissal rendered without evidentiary hearing, a request for findings of fact and conclusions of law does not extend any applicable deadlines); *Smith v. Smith,* 835 S.W.2d 187, 190 (Tex.App.--Tyler 1992, no writ) (in divorce case tried to jury, request for findings of fact and conclusions of law did not extend appellate timetable even though the trial judge was not bound by some of the jury's answers).

4. SEQUENCE FOR OBTAINING FINDINGS

a. Initial Request

Rule 296 of the Texas Rules of Civil Procedure requires that the request for findings and conclusions be filed within twenty days after the judgment is signed. **FILING A MOTION FOR NEW TRIAL DOES NOT EXTEND THE TIME PERIOD FOR FILING A REQUEST FOR FINDINGS AND CONCLUSIONS.** Often, the decision to appeal is made after the motion for new trial is filed and often after it is presented to the court or overruled by operation of law. Frequently, appellate counsel is employed to handle the appeal after the overruling of the motion for new trial. At that point, it is too late for appellate counsel to file the initial request for findings of fact and conclusions of law. A basic rule of thumb should be that if the client is the slightest bit unhappy with a portion of the judgment, submit the request for findings within the required time period. If an appeal is later perfected, you have preserved the right to findings. If no appeal is taken, the request can always be withdrawn or ignored.

Note that under Rule 296, the request must be specifically entitled "Request for Findings of Fact and Conclusions of Law". The request should be a separate instrument and not coupled with a motion for new trial or a motion to correct or reform the judgment.

If you miss the deadline, you will have waived your right to complain of the trial court's failure to prepare the findings. Keep in mind, however, that you can still make the request, even if it is untimely. The trial court can give you findings and conclusions even though it is not obligated to do so. The timetables set out by Rule 296 and 297 of the Texas Rules of Civil Procedure are flexible if there is no gross violation of the filing dates and no party is prejudiced by the late filing. *Wagner v. GMAC Mortg. Corp. of Iowa*, 775 S.W.2d 71 (Tex.App.--Houston [1st Dist.] 1989, no writ). Also, Rule 5, Texas Rules of Civil Procedure, "Enlargement of Time," appears to permit the trial court to enlarge the time for requesting findings and conclusions.

b. Presentment Not Necessary

Older case law required that the request for findings of fact and conclusions of law be actually presented to the judge; it was insufficient to simply file the request among the papers of the cause. *Lassiter v. Bliss,* 559 S.W.2d 353 (Tex. 1977). The Supreme Court, in *Cherne Industries, Inc. v. Magallanes,* 763 S.W.2d 768 (Tex. 1989), abandoned the requirement of presentment to the trial judge. Rule 296 now provides that the request shall be filed with the clerk of the court "who shall immediately call such request to the attention of the judge who tried the case." Notice to the opposing party of the filing of the request is still required under the rule. Presentment to the trial judge is no longer required.

c. Response by Court

Rule 297 of the Texas Rules of Civil Procedure provides that, upon timely demand, the court shall prepare its findings of fact and conclusions of law and file them within 20 days after a timely request is filed. The court is required to mail a copy of its findings and conclusions to each party to the suit. Deadlines for requesting additional or amended findings run from the date the original findings and conclusions are filed, as noted below.

d. Untimely Filing by Court

The procedural time limits in the rules do not prevent the trial court from issuing belated findings. *Robles v. Robles*, 965 S.W.2d 605 (Tex.App.--Houston [1st Dist.] 1998, pet. denied); *Jefferson County Drainage Dist. No. 6 v. Lower Neches Valley Authority,* 876 S.W.2d 940 (Tex.App.--Beaumont 1994, writ denied); *Morrison v. Morrison*, 713 S.W.2d 377 (Tex. App.--Dallas 1986, no writ). Unless injury is demonstrated, litigants have no remedy for the untimely filing of findings. *Jefferson County,* 876 S.W.2d at 960; *Morrison*, 713 S.W.2d at 381. Injury may be shown if the litigant was unable to request additional findings or if the litigant has been prevented from properly presenting the appeal. *Id.*

In *Robles,* the appellant made both a timely original and reminder request for findings, but the trial court had not filed them by the time the appellant filed his original appellate brief. Thereafter, a supplemental transcript was filed containing the findings and the appellant was given the opportunity to file an amended brief. Claiming the trial court's untimely filing deprived him of the ability to request additional findings and caused him economic harm due to the added expense of filing an amended brief, the appellant sought a reversal and remand. The appellate court concluded that he had suffered no injury as he had made no request for additional findings nor had he requested the appellate court to abate the appeal in order to secure additional findings.

Similarly, in *Morrison*, the husband appealed the property division in a divorce and requested findings and conclusions. In the original findings, the court stated that the marriage had become insupportable. The wife requested additional findings on the issues of cruelty, adultery and desertion. The judge made the additional findings, noting that the husband was at fault in the breakup of the lengthy marriage due to his drinking, adultery and spending community assets on other women. The husband attempted to have the additional findings disregarded because they were filed untimely. The appellate court determined that the only issue raised by the late filing was that of injury to the appellant, not the trial court's jurisdiction to make the findings. The court also noted that the husband had not demonstrated any harm which he suffered because of the

late filing.

From the standpoint of preservation of error, note that to complain of the untimely filing, the appellant may be required to file a motion to strike. *See*, *Narisi v. Legend Diversified Investments*, 715 S.W.2d 49 (Tex.App.--Dallas 1986, writ ref'd n.r.e.), which contains the following footnote at page 50:

> Although not made a point of error, Narisi complains about when the supplemental findings and conclusions were filed. Even if they were filed late, which we do not decide here, we may consider them because appellant neither filed a motion to strike, *City of Roma v. Gonzales*, 397 S.W.2d 943, 944 (Tex.Civ.App.--San Antonio 1965, writ ref'd n.r.e.), nor has she shown that she was harmed by the delay in the filing. *Fonseca v. County of Hidalgo*, 527 S.W.2d 474, 480 (Tex.Civ.App.--Corpus Christi 1975, writ ref'd n.r.e.).

See also, *Summit Bank v. The Creative Cook*, 730 S.W.2d 343 (Tex.App.--San Antonio 1987, no writ), where the court specifically stated that a reviewing court will consider late filed findings of facts and conclusions of law where there has been no motion to strike. Thus, if the appellant has been prejudiced in his/her appeal because of the late filing, s/he should consider filing a motion to strike, but s/he must also be prepared to demonstrate injury.

Note also that if the findings and conclusions are filed too far past the deadline, the appellate court may disregard them. *Stefek v. Helvey,* 601 S.W.2d 168 (Tex.Civ.App.--Corpus Christi 1980, writ ref'd n.r.e.). In *Labar v. Cox*, 635 S.W.2d 801 (Tex.App.--Corpus Christi 1982, writ ref'd n.r.e.), the court determined a late filing to be reversible error because it prevented the appellant from requesting additional findings. The court declined to permit the trial court to correct its procedural errors because other errors existed which required a reversal.

e. Reminder Notice

Rule 297of the Texas Rules of Civil Procedure provides that if the trial court fails to submit the findings and conclusions within the 20 day period, the requesting party must call the omission to the attention of the judge within 30 days after filing the original request. Failure to submit a timely reminder waives the right to complain of the court's failure to make findings. *Averyt v. Grande, Inc*., 717 S.W.2d 891 (Tex. 1986); *Employees Mutual Casualty Co. v. Walker,* 811 S.W.2d 27 (Tex. App.--Houston [14th Dist.] 1991, writ denied); *Saldana v. Saldana,* 791 S.W.2d (Tex.App.--Corpus Christi 1990, no writ). Where the reminder is filed, the time for the filing of the court's response is extended to 40 days from the date the original request was filed.

f. Additional or Amended Findings

If the court files findings and conclusions, either party has a period of ten days in which to request specified additional or amended findings or conclusions. The court shall file any additional or amended findings and conclusions within ten days after the request, and again, cause a copy to be mailed to each party. No findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings or conclusions. Tex.R.Civ.P. 298.

(1) FAILURE TO REQUEST

When a party fails to timely request additional findings of fact and conclusions of law, it is deemed to have waived the right to complain on appeal of the court's failure to enter additional findings. *Briargrove Park Property Owners, Inc. v. Riner,* 867 S.W.2d 58, 62 (Tex.App.--Texarkana 1993, writ denied); *Cities Services Co. v. Ellison.* 698 S.W.2d 387, 390 (Tex.App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.). Further, where the original findings omit a finding of a specific ground of recovery which is crucial to the appeal, failure to request an additional finding will constitute a waiver of the issue. *Poulter v. Poulter,* 565 S.W.2d 107 (Tex.Civ.App.--Tyler 1978, no writ)(the failure to request a specific finding on reimbursement waived any reimbursement complaints on appeal). In *Keith v. Keith,* 763 S.W.2d 950 (Tex.App.--Fort Worth 1989, no writ), the trial court refused to set aside the good will of a community partnership business as the husband's separate property. The findings of fact and conclusions of law found the value of the businesses to be $262,400. The husband made no request for additional findings as to whether the partnership had any good will or whether any such good will was professional good will attributable to him personally. He challenged the failure to make those findings on appeal. The court of appeals affirmed, noting that the failure to request additional findings constitutes a waiver on appeal.

(2) COURT'S FAILURE TO RESPOND

A trial court's failure to make additional findings upon request is not reversible error if the requested finding is covered by and directly contrary to the original findings filed. *Asai v. Vanco Insulation Abatement, Inc.,* 932 S.W.2d 118 (Tex.App.--El Paso 1996, no writ); *San Antonio Villa Del Sol Homeowners Association v. Miller,* 761 S.W.2d 460 (Tex.App.--San Antonio 1988, no writ).

g. Effect of Premature Request

Rule 306(c) of the Texas Rules of Civil Procedure provides that no motion for new trial or request for findings of fact and conclusions of law will be held ineffective because of premature filing. Instead, every such request shall be deemed to have been filed on the date of but subsequent to the signing of the judgment. *Fleming v. Taylor,* 814 S.W.2d 89 (Tex.App.--Corpus Christi 1991, no writ).

5. WHAT FORM IS REQUIRED?

Findings of fact and conclusions of law need not be in any particular form as long as they are in writing and are filed of record. *Hamlet v. Silliman,* 605 S.W.2d 663 (Tex.App.--Houston [1st Dist.] 1980, no writ). It is permissible for the trial court to list its findings in a letter to the respective attorneys, as long as the letter is filed of record. *Villa Nova Resort, Inc. v. State,* 711 S.W.2d 120 (Tex.App.--Corpus Christi 1986, no writ). Remember, however, that oral statements as to findings made by the judge on the record will not be accepted as findings of fact and conclusions of law. *In re W.E.R.,* 669 S.W.2d 716 (Tex. 1984); *Stevens v. Snyder,* 874 S.W.2d 241 (Tex.App.--Dallas 1994, writ denied); *Giangrosso v. Crosley,* 840 S.W.2d 765, 769 (Tex.App.--Houston [1st Dist.] 1992, no writ); *Ikard v. Ikard,* 819 S.W.2d 644 (Tex.App.--El Paso 1991, no writ). Nor may the court have those statements prepared as a reporter's record and filed as findings of fact and conclusions of law. *Nagy, v. First National Gun Banque Corporation,* 684 S.W.2d 114 (Tex.App.--Dallas 1984, writ refd n.r.e.). The Supreme Court ruled in one case, however, that appellate courts must give effect to **intended** findings of the trial court, even where the specific findings made do not quite get the job done, provided they are supported by the evidence, the record and the judgment. See *Black v. Dallas County Child Welfare,* 835 S.W.2d 626 (Tex. 1992).

6. WHAT FINDINGS ARE AVAILABLE?

As indicated above, the courts of appeals are not consistent in their discussions of what findings are available to an appellant. But without question, the court must make findings on each material issue raised by the pleadings and evidence, but not on evidentiary issues. Findings are required only when they relate to ultimate or controlling issues. *Roberts v. Roberts*, 999 S.W.2d 424, 434 (Tex. App. – El Paso 1999, no pet.)*; Dura-Stilts v. Zachry,* 697 S.W.2d 658 (Tex.App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Loomis International v. Rathburn,* 698 S.W.2d 465 (Tex.App.--Corpus Christi 1985, no writ); *Lettieri v. Lettieri,* 654 S.W.2d 554 (Tex.App.--Fort Worth 1983, writ dism'd).

7. CONFLICTING FINDINGS FINDINGS AT VARIANCE WITH THE JUDGMENT

When the findings of fact appear to conflict with each other, they will be reconciled if reconciliation is possible. If they are not reconcilable, they will not support the judgment. *Yates Ford, Inc. v. Benevides,* 684 S.W.2d 736 (Tex.App.--Corpus Christi 1984, writ ref'd n.r.e.). Where Rule 296 findings appear to conflict with findings recited in the judgment, the Rule 296 findings control for purposes of appeal. Tex.R.Civ.P. 299a. This rule was in accord with the practice of the appellate courts, even before Tex.R.Civ.P. 299a was adopted. *See Southwest Craft Center v. Heilner,* 670 S.W.2d 651 (Tex.App.--San Antonio 1984, writ ref'd n.r.e.); *Law v. Law,* 517 S.W.2d 379, 383 (Tex.Civ.App.--Austin 1974, writ dism'd); *Keith v. Keith,* 763 S.W.2d 950 (Tex.App.--Fort Worth 1989, no writ).

A problem can arise if an amended judgment is signed after findings and conclusions have been given. In *White v. Commissioner's Court of Kimble County,* 705 S.W.2d 322 (Tex.App.--San Antonio 1986, no writ), judgment was entered on November 12, 1984. Findings of fact and conclusions of law were requested and filed. An amended judgment was entered on January 25, 1985, in response to a motion to correct. The appellate court ruled that the findings could not be relied upon to support the corrected judgment because they pertained only to the November 12 judgment.

Note also that if there are conflicts between statements made by the trial judge on the record and findings of fact and conclusions of law actually prepared, the formal findings will be deemed controlling. *Ikard v. Ikard,* 819 S.W.2d 644 (Tex.App.--El Paso 1991, no writ).

8. CONFLICT BETWEEN FINDINGS AND ADMISSIONS

The Supreme Court has considered whether a reviewing court is bound by admissions of parties as to matters of fact when the record shows that the admissions were not truthful and that the opposite of the admissions was in fact true. In *Marshall v. Vise,* 767 S.W.2d 699 (Tex. 1989), the plaintiff submitted requests for admissions which were never answered. Prior to the nonjury trial, the court granted the plaintiff's motion that his requests for admissions be deemed admitted. Nevertheless, the defendant presented testimony in direct contravention of the deemed admissions. Plaintiff, who had filed no motion for summary judgment, failed to urge a motion *in limine*, failed to object to the evidence when offered and failed to request a directed verdict. The court rendered judgment contrary to the facts deemed admitted and made findings of fact and conclusions of law contrary to the facts deemed admitted. The court of appeals concluded that the trial court's findings were directly contrary to the deemed admissions and were so against the great weight and preponderance of the evidence as to be manifestly erroneous. The Supreme Court concluded that unanswered requests for admission are in fact automatically deemed admitted unless the court permits them to be withdrawn or amended. An admission, once admitted, is a judicial admission such that a party may not introduce testimony to contradict it. Here, however, the plaintiff had failed to object; in fact he elicited much of the controverting testimony himself. Thus, he was found to have waived his right to rely on the admissions which were controverted by testimony admitted at trial without objection.

9. WHICH JUDGE MAKES THE FINDINGS?

Suppose a trial judge hears the evidence in a case and enters judgment, but before s/he is able to make his/her findings of fact and conclusions of law, s/he dies, or is disabled, or fails to win re-election? In *Ikard v. Ikard,* 819 S.W.2d 644 (Tex.App.--El Paso 1991, no writ), the family court master heard the evidence by referral with regard to a requested increase in child support. The master prepared a written report and the order was signed by the judge of the referring court. In the intervening time between trial and entry of the order, the court master won the November election to a district court bench, and left the master's bench. Findings of fact and conclusions of law were prepared following a timely request. Due to the absence of the court master who had heard the evidence, the findings were approved by another court master and signed by the referring judge, neither of whom had heard the evidence. On appeal, Mr. Ikard claimed this procedure was reversible error. The appellate court disagreed, noting that a successor judge has full authority to sign the findings, which in most cases, have been prepared by counsel for the prevailing party and not by the trier of fact. The findings then become those of the trial court, regardless of who prepared them. *See also, Robert,* 999 S.W.2d at 430 n.5 (Tex. App. – El Paso 1999, no pet.); *Lykes Bros. Steamship Co., Inc. v. Benben,* 601 S.W.2d 418 (Tex.Civ. App.--Houston [14th Dist.] 1980, writ ref'd n.r.e.)*; Horizon Properties Corp. v. Martinez,* 513 S.W.2d 264 (Tex.Civ.App.--El Paso 1974, writ ref'd n.r.e.).

Other courts have taken a different approach where the trial judge is no longer available. In *FDIC v. Morris,* 782 S.W.2d 521 (Tex.App.--Dallas 1989, no writ), the appellate court noted that the trial judge was no longer on the bench and was unavailable to respond to the order to prepare findings. Citing *Anzaldua v. Anzaldua,* 742 S.W.2d 782, 783 (Tex.App.--Corpus Christi 1987, writ denied), the court reversed the judgment.

10. EFFECT OF COURT'S FAILURE TO FILE

a. Must Complain In Brief

Where findings and conclusions were properly requested, but none were filed by the trial court, and the trial court was properly reminded of its failure to file the findings and conclusions, the injured party must then complain about the failure to file by point of error in the brief, or else the complaint is waived. *Seaman v. Seaman,* 425 S.W.2d 339, 341 (Tex. 1968); *In Interest of Hidalgo*, 938 S.W.2d 492 (Tex.App.--Texarkana 1996, no writ); *Southwest Livestock & Trucking Co. v. Dooley*, 884 S.W.2d 805 (Tex.App.--San Antonio 1994, writ denied); *Owens v. Travelers Ins. Co.,* 607 S.W.2d 634, 637 (Tex.Civ.App.--Amarillo 1980, writ refd n.r.e.).

b. When Does the Failure to File Cause Harmful Error?

The general rule is that the failure of the trial court to file findings of fact constitutes error

where the complaining party has complied with the requisite rules to preserve error. *Wagner v. Riske,* 142 Tex. 337, 342; 178 S.W.2d 117, 199 (1944); *FDIC v. Morris, 782* S.W.2d at 523. There is a presumption of harmful error unless the contrary appears on the face of the record. *In the Matter of the Marriage of Combs,* 958 S.W.2d 848, 851 (Tex.App.--Amarillo 1997, no writ); *City of Los Fresnos v. Gonzalez,* 830 S.W. 2d 627 (Tex.App.--Corpus Christi 1992, no writ). Thus, the failure to make findings does not compel reversal if the record before the appellate court affirmatively demonstrates that the complaining party suffered no harm. *Las Vegas Pecan & Cattle Co. v. Zavala County,* 682 S.W.2d 254, 256 (Tex. 1984). Where there is only one theory of recovery or defense pleaded or raised by the evidence, there is no demonstration of injury. *Guzman v. Guzman,* 827 S.W.2d 445 (Tex.App.--Corpus Christi 1992, writ denied); *Vickery v. Texas Carpet Co., Inc.,* 792 S.W.2d 759 (Tex.App.--Houston [14th Dist.] 1990, writ denied). *Accord, Landbase, Inc. v. T.E.C.,* 885 S.W. 2d 499, 501-02 (Tex. App.--San Antonio 1994, writ denied) (failure to file findings and conclusions harmless where the basis for the court's ruling was apparent from the record).

The test for determining whether the complainant has suffered harm is whether the circumstances of the case would require an appellant to guess the reason or reasons that the judge has ruled against it. *Elizondo v. Gomez,* 957 S.W.2d 862 (Tex.App.--San Antonio 1997, no writ); *Martinez v. Molinar,* 953 S.W.2d 399 (Tex.App.--El Paso 1997, no writ); *Sheldon Pollack Corp. v. Pioneer Concrete,* 765 S.W.2d 843, 845 (Tex.App.--Dallas 1989, writ denied); *Fraser v. Goldberg,* 552 S.W.2d 592, 594 (Tex. Civ.App.--Beaumont 1977, writ ref'd n.r.e.). The issue is whether there are disputed facts to be resolved. *FDIC v. Morris,* 782 S.W.2d at 523.

c. Remedy

Rule 44.4(b) of the Texas Rules of Appellate Procedure provides that if the trial court's failure to enter findings prevents a proper presentation of the case on appeal and if the trial court can correct its failure, the court of appeals must direct the trial court to correct the error and then proceed as if the failure to act had not occurred. Abatement rather than reversal is now required by the rules.

d. Failure to Make Additional Findings

With regard to additional findings, the case should not be reversed if most of the additional findings were disposed of directly or indirectly by the original findings and the failure to make the additional findings was not prejudicial to the appellant. *Landscape Design & Const., Inc. v. Harold Thomas Excavating, Inc.,* 604 S.W.2d 374 (Tex.Civ.App.--Dallas 1980, writ ref'd n.r.e.). Refusal of the court to make a requested finding is reviewable on appeal if error has been preserved. Tex.R.Civ.P. 299.

11. EFFECT OF COURT'S FILING

The Texas Rules of Civil Procedure, Rule 299, provide that where findings of fact are filed by the trial court, they shall form the basis of the judgment upon all grounds of recovery. The judgment may not be supported on appeal by a presumption or finding upon any ground of recovery no element of which has been found by the trial court. Where one or more of the elements have been found by the court, however, any omitted unrequested elements, if supported by the evidence, will be supplied by presumption in support of the judgment. This presumption does not apply where the omitted finding was requested by the party and refused by the trial court. *Chapa v. Reilly*, 733 S.W.2d 236 (Tex.App.--Corpus Christi 1987, writ ref'd n.r.e.).

Findings of fact are accorded the same force and dignity as a jury verdict. *McPherren v. McPherren*, 967 S.W.2d 485 (Tex.App.--El Paso 1998, no pet.) When they are supported by competent evidence, they are generally binding on the appellate court. Where a reporter's record is available, challenged findings are not binding and conclusive if manifestly wrong. The same is true of patently erroneous conclusions of law. *Reddell v. Jasper Federal Savings & Loan Association*, 722 S.W.2d 551 (Tex.App.--Beaumont 1987) *rev'd on other grounds* 730 S.W.2d 672 (1987); *De La Fuenta v. Home Savings Association*, 669 S.W.2d 137 (Tex.App.--Corpus Christi 1984, no writ). Where no reporter's record is presented, the court of appeals must presume that competent evidence supported not only the express findings made by the court, but any omitted findings as well. *D&B, Inc. v. Hempstead*, 715 S.W.2d 857 (Tex.App.--Beaumont 1986, no writ); *Mens' Wearhouse v. Helms*, 682 S.W.2d 429 (Tex.App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 474 U.S. 804, 106 S.Ct. 38 (1985).

12. DEEMED FINDINGS

When the trial court gives express findings on at least one element of a claim or affirmative defense, but omits other elements, implied findings on the omitted unrequested elements are deemed to have been made in support of the judgment. In other words, if a party secures an express finding on at least one element of an affirmative defense, then deemed findings arise as to the balance of the elements. *Linder v. Hill,* 691 S.W.2d 590 (Tex. 1985); *Dunn v. Southern Farm Bureau Casualty Insurance Co.,* 991 S.W.2d 467 (Tex.App --Tyler 1998, pet. denied); *Sears, Roebuck & Co. v. Nichols,* 819 S.W.2d 900 (Tex.App.--Houston [14th Dist.] 1991, writ denied). Where deemed findings arise, it is not an appellee's burden to request further findings or to complain of other findings made. It is the appellant's duty to attack **both the express and implied findings.**

13. PECULIARITIES OF CONCLUSIONS OF LAW

Conclusions of law are generally lumped in with all discussions of findings of fact but, in reality, they are rather unimportant to the appellate process. The primary purpose is to demonstrate the theory on which the case was decided. A conclusion of law can be attacked on the ground that the trial court did not properly apply the law to the facts. *Foster v. Estate of Foster,* 884 S.W.2d 497 (Tex.App.--Dallas 1994, no writ). However, erroneous conclusions of law are not binding on the appellate court and if the controlling findings of fact will support a correct legal theory, are supported by the evidence and are sufficient to support the judgment, then the adoption of erroneous legal conclusions will not mandate reversal. *Leon v. Albuquerque Commons Partnership,* 862 S.W.2d 693 (Tex.App.--El Paso 1993, no writ); *Westech Engineering, Inc. v. Clearwater Constructors, Inc.,* 835 S.W.2d 190, 196 (Tex.App.--Austin 1992, no writ); *Bellaire Kirkpatrick Joint Venture v. Loots,* 826 S.W.2d 205, 210 (Tex.App.--Fort Worth 1992, writ denied); *Sears, Roebuck & Co. v. Nichols,* 819 S.W.2d 900, 903 (Tex.App.--Houston [14th Dist.] 1991, writ denied); *Matter of Estate of Crawford,* 795 S.W.2d 835, 838 (Tex.App.--Amarillo 1990, no writ); *Valencia v. Garza,* 765 S.W.2d 893, 898 (Tex.App.--San Antonio 1989, no writ). "If an appellate court determines a conclusion of law is erroneous, but the judgment rendered was proper, the erroneous conclusion of law does not require reversal." *Town of Sunnyvale v. Mayhew,* 905 S.W.2d 234, 243 (Tex.App.--Dallas 1994, writ requested). The standard of review for legal conclusions is whether they are correct, *Zieben v. Platt,* 786 S.W.2d 797, 801-02 (Tex. App.--Houston [14th Dist.] 1990, no writ),

and they are reviewable *de novo* as a question of law. *State v. Evangelical Lutheran Good Samaritan Society,* 981 S.W.2d 509, 511 (Tex. App.--Austin 1998, no pet.); *Nelkin v. Panzer*, 833 S.W.2d 267, 268 (Tex.App.--Houston [1st Dist.] 1992, writ dism'd w.o.j.). In other words, the appellate court must independently evaluate conclusions of law to determine their correctness when they are attacked as a matter of law. *U.S. Postal Serv. v. Dallas Cty. App. D.*, 857 S.W.2d 892, 895-96 (Tex.App.--Dallas 1993, writ dism'd).

14. CHALLENGES ON APPEAL

a. Challenging the Trial Court's Failure to Make Findings of Fact

The trial court's failure to make findings upon a timely request must be attacked by point of error on appeal or the complaint is waived. *In Interest of Hidalgo,* 938 S.W.2d 492 (Tex.App.--Texarkana 1996, no writ); *Perry v. Brooks,* 808 S.W.2d 227, 229-30 (Tex.App.--Houston [14th Dist.] 1991, no writ); *Belcher v. Belcher,* 808 S.W.2d 202, 206 (Tex.App.--El Paso 1991, no writ).

b. Challenging Findings and Conclusions on Appeal

Unless the trial court's findings of fact are challenged by point of error in the brief, the findings are binding on the appellate court. *S&A Restaurant Corp. v. Leal,* 883 S.W.2d 221, 225 (Tex.App.--San Antonio 1994), *rev'd on other grounds,* 892 S.W.2d 855 (Tex. 1995) *(per curiam); Wade v. Anderson,* 602 S.W.2d 347, 349 (Tex.Civ.App.--Beaumont 1980, writ ref'd n.r.e.); s*ee* 6 McDonald, Texas Civil Appellate Practice § 18:12 n. 120 (1992).

Frequently, trial courts include disclaimers to the effect that "any finding of fact may be considered a conclusion of law, if applicable" and vice-versa. There is a difference, however, in the standard of review. Findings of fact are the equivalent of a jury answer and should be attacked on the basis of legal or factual sufficiency of the evidence. *Associated Telephone Directory Publishers, Inc. v. Five D's Publishing Co.,* 849 S.W.2d 894, 897 (Tex.App.--Austin 1993, no writ); *Lorensen v. Weaber,* 840 S.W. 2d 644 (Tex.App.--Dallas 1992) *rev'd on other grounds sub nom.; Exxon Corp. v. Tidwell,* 816 S.W.2d 455, 459 (Tex. App.--Dallas 1991, no writ); *A-ABC Appliance of Texas, Inc. v. Southwestern Bell Tel. Co.,* 670 S.W.2d 733, 736 (Tex.App.--Austin 1984, writ ref'd n.r.e.). Conclusions of law should be attacked on the ground that the law was incorrectly applied.

Sometimes, however, findings of fact are mislabeled as conclusions of law, as in *Posner v. Dallas County Child Welfare,* 784 S.W.2d 585 (Tex.App.--Eastland 1990, writ denied). There, the ultimate and controlling findings of fact were erroneously labeled as conclusions of law, and instead of challenging these, the appellant challenged the immaterial evidentiary matters which were included in the findings of fact. The appellate court found that the appellant was bound by the unchallenged findings which constituted undisputed facts.

B. Findings In Sanction Orders

1. TEXAS RULES OF CIVIL PROCEDURE: RULE 13 SANCTIONS

The imposition of Rule 13 sanctions lies within the discretion of the trial court and will not be reversed absent an abuse of discretion. *Stewart v. Transit Mix Concrete & Materials Co.,* 988 S.W.2d 252 (Tex.App.--Texarkana 1998, pet. denied). Rule 13 provides:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both. . .
>
> . . . **No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order.** 'Groundless' for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law . . .
>
> [Emphasis added].

Several recent appellate decisions have considered the language of the Rule and determined that its requirements are mandatory. *Keever v. Finlan,* 988 S.W.2d 300, 312 (Tex. App. -- Dallas 1999, pet. dism'd); *Thomas v. Thomas,* 917 S.W.2d 425 (Tex.App.--Waco 1996, no writ). Requiring a trial court to enunciate its reasons in the sanction order serves two purposes. First, it invites the trial court to reflect on the order before sanctions are imposed. Second, it informs the party of the offensive conduct in order to prevent its recurrence. *Keever,* 988 S.W.2d at 312.

In *GTE Communications Systems Corp. v. Curry,* 819 S.W.2d 652 (Tex.App.--San Antonio 1991, *orig. proceeding),* the appellate court determined that a rule of civil procedure is to be interpreted by the same rules that govern statutes. When a rule is clear and unambiguous, the language must be construed according to its literal meaning. *Id*. at 653; *RepublicBank Dallas, N.A. v. Interkal, Inc.,* 691 S.W.2d 605, 607 (Tex. 1985); *Hidalgo, Chambers & Co. v. FDIC,* 790 S.W.2d 700, 702 (Tex.App.--Waco 1990, writ denied). The court in *GTE* found the language of Rule 13 to be clear and unambiguous in its provisions that no sanctions may be imposed except for good cause shown. The court further noted that the trial court must enumerate the particulars of the good cause in the sanction order and that this requirement of the rule is mandatory.

Other courts of appeals have held that the complaining parties may waive the particularity requirement of Rule 13 if they fail to make a timely complaint and that the trial court's failure to make particular findings in the order may constitute harmless error. *Alexander v. Alexander,* 956 S.W.2d 712, 714 (Tex.App.--Houston [14th Dist.] 1997, pet. denied); *Bloom v. Graham,* 825 S.W.2d 244, 247 (Tex.App.--Fort Worth 1992, writ denied); *Powers v. Palacios, 771* S.W.2d 716, 719 (Tex. App.--Corpus Christi 1989, writ denied). The El Paso Court of Appeals has determined that error may indeed be waived but a legitimate effort at obtaining findings will require an abatement similar to that utilized in the area of traditional findings of fact. *Campos v. Ysleta General Hospital, Inc. et al,* 879 S.W.2d 67 (Tex.App.--El Paso 1994, writ denied).

2. TEXAS RULES OF CIVIL PROCEDURE: RULE 215 SANCTIONS

> *b. Sanctions by Court In Which Action is Pending.* If a party or an officer, director, or managing agent of a party of a person designated under Rules 200-2b, 201-4 or 208 to testify on behalf of a party fails to comply

with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following.

* * * * *

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or other, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, **unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.** Such an order shall be subject to review on appeal from the final judgment.

[Emphasis added].

There is no requirement that the complaining party have requested or obtained formal findings of fact and conclusions of law with regard to the sanctions order. The Supreme Court has ruled that formal findings are unnecessary. *Otis Elevator Company v. Parmelee,* 850 S.W.2d 179 (Tex. 1993).

C. Findings In Child Support Orders

Section 154.130 of the Family Code provides that, without regard to Texas Rules of Civil Procedure, Rules 296 through 299, in rendering an order of child support, the court shall make written findings of fact if (1) the party files a written request with the court not later than ten days **after the date of the hearing**; (2) the 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 child support guidelines. Tex. Fam.Code Ann. § 154.130.

[Emphasis added].

D. Findings In Visitation Orders

Section 153.258 of the Family Code provides that without regard to Rules 296 through 299 of the Texas Rules of Civil Procedure, in all cases in which possession of a child by a parent is contested and the possession of the child varies from the standard possession order, the trial court shall state in the order the specific reasons for the variance from the standard order. Tex.Fam.Code Ann. § 153.258 (Vernon 1997). A written request must be filed with the court not later than ten days **after the date of the hearing.** An oral request must be made in open court during the hearing.

E. Findings in Dissolution of Marriage

Section 6.711 of the Family Code provides that in a suit for dissolution of a marriage in which the court has rendered a judgment dividing the estate of the parties, on request by a party, the court shall state in writing its findings of fact and conclusions of law concerning (1) the characterization of each party's assets, liabilities, claims, and offsets on which disputed evidence has been presented; and (2) the value or amount of the community estate's assets, liabilities, claims, and offsets on which disputed evidence has been presented. These findings are controlled by the Texas Rules of Civil Procedure, Rule 296, *et. seq.*

VIII. CONCLUSION

Litigants tend to believe that if they are unsuccessful at the trial court, they will get a second bite at the apple on appeal. Appeals are not trials de novo, and only where the trial court has actually committed reversible error will the fruits of labor be sweet. How tragic to have a client lose an opportunity to get that second taste because a truly reversible error was not adequately preserved. Our rules of procedure and interpreting decisions require that the practitioner get it right the first time.

ANN CRAWFORD MCCLURE
is Chief Justice of the 8th Court of Appeals.

LITTLE YELLOW BOOKS ARE HERE!!!!

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The Star Spangled Banner:

Realizing the Dream, Equality for All

By Fernando Chacón

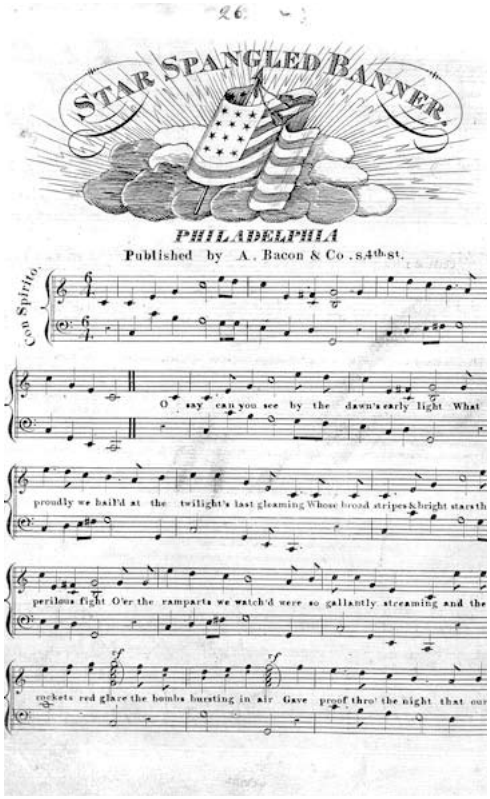
As attorneys we can take pride in our profession for the many contributions lawyers have made throughout our country's history. This year the American Bar Association set the theme for Law Day 2013: Realizing the Dream, Equality for All. In events across the nation, Law Day reflected many historical milestones for our country, such as the 150th anniversary of the Emancipation Proclamation, the 50th anniversary of Martin Luther King Jr.'s speech from the Lincoln Memorial, the 50th anniversary of the Equal Pay Act, and the 50th anniversary of the Civil Rights Act of 1964.

The El Paso Bar Association celebrated this day with a banquet on May 4, 2013, at Ardovino's Dessert Crossing. The guest of honor was federal Judge Royal Ferguson who revisited his acceptance of the State Bar's *pro bono* award in 1983. I felt proud to be in the company of my colleagues and their families. We shared a wonderful evening, realizing that our profession is the community that gives meaning to the Constitution and in many ways advances civil and human rights.

I was also proud that my daughter Star Chacon was given the privilege and honor of singing the National Anthem for the event. We sat at a table with many wonderful persons, including our Bar Journal's editor, Clinton Cross. A few weeks after the banquet, he asked me to write this article about the history of the Star Spangled Banner. As you can see, I agreed.

Francis Scott Key was an attorney who wrote the words to the Star Spangled Banner. Although Key was a slave owner, he would have undoubtedly embraced this year's law day theme. He was an abolitionist, once condemning slavery as "bed of torture."

In an effort to support the abolitionist movement, Key represented the plaintiff in *Mima Queen v. Hepburn 11 U.S. (7 Cranch)* 290 (1813). Mima Queen was an elderly slave who asserted her rights to be free. She argued that her grandmother, Mary Queen, had been freed by her owner. Under the law of slavery, Mary Queen's descendants should then be free. The plaintiff bore the burden of proving that Mary Queen, now deceased, had been freed. The only evidence available



was from witnesses who heard other people say that Mary Queen had been freed. The jury was instructed that such statements were inadmissible because they were hearsay, so the jury ruled against the plaintiff. In the appeal to the U.S. Supreme Court, John Marshall upheld the trial court's decision on the basis that the out of court declarants could not be cross-examined by the adversary. They were dead.

Gabriel Duvall dissented (the only time he or perhaps anyone else ever dared to disagree with Chief Justice John Marshall) contending that the testimony should have been admitted. He noted that a similar exception had already been recognized to prove, among other things, pedigrees and land boundaries. Furthermore, shouldn't the importance of a human being's freedom weigh heavily in deciding whether or not to admit 'hearsay' evidence?

Eighteen months after the U.S. Supreme Court issued its opinion in *Mima Queen,* Key penned the words to the Star Spangled Banner. Prior to writing the words to the national anthem, Key had been employed to secure the freedom of Dr. William Beanes, an elderly and popular physician who had been captured by the British. Though at first the British refused to release Beanes, they changed their minds when Key and John Stuart Skinner (who accompanied Key on the assignment) showed the letters of British prisoners who praised Beanes and other Americans for their kind treatment. The British did not allow the immediate return of Key and Skinner because they had heard the plans for the attack on Baltimore.

It was during this stay that Key witnessed the attack on Fort McHenry in Baltimore Harbor by the British during the War of 1812 during the naval portion of the battle. Major George Armisted, the fort commander, had expressed a desire for a very large flag to fly over the fort-- "a flag so large that the British would have no difficulty seeing it from a distance." General John S. Stricker and Commodore Joshua Barney placed an order with local flag maker, Mary Young Pickersgill. The flag measured 30 by 42 feet, fifteen stripes 2 feet wide and fifteen stars that measured about two feet in diameter. This flag and a smaller "storm flag" that flew in inclement weather and during the battle survived the barrage. In the morning after the battle, the smaller flag was triumphantly replaced with the larger flag. This inspired Key to write a poem that he gave to his brother-in-law Judge Joseph H. Nicholson, who in turn saw that it fit the melody of a popular tune "The Anacronic Song" by English composer John Stafford Smith.

It was very interesting for me to learn that, as a result of his indignation over the start of the Civil War, Oliver Wendell Holmes, Sr. (father of Justice Oliver Wendell Holmes) wrote a fifth stanza to the national anthem.

I hope my daughter, Star Chacon, will continue singing our national anthem. She has been accepted to law school and will soon begin her first year of studies taking another step toward joining our profession. In doing so she will embrace the legacy of Francis Scott Key and the nation's commitment to equal justice under the law.

FERNANDO CHACÓN is an El Paso attorney engaged in the general practice of civil and criminal law.

My Family, ASARCO, and Death

By Jaime E. Gándara

American Smelting and Refining Company, from its inception, owned and leased mining operations in Chihuahua for procurement of raw materials in the form of gold, silver, lead and copper ores. The "Smelter" had mineral and land interests, business organizations, contractual arrangements with labor and professional groups, transportation agreements with the Mexican railway system, and a legal structure for international mining, transport, smelting, and distribution. José María Gándara, who practiced law and held a State judicial position in Chihuahua, served as lawyer, counselor, negotiator, and advisor to ASARCO with regard to its Chihuahua operations from 1882 until 1910.

My great grandfather José María Gándara was licensed to practice law in the Republic of Mexico, by and through the Governor of the State of Jalisco in Guadalajara, in 1879. His license was endorsed by the Supreme Tribunal of Justice (Supreme Court) of the State of Jalisco and the Directorate of Education of Guadalajara in May of 1879. His license to practice law was endorsed by the Supreme Tribunal of Justice (Supreme Court) of the State of Chihuahua on January 21, 1882. After 29 years of law practice in Chihuahua, with heavy emphasis on legal work for ASARCO, he left Chihuahua with Francisco (Pancho) Villa in hot pursuit.

José had attempted to arrange a truce among the competing revolutionary factions in Chihuahua, i.e. among the Villa, Carranza, Orozco, and federal factions. Pancho resented Jose's meddling and sent his men to detain him, with what intentions we can only guess. Josè was fair-skinned, green-eyed, and wore spectacles. Apparently, the description given to those assigned to grab him emphasized the fact that he wore glasses. José boarded a northbound train from Chihuahua. He sat in the car where there were "americanos" of various persuasions traveling to Juarez and ultimately to El Paso. Villa's men boarded the train at some point north of Chihuahua looking for "*el juez* Gándara". José, who spoke fluent English, sat at a table with the "americanos" in full conversation with them and, when the Villistas approached, he picked up an American newspaper (some say it was the New York Times) and pretended to read aloud to his companions (he had stashed his glasses). The Mexicans passed him up. They failed to recognize the target and Josè made his escape on that train that brought him all the way into El Paso. He was reunited with his family in El Paso. He had sent them all north before the fighting began.

Photo courtesy of Sara Rogness

Death of a landmark, April 13, 2013

Once in El Paso, José bought a home where he lived with his sisters, María Dolores and Marìa Teresa, and his sons José Felix and Carlos. ASARCO hired him as their Chief Advisor on Mexican Affairs and later, when the revolution subsided, as their General Counsel in the Mexican courts. He practiced Mexican law mostly in exile.

My grandfather, José Felix ("Pepe"), married Guadalajara born Eulalia Armendariz, and they had five children. José Felix involved himself in the 1925 revolution of the "Cristeros", who opposed the draconian oppression of the Catholic Church after the 1910 Revolution. José Felix was prosecuted by the American federal authorities for violating the neutrality laws by running guns to the revolutionary Yaqui Indians in the State of Sonora. Pepe was imprisoned in Yuma Territorial Prison until granted a presidential pardon.

My father, Ignacio Loyola Gándara, fought in the United States Army Air Corps during World War II. He was a tail gunner, flew 39 missions over Germany, and was decorated with a Medal of Valor and Purple Heart. He married Delfina Duràn and they had a family of four. With the help and encouragement of my mother, father, brothers, sisters, and maternal uncle, attorney Alejandro Duràn, Jr. (R.I.P.), I was able to follow in the footsteps of my great grandfather and became a lawyer.

My great grandfather, my grandfather, my father, and ASARCO are all gone now. I was present when the ASARCO smokestacks were laid to rest and felt a twinge of sadness at their demise.

JAIME E. GÁNDARA is an El Paso County Deputy Public Defender
SARA ROGNESS is an El Paso County Assistant District Attorney and an amateur photographer

Law Day 2013

By Judge María Salas Mendoza

This year's Law Day theme was: REALIZING THE DREAM: EQUALITY FOR ALL. 2013 marked the 150th anniversary of the Emancipation Proclamation and 50 years from Dr. Martin Luther King Jr.'s inspirational "I Have a Dream" speech (upon the 100th anniversary of the Proclamation) which called upon our nation to live up to the great promise of equality for all. We could spend the entire year celebrating the achievements in civil rights as well as the long path and daunting struggles that still remain.

This year the Bar participated in a commemoration of the 50th anniversary of *Gideon v. Wainwright*, the landmark case in which the U.S. Supreme Court held that individuals charged with felony offenses were constitutionally entitled to effective trial counsel regardless of the ability to hire such a lawyer. On March 18, 2013, joined by the Federal Public Defender's Office, El Paso County Public Defender's Office, El Paso District Attorney's Office, El Paso Council of Judges, Federal Bar Association--El Paso Chapter and members of the Texas Criminal Defense Lawyers Association, the Bar held a public reading of excerpts from the opinion and the 6th Amendment on the lawn of the U.S. Albert Armendariz District Court.

Participating in the State Bar of Texas' photo, essay and poster contests, over 18 submissions were received locally. Two of our nominees, Evangeline Bryant and Luis Garcia were selected state-wide winners and traveled with their parents to Austin, Texas, to receive their awards and scholarships.

On April 20th, the Bar held its annual Law Day Chess Tournament. Over 60 students in grades 1-8 participated and among the age-group winners several boasted their "I beat a lawyer" medals at the end of the day. Volunteers included Victor Parra, Charles Skinner, Aldo Lopez, Evi Licona, Gerald Georges, Lilia Doibani, Clinton Cross, Robert Estrada, Todd Marshall, Paul Kubinski, Octavio Dominguez, Edward Porous and Omar Carmona

On April 27th, the Bar hosted its Open Courts program inviting 7th -10th graders to visit the court house and learn about what the courts do. They heard presentations from law enforcement, lawyers and judges and ended the day with a mock trial exercise. Participants took inspirational mug shots in which their "case number" was a placard announcing their crime: Guilty of Being on Honor Roll; Guilty of Going to College, etc. Students also took an oath, administered by Judge Linda Chew and me—to be good students, responsible, respectful and good citizens.

This year's events were capped off by a wonderful Law Day banquet at which many of our local heroes were honored for their professional success as well as their service to the profession, Bar and community. Judge Royal Ferguson aptly delivered the keynote address commemorating the establishment of mandatory pro bono in El Paso acknowledging the local community's leadership in that effort.

These events bring us together as community but most importantly highlight the Bar's role in establishing community standards and continued work in achieving access to our courts and creating a world in which all of us succeed when we inspire one another, especially our youth, to achieve.

MARÍA SALAS MENDOZA is Judge of the 120th District Court of El Paso County, Texas

Judge Royal Furgeson speaks at Bar Banquet

On May 4th, 2013 former Kemp, Smith attorney, federal district judge, and future law school dean Royal Furgeson spoke to El Paso attorneys at the annual Law Day banquet. In celebration of this year's law day them, *Realizing the Dream: Equality for All*, Judge Furgeson shared with the audience the speech he gave at the State Bar Convention on July 1st, 1983, accepting the State Bar's *Pro Bono* Award on behalf of the El Paso Bar Association. The speech is re-printed here as it was given on both occasions:

The lawyers of El Paso thank you for this recognition of our *pro bono* program. You should be told that not all of the recognition we have received has been so positive. Immediately after the program was adopted, our morning paper questioned our plan in an editorial. Here, in part, is what was said:

The El Paso Bar Association has no business requiring of its nearly 700 members that each handle two domestic legal cases a year free.

It is almost unbelievable that this has been proposed, but even more astonishing is that a court order backs the plan. Any lawyer refusing to cooperate potentially faces court action.

Any lawyer, that is, except the 10 district judges who signed the court order. Although they're lawyers, too, they're exempt from their own order. Doesn't seem quite right . . .

This cockeyed plan is defended on the grounds that President Reagan's budget cuts have affected adversely legal aid for the poor. Whether free legal aid was a good idea in the first place is certainly a fair question. We already have out or necks the albatross called Medicare; do we need "Judicare," too?

Maybe if we weren't all so broke from having paid taxes to finance federal boondoggles like Medicare, we'd have the money to go see a lawyer when we need one.

Judge Royal Furgeson

Based upon these and other criticisms, it is clear to us that not everyone thinks we are on the right track. Indeed, when people hear about the program, they normally respond in one of three ways: (1) our Bar Association has gone crazy, (2) there has been an outbreak of piety and righteousness in El Paso, or (3) our Bar Association has been taken over by Bolsheviks. We plead not guilty on all counts.

We adopted our program because we were simply caught in the numbers crunch which often afflicts border cities; we have a great many indigent clients and a relatively small legal community. We have gone forward with this plan for one reason: all other choices appear inadequate. I know our plan is the subject of great debates. Unfortunately, these debates fail to focus on the reason for our decision: too many clients and not enough lawyers.

After going through the pleasure and the pain of our program for one year, I would suggest to any other bar association considering our model that you first make certain you know your client base. If you can come anywhere close to handling that base voluntarily, do it. A plan like ours is hard to enact, hard to implement, and hard to administer.

In closing, let me say that I am very proud of El Paso's lawyers. They are just like lawyers anywhere else: diverse, cantankerous, independent, hardheaded. And yet, on one single decision of courage and compassion, they have banded together, they have remembered that they are a part of a great and learned profession and they have done something very special: they have unlocked the doors of the courthouse for those who cannot afford a key. In doing so, they have recalled one of our nation's most important promises: let there be equal justice under the laws – not just for the rich, but also for the poor; not just for the powerful, but also for the weak; not just for the great, but also for the small.

It hasn't been easy. But then again, nothing worthwhile ever is.

Thank you.

When the King goes mad: King George III, his guardians, and the struggle for sanity, power, and the purse

By Terry Hammond

He died at 82 years of age – blind, deaf, and isolated from the world – just like many of us in our last season of life.

George William Frederick Hanover, who we know as King George III, is often known as the "Mad King" – at least as depicted in the play and eventually the film "The Madness of King George." In that 1994 movie, Nigel Hawthorne gives an excellent portrayal of King George III of Great Britain. The movie is centered on the King's first extended bout with mental illness in 1788-1789, and his remarkable recovery just in time to avoid his oldest son, Prince George who he despised, from being named Prince Regent by Parliament. (Of Prince George, King George remarked, *"My dear first-born is the greatest ass and the greatest liar and the greatest canaille and the greatest beast in the whole world, and I heartily wish he were out of it."* The movie ends with George III's triumphant return from madness. Had the film lasted 82 years – the length of George III's life – it would have more accurately demonstrated the near-insurmountable challenges and expense that a family can face when struggling to contain and treat chronic mental illness.

As we explore the theme "Equality for All," it is poignant to consider that all humans begin similarly situated as infants and, if we live long enough, may well live through our "golden years" until we can no longer manage our own affairs and then must rely on the assistance of others. King George III offers an early example of a man who had power, wealth, and an absolute command of his own destiny only to succumb to the control of his family and others who, of necessity, were forced to take the reigns of authority from him and then to manage every aspect of his life.

King George III

The Hanovers

King George III is best known to us as the last king of America – the one whose arbitrary and unreasonable acts led to revolution in American colonies and who eventually lost the American Revolutionary War and the War of 1812. George III was hated and vilified in the colonies. However, in studying his letters, records of his medical treatment, and secondary monographs, I found him to be well-educated, remarkably engaged and politically astute, and to have unique humanizing "tics" such as constantly interjecting into conversations phrases such as "Hey, Hey!" and "What, What?".

George III was descended from the German House of Hanover, which ruled the Kingdom of Hanover (before German unification) and the United Kingdom. The Hanovers succeeded the House of Stuart as monarchs of Great Britain and Ireland in 1714 and held that office until the death of Queen Victoria in 1901. Queen Victoria was the granddaughter of George III, and was an ancestor of most major European royal houses which routinely intermarried. She was the last British monarch of the House of Hanover; her son King Edward VII belonged to the House of Saxe-Coburg and Gotha, the line of his father, Prince Albert. The present Queen Elizabeth II is descended from George III as well.

King George III married Charlotte of Mecklenburg, and together they produced 15 children. Their oldest son, George, Prince of Wales, would eventually succeed his father as King after a long, long, long wait for his father

to succumb to insanity.

The king's illness

George III experienced his first acute attack of physical and related mental illness in 1765 at the age of 27. He would have similar, often more prolonged bouts with illness in 1788-1789, 1801, and 1810 until his death in 1820. By 1800 he had effectively retreated from active involvement in governance, assuming a more pastoral life of regal pomp and circumstance. By 1810, George III was blind and deaf, and was confined to Windsor Castle with a team of physicians constantly minding his health and behavior – he would never be allowed in public again. In the more acute episodes, George III would babble incoherently for days at a time without sleep. His delusions often centered on sexual fantasies and extremely inappropriate behavior that would result in confinement in a straightjacket strapped to a straight-backed wooden chair he coined his "coronation" chair.

The team of physicians who attended King George reflected the political intrigue that characterized his reign as King – his majority party in Parliament was aligned with Dr. Francis Willis, while the King's reviled son, Prince George, and the minority party in Parliament insisted that their own hand-chosen physician be involved with the medical team as well. The King's illness was characterized by disabling intestinal inflammation and cramps, discolored urine, delusions, dementia, and mindless ramblings that would last months at a time. During these periods of incapacity, George III was simply unable to perform even the most ministerial of tasks. In addition to isolation, the straightjacket, and confinement to the Coronation Chair, the King's physicians applied leaches, burned his skin with heated jars that would cause numerous boils on his body, and treated him with James' Powders for sustained periods of time. The King's illness was never cured, but until late in his life through operant conditioning he learned to suppress his thoughts and behavior, thereby "behaving" himself as the "cure" was painful beyond belief.

It was not until the 1970's that researchers determined that a number of factors may have combined to exacerbate the King's condition. A strand of King George's hair was tested and was determined to have 300 times the accepted level of arsenic in it. The researchers then determined that James' Powders contained unhealthy levels of arsenic. The King's discolored urine was linked to a treatable blood disorder called porphyria which is exacerbated and intensified by arsenic. Simply put, the King's doctors were medicating him with poison which was making him physically and mentally ill.

During the last ten years of King George III's life, he was constantly attended by a team of physicians that produced bulletins to Parliament detailing the King's condition. The cost of the medical treatment and confinement to the Royal family was enormous – calculated to be $32,000,000 in modern dollars. The cost nearly bankrupted the Hanover family, and the King was never cured.

Regency Acts

Parliament in the 18th Century was surprisingly unprepared to deal with an incapacitated king. George III's father, King George II, spent most of his time in Hanover, thus prompting Parliament to pass the "Regency During the King's Absence Act" of 1728. This regency bill specified that Henry II's wife, Queen Caroline, would act as regent in the absence of King George II. In 1751, Frederick, Prince of Wales, the eldest son and heir apparent of King George II, died. This left Frederick's eldest son, Prince George (who would become King George III), as the new heir apparent. But George was only 12 at the time of his father's death. If the King were to die before Prince George turned 18, the throne would pass to a minor. Consequently, Parliament made a provision for a regent by passing the "Minority of Successor to Crown Act" 1751. This Act provided that George's mother, Augusta, Dowager Princess of Wales, would act as regent. The Act also specified that a Council of Regency be put in place to rule alongside Princess Augusta. The Council of Regency was to act as a brake on the regent's power. Some acts of the Royal prerogative, such as declarations of war or the signing of peace treaties, would require a majority vote of the council.

In 1760, King George III ascended the throne, with his brother the Duke of York as heir presumptive. However, George III soon married Charlotte of Mecklenburg and had several children. In 1765, King George III experienced his first bout of brief but serious illness. He had three infant children in the order of succession. Parliament again passed a Regency Act to provide for a regent in the event of the King's death. The "Minority of Heir to the Crown Act" of 1765 provided that either the King's wife, Queen Charlotte, or his mother, would act as regent. This Act also required the formation of a Council of Regency.

The Regency Bill of 1789 (which played prominently in the film) was a proposed Act of Parliament to provide that King George III's eldest son George, Prince of Wales, would act as regent due to the King's incapacity. With no legislation already in place, there was no legal basis for providing a regent, and the King was in no fit state to give Royal Assent to the Act. Parliament decided to have the Lord Chancellor (Lord Thurlow) approve the bill by fixing the Great Seal of the Realm to give Royal Assent. However, the King recovered in time before the bill could be passed.

The King's continuing mental problems throughout the rest of his life confirmed the need for a suitable Regency Act to be in place. However, the King was hostile to the passing of such an Act while he was of sound mind.

In late 1810, King George III was once again overcome by mental illness following the death of his youngest and favorite child, Princess Amelia. Parliament agreed to follow the precedent of 1789; without the King's consent, the Lord Chancellor affixed the Great Seal of the Realm to letters patent naming Lords Commissioners. Although many thought this act to be illegal, the King needed a guardian and the kingdom needed a King. King George III was already incapacitated de facto, so resolutions by both Houses of Parliament approved the action, directing the Lord Chancellor to prepare the Letters Patent and to affix the Great Seal to them even without the signature of the monarch. In the "Care of King During His Illness Act" of 1811, Parliament restricted some of the powers of the Prince Regent (as the Prince of Wales became known). The constraints expired one year after the passage of the Act and would periodically be renewed if there were no improvement in the King's condition. King George III remained under the personal supervision of Queen Charlotte until her death in 1818; even then, the King's personal decisions were made by Parliamentary appointees, and the Prince Regent was not allowed to make decisions for his father.

As a postscript, after George IV died in 1830 the throne passed to George III's third-eldest son, King William IV. But William IV had no legitimate children (although King George III is said to have had 56 illegitimate children fathered by his sons), and given the age of his wife, Queen Adelaide, he was unlikely to have any in the future. The heiress presumptive to the throne was his niece, Princess Victoria of Kent, who was only eleven. As Victoria's father was dead, and Parliament mistrusted the younger sons of George III, Parliament

passed yet another regency act that placed any potential regency caused by the King's death before Victoria had reached 18, in her mother, the Duchess of Kent. However since Victoria became queen at age 18, and Queen Adelaide had no more children, a regency was unnecessary and the Act never came into force.

Legacy

Over Christmas of 1819, King George III suffered a further onslaught of madness. He spoke nonsense for 58 hours before falling into a coma. King George III died on January 29, 1820, having reigned for 60 years, longer than any British monarch up to that point.

One biographer encapsulated the hatred of King George III by many in America and the embarrassment of many of his subjects in Great Britain with this harsh epitaph:

He spent a long life in obstinately resisting measures which are now almost universally admitted to have been good, and in supporting measures which are as universally admitted to have been bad.

However, a more enlightened understanding and acceptance of chronic mental illness, coupled with forensic explanations for King George's condition, have engendered a kinder revisionist view of King George III and his reign. For those who are inclined toward a benevolent view of George III, the following can be considered:

♠ George III spoke English as his first language and never visited Hanover, Germany.

♠ George III never took a mistress and sired 15 children.

♠ George III's life and reign were longer than any of his predecessors.

♠ During the reign of King George III, Great Britain defeated France in the Seven Years Wars and became the dominant European Power in North America and India. British forces also defeated Napoleon in 1815.

♠ King George III collected over 65,000 books – the nucleus of British Library.

Lessons learned

The experience of King George III and his family, physicians, and Parliament, are unfortunately not dissimilar from the experience of 21st century families in America. The limitations imposed by medical science far too often result in long-term confinement of the mentally ill. Families still often bankrupt themselves in an attempt to secure treatment and to find a cure for often insoluble illnesses. Family dynamics can exacerbate the situation, often leading to the appointment of third parties to assume responsibility for the incapacitated loved one.

Perhaps the best lesson learned from the difficulties experienced by George III is that the family and Parliament were open and honest about the King's condition. They confronted his illness and handled it candidly. The more closed the situation, the greater the likelihood of abuse, neglect and/or exploitation of the vulnerable person.

These situations are especially challenging when the person suffering from mental illness is the chief executive officer – the person who has always been in charge and who is often surrounded by those who either want to exploit and benefit from the CEO's incapacity or by those who are incapable of acting in the CEO's absence. There are numerous instances where closed societies have either collapsed or descended into chaos after the CEO's incapacity (*e.g.*, the U.S.S.R. after Vladymir Ilyich Lenin's incapacitating stroke). Families are no different.

King George III's long and intermittent illness demonstrates the need for advanced planning to anticipate possible incapacity and to protect the person, the family, and the financial estate. Wrestling control away from the King or CEO is not nearly as easy as the movies make it appear to be, and certainly takes longer than an hour and 47 minutes.

TERRY W. HAMMOND is an El Paso attorney specializing in Probate and Elder Law.

The El Paso Probate Bar: Who We Are and What We Do

By Daniel Ordóñez

When Benjamin Franklin said, "Only two things in life are certain: death and taxes," he must have had probate and estate planning attorneys in mind. The El Paso Probate Bar exists to assist El Pasoans navigate through these inevitable certainties. Our members engage in activities ranging from probating estates, litigating the validity of wills, submitting and contesting guardianship proceedings, representing individuals in mental commitment hearings, helping people plan their estates and understand estate related tax liabilities.

More importantly, members of the El Paso Probate Bar give back--to each other and to the citizens of El Paso. By working closely with El Paso County Probate Courts One and Two, our organization is able to sponsor year-round continuing legal education classes and conferences, and facilitate round table discussions with the judges to educate local attorneys related to the procedures and processes as they apply to all probate matters.

With a poverty rate of over 30%, El Pasoans desperately need legal services and the El Paso Probate Bar proudly engages in numerous activities to help meet that need. The Bar, with assistance of both Probate Courts, sponsors two *pro bono* "will clinics" each year. The Bar also co-sponsors the Process of Guardianship Annual Conference. All proceeds from this conference go to the Guardian Angel Fund to assist the needs of individuals who are under guardianship of both probate courts. Moreover, our members generously contributed over 130 gifts for needy individuals under the care of the Probate Courts through the Giving Tree Program last Christmas.As probate and estate planning attorneys, we play a unique role as counseling our clients when they are grieving the loss of a loved one or protecting their home from the possibility of attachment or assessment of liabilities. Undoubtedly, the probate court will touch everyone's life in some capacity during their lifetimes. Membership in the El Paso Probate Bar helps attorneys not only perfect their craft, but also give back to the community that has already given so much to them. I invite all interested lawyers to join our organization and learn more about what we have to offer.

If you are interested in joining the El Paso Probate Bar Association, feel free to contact me at 845-5800, dordonez@bomwlaw.com.

DANIEL ORDOÑEZ is an El Paso attorney in the firm of Blanco Ordoñez Mata & Wallace; he is also president of the El Paso Probate Bar Association.

Senior Lawyer Interview

Ben endlich

By Clinton F. Cross

A few weeks ago I walked over to Ben Endlich's office a 707 Myrtle where I shared memories with him and his wife about lawyers I met when I first came to El Paso in the 1970's; then we talked about his legal career.

CROSS: Tell me about your Parents and Childhood.

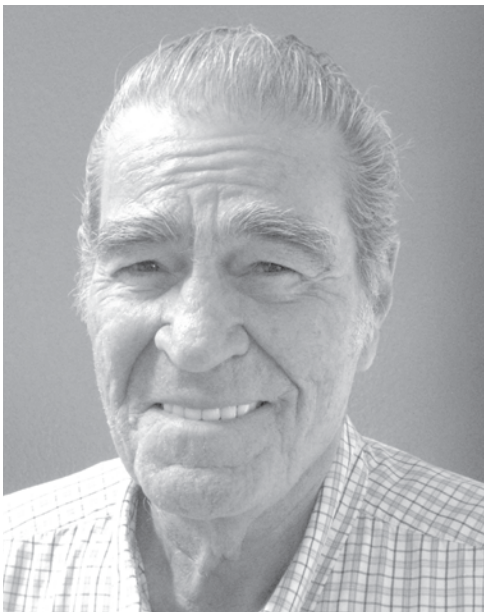
ENDLICH: My father and mother lived in El Paso, where my father earned a living selling used cars and my mother was a beautician. There were 5 of us; I was the oldest, then came my three sisters and one brother.

I attended Mesita Elementary, El Paso High School, Texas Western College, and University of Houston School Law School. I always worked during my school years but especially during the summers – towing cars from Lubbock for my Dad; and then I worked moving ice from railroad cars and breaking up the ice which was the way things were kept cool at that time. To get this job done required a lot of physical strength and stamina. At the end of every day, working on the railroad, breaking up ice sometimes in 100 degree heat, I was a very, very tired worker, which perhaps helped motivate me to continue my education.

After graduating from college, I immediately went to law school, graduating in 1961. I then went to work for Ernest Guinn, Sr., learning a great deal from him as to the actual practice of law, which I didn't learn from my law school classes.

When Guinn became a federal judge, I took over his practice. I invited Paul Caruthers, Clark Hughes, Dick Guinn, and Harry Lee Hudspeth, among others, to share the offices where we all individually engaged in the general practice of law. As time went on, these lawyers went their separate ways, either opening their own offices or doing something else. Harry Lee became a federal judge.

Through the years I have mentored other young men, such as Stewart Forbes and Bruce Ponder, helping them become the good, caring attorneys that they are. Right now, I am sharing offices with Dolph Quijano and we are mentoring two fine young men, Joshua Herrera and Omar Carmona, who are on their way to becoming very fine attorneys.



Ben Endlich

CROSS: Tell me about your wife.

ENDLICH: Before I met her, my wife, Sharon Lukowski, was a legal secretary. She had already worked for George Rodriguez, Jr., when he was in private practice. When George was elected County Attorney, she went to work for Paul Caruthers, which is how I met her. We married in 1970. She is still working as a legal secretary, this time for me. She is a wonderful boss.

CROSS: Children?

ENDLICH: I have four children, two boys and two girls; 8 grandchildren; and one great grandchild.

CROSS: As a lawyer, what kinds of cases have you handled?

ENDLICH: As a young attorney, I handled anything that came my way. As my practice grew, I became more involved with labor law. I was the attorney for the El Paso Police Officers Association for a while and for the meat cutters at Peyton Packing. As a result, I began handling a lot of Worker's Compensation cases. That in turn lead to becoming a Plaintiff's attorney in personal injury cases, but I continued handling other kinds of cases, such as divorces, adoptions, wills, probates.

As I grew older, my interest in major disputes waned. After becoming a member of the heart "zipper" club, I quit doing anything that was contentious. I now focus on wills and probate matters. Most of my clients are long-time clients who now need of this kind of help. I still enjoy coming to the office and honestly I don't know what else I would rather be doing – but fishing does come to mind.

CROSS: Any interesting cases?

ENDLICH: I assisted Judge Guinn when he was involved with Dr. Eidinoff (*see El Paso Bar Journal*, October, 2008, published on the internet, *ed*.) and that's when I discovered that criminal law was something that I didn't want to pursue. The rest of my cases were interesting to me and my clients but probably not to anyone else.

CROSS: How do you feel about your legal practice?

ENDLICH: I love what I do. I have slowed down quite a bit and am a stage in life where I am not as concerned with making a lot of money and can focus more on just helping people who need help, who don't know where else to turn, and sometimes don't have very much money. I also enjoy daily activity, seeing people, talking to other attorneys who are old friends. This keeps me active.

CROSS: How are you helping people?

ENDLICH: For one thing, I do not charge a fee for an initial consultation, which I am sure a lot of other attorneys don't agree with. If I feel that I cannot do the job competently, I refer the client to another lawyer and, having been in practice for 53 years, I do know quite a few lawyers that I know will treat my clients the way I treat them. I am proud of the fact that no-one has ever filed a grievance against me.

I have also tried, and still do, mentor young lawyers who are interested in establishing their own practices. I emphasize the importance of being honest, of keeping your word, and being available. Lawyers should consider themselves members of a secular priesthood, whose mission is to help and guide people through critical times in their lives.

One of my pet peeves is the discourtesy among my brethren. When I started practicing, lawyers always took their phone calls, whether they were from clients or other attorneys, and if they were unavailable at the time of the call they returned them as soon as they were able to do so. Now, it seems as if there is no more time for this common courtesy.

I might add that resolution of a problem quickly and inexpensively is a service to the client. A phone call or two can sometimes benefit a client in many ways, resolving problems that could escalate into expensive litigation if not addressed promptly.

One of the most troubling issues, I think, may have to do with attorneys fees. A lawyer must earn a fair fee – as there are expenses involved in the practice of law such as staffing and taxes and we need to earn a living; never-the-less, the question often presents itself: what is a fair fee? This becomes a particularly difficult question when the client is old, perhaps somewhat demented, has a limited income, is unable to evaluate the appropriateness of the fee, and perhaps has no relatives. Fees are not regulated and I do not necessarily think that they should be. But I do believe that one needs to gauge each situation separately (and with a bit of charity) and try to reach a fee agreement that is reasonable to all.

CLINTON CROSS is an Assistant El Paso County Attorney responsible for prosecuting criminal Deceptive Business Practice cases

The late Billie Sol Estes was prosecuted in El Paso, served time in La Tuna

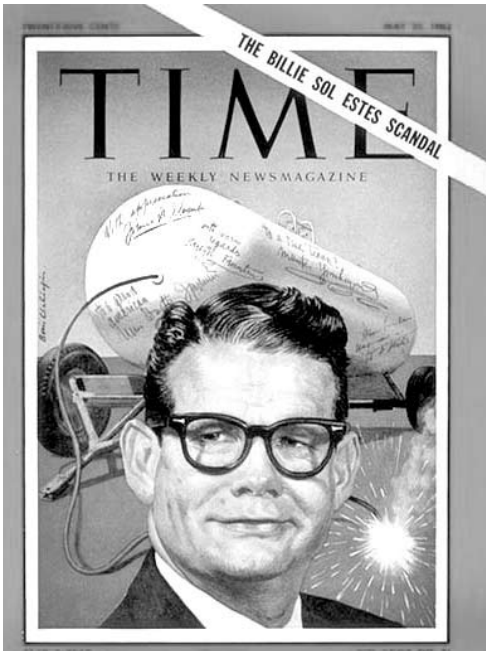
By Clinton F. Cross

Billie Sol Estes died May 14th, 2013 in his home near Dallas, Texas. At one time he was one of the most famous swindlers in the United States, his picture even appearing on the cover of *Time* magazine on May 25, 1962, then its best-selling issue.

Estes was born in 1925 on a farm near Clyde, Texas. He was an average student, but he showed early promise as a financier. At 13, he reportedly received a lamb as a gift, sold its wool for $5, bought another lamb and went into business. At 15, he sold 100 sheep for $3,000. By 18, he had $38,000.00. He never attended college, but served in the merchant marine in World War II. In 1951, he moved to Pecos and farmed cotton. At 35, he reportedly employed 4,000 people and was worth $40 million. Robert D. McFadden, *Billie Sol Estes, Texas Con Man Whose Fall Shook Up Washington, Dies at 88*, N.Y. Times, May 14, 2013.

Estes was best known for the scandal that broke out during President John F. Kennedy's administration involving phony financial statements and non-existent fertilizer tanks. El Paso attorney Fred Morton, Chief of the U.S. Attorney's Office in El Paso in 1965, prosecuted Estes in Judge R. E. Thomason's court, convicting him of mail fraud and fraudulent interstate transportation of securities obtained by fraud. His conviction in State court for similar activities was reversed by the U. Supreme court due to intrusive television coverage of the trial.

Shortly after he was indicted, the Secretary of Agriculture revealed that a key investigator



in the USDA cases had been found dead, bludgeoned on the head, with carbon monoxide in his bloodstream and five chest wounds from a bolt-action rifle. The cause of death was eventually ruled a homicide.

Six other men involved in the case also died, two found in cars filled with carbon monoxide. Estes' accountant was also found dead in a car, with a tube connecting its exhaust to the interior, but no poisonous gases were found in the body. His death was attributed to a heart attack.

After his conviction in Judge Thomason's court, Estes was sentenced to serve 15 years in prison. Estes unsuccessfully appealed the conviction. He later filed a post conviction attack on the conviction, alleging that the federal government had relied on perjured testimony to obtain the conviction. Harry Lee Hudspeth, then chief of the US. Attorney's office in El Paso, represented the government at this hearing, and proved that in the hearing Estes perjured himself. The government prevailed; Estes attempted to appeal *in forma pauperis*, denial of which (for inexplicable disappearance of almost $200,000 from Estes' account immediately before and after his initial arrest) was not appealed by Estes.

In 1971 after serving six years on his original convictions, Estes was freed. New charges were later brought against him in 1979, for which he was convicted of mail fraud and conspiracy to conceal assets from the Internal Revenue Service. He was sentenced to 10 more years, at first serving time in La Tuna federal correctional facility, where Eden Rodriguez, presently a clerk in the courthouse print shop, was a teacher. Upon learning of Estes' death, Eden commented, "Estes was a model prisoner; and at all times, wherever he went, he carried the bible."

It has been said that Estes could have made millions honestly, if he had only tried. In response, Fred Morton commented, "That's like saying, 'if a leopard changed its spots it would not be a leopard.'"

CLINTON CROSS is an Assistant El Paso County Attorney responsible for prosecuting criminal Deceptive Business Practice cases

Transfer Traps and the Medicaid Estate Recovery Program

By Stephanie Townsend Allala

We've all received the call, parents wanting to transfer their homes to their children. Beware, what might seem like a simple real property question can turn into a Medicaid nightmare. Gifts, including any transfer for less than fair market value, can trigger transfer penalties. These penalties can include the loss of all benefits, requests for recoupment of overpayments, and nursing home discharge. In order to ensure that parents or other loved ones are safe from loss of benefits or discharge from health care facilities, more and more real estate attorneys are asking clients questions about medical, health, and long term care before drafting a real property deed.

Here's the problem: Mom or Dad might need nursing care and can't afford the $5,000 or more a month it can cost, so Medicaid pays the difference. The client, usually for fear of losing their home, makes a transfer of assets for less than fair market value, which can result in immediate loss of all benefits. Medicaid assesses a transfer penalty for most transfers made in the previous five years without full fair market value compensation. *Medicaid Eligibility Handbook* (MEH) Sec. I-1200. The penalty period, for most transfers, doesn't begin to run until the first day of the month when the client is otherwise eligible. MEH Sec. I-5200.

Why not just leave the home in Mom's or Dad's name? You may do so at the risk of losing it. The threat comes from the Medicaid Estate Recovery Program "MERP," a program that causes many people who need care to refuse to apply for benefits. It's a misunderstood Medicaid program and Health and Human Services has no stated intention of correcting the pervasive culture of misinformation regarding the program. The program creates fear in the hearts of the elderly and disabled because it allows Texas to reimburse themselves from the probate estates of people who have received Long Term Care benefits at home or in a facility. The fact is that most people won't lose their homes if they receive competent legal advice.

Many people believe MERP can take a person's home during that person's life to pay for care or that MERP can put a lien on the family home. That is simply **not true**. The truth is that the statute controlling MERP is a creditor claim statute, making MERP a class seven creditor under Section 322 of the Texas Probate Code. Not only can't MERP take the client's home during her life, but in terms of getting paid from the estate, MERP rates just above creditors of unsecured credit card debt. Tex. Prob. Cd. Sec. 322. Just as importantly, MERP can ***never*** put a lien on a non-probate home as Texas is not a lien statute state. That's why any time a client receives long-term care Medicaid, the goal is to remove her estate from the formal probate process.

The solution is often a "Lady Bird" Deed or Enhanced Life Estate Deed. A Lady Bird Deed is a Life Estate Deed with extras. It allows the Grantor to retain, above and beyond a traditional life estate, the right to sell, transfer, encumber, or take most other actions a fee simple owner could take, without the joinder of the remainder beneficiary, as the Grantor also retains the power of appointment. Lady Bird Deeds are revocable instruments. A Lady Bird Deed conveys only a contingent remainder interest, and thus incurs no transfer penalty under Medicaid rules. Title then passes automatically upon the Grantor's death. Thus, the home is a non-probate asset, and not subject to a claim by MERP. A Lady Bird Deed is an easy way to protect the home from MERP, without triggering a transfer penalty that could disqualify the client from receipt of benefits for months or years.

Where there is capacity or a well-drafted and properly recorded Power of Attorney, Lady Bird Deeds are the easiest way to avoid MERP. Sometimes though, a Lady Bird Deed isn't an option and another solution to the MERP threat must be explored. This can happen under a guardianship or where the Power of Attorney does not grant the necessary authority. Even under these circumstances, MERP can often be avoided because MERP does not apply for certain exempt estates, most importantly the surviving spouse or under the unmarried child exemption. It can even be possible to use MERP's failure to comply with proper notice requirements to end the claim.

If a Statutory Durable Power of Attorney ("POA") agent is signing on behalf of the principle, make sure that no agents transfer the home to themselves. Title companies may not insure a subsequent sale because of questions over self-dealing and possible breaches of fiduciary duty. In fact, the legislative focus in recent decades has been to scrutinize self-dealing and accounting by agents. While strict prohibition bills have been proposed, they have failed. What did pass was 489B of the Texas Probate Code which clarified that fiduciary agents have a duty to inform and account for any actions taken as agents. If you want to use the POA to make a real property transfer, the POA must be recorded in the county clerk's office of the county where the property is located.

The law provides that the agent owes the principle the "high duty of good faith, fair dealing, honest performance, and strict accountability." *Sassen v Tanglegrove Townhouse Condo Assoc.*, 877 S.W. 2d 489 (1994) – Texarkana, May 31, rehearing denied). That duty is increasingly including the duty to investigate the direct, life-threatening repercussions of losing Medicaid benefits.

So what should you do when an elderly mother asks you to transfer her home to her daughter? Be cautious and ask a lot of questions about their health and plans for paying for health care in the coming years. Remember that transfers can deny people vital nursing care services by pricing them out of range during a transfer penalty period. Talk about a Lady Bird Deed and the purposes for the transfer. Fix transfers that might cause a penalty, since Medicaid allows the return of the asset to wipe out the transfer. Call an expert if you are unsure. Remember that no one should have to refuse nursing care for fear of losing her home, and thank goodness, give-backs are always allowed!

Stephanie Townsend Allala is an attorney, journalist and good-government advocate. She is President of Stephanie Townsend Allala and Associates, an El Paso elder law firm. Ladybird Deed forms are provided by her free of charge to attorneys upon request at stephanie@elpasoelderlaw.com.

STEPHANIE TOWNSEND ALLALA
is an El Paso attorney specializing in probate and elder law

ADVANCE SHEET, *1275 A.D.*

By Charles Gaunce

What was the status of children in early England? There are not many commentators about this beyond the occasional reference of a guardian and his ward, and in those instances the entire discussion revolves around the right of the guardian to usefully put the ward's property to valuable service until the ward comes of sufficient age that he or she can manage the property in his or her own right. Usually the issue is only an issue because there is no parent to assist the child in the management of the property for the simple reason that the child had to come into rightful possession through the death of the parents. As we have seen, the right of a she-child to manage her own property was severely restricted, to the point of being a legal nullity. But what of the orphan child who had no property? Were these children simply ignored by the legal system?

As is true of any good legal question, the answer is: it depends. Orphans without property were considered as economic drags and were largely ignored until they managed to somehow make a viable living through being an outlaw. They would start as pickpockets and gradually work their way up to highway robbery. At the time, prisons were not intended as a place for punishment, but as a place of confinement until the criminal was either (likely) executed or (unlikely) set free.

The truly amazing thing about our legal heritage is that it is simply the result of a series of patchwork kludges placed over the underlying kludges until the system more-or-less worked to the benefit of those who mattered. How often do you have a client come to you, and after being explained to them how the legal system works they respond, "That's not fair! They can't do that!" The sad truth is that the legal system, for all of its attempts to be fair and reasonable, simply isn't fair and reasonable to everyone. There are always winners and losers.

The system of slavery immediately springs to mind. But in truth, the early English legal system was, in many respects, remarkably similar to the slave holding system that eventually flourished in the Americas. In a system where everyone is held to personal service to someone else, or otherwise left to fend for themselves, the response to the claim that "They can't do that!" is, "Yes, they can."

Consider the following from the Pleas of the Manor of Bec, A.D. 1275:

> "Baldwin Cobbler's son finds as pledges Walter Cobbler, Roger of Broadwater, Robert Linene, William Frances, that notwithstanding his stay in London he will always make suit with his tithing and will at no time claim any liberty contrary to the lord's will and will come to the lord whenever the lord wills."

The lad was free to remain in London, provided, he sent 10% of his earnings to his lord and promised to return to Bec upon the lord's command. In addition, his right to remain in London was conditioned upon four other persons being willing to compensate the lord for the loss of income should the lad fail to return when commanded, or if he failed to remit the sums promised.

Clearly, the lord had an economic interest in this deal: he did not need to feed, shelter, or clothe the lad, and still received a tenth of his earnings. In return the lad promised that he would return to the personal service of the lord upon demand.

The case does not inform us how the lad came to be in London to begin with. Was he a runaway who was found and had to make a deal to avoid harsh punishment? Was he tasked with some personal errand for the lord and then failed to return as expected? We simply do not know. But it does raise an interesting point for the modern world and how things have changed.

When was the last time you had to post bond with your employer so you could take a vacation?

CHARLES GAUNCE is the Legal Reference Librarian at the University of Texas at El Paso.

What is Technology Doing to the *Bill of Rights*?

by David J. Ferrell

In the past few months, Congress and almost everyone else in America has been debating the *Bill of Rights*, primarily the *Second Amendment* right to bear arms and its relevance to 21st century America. But who is discussing the *Fourth Amendment*, in particular the protection against unreasonable searches and seizures? In April, 2013, Americans discovered how little *Fourth Amendment* privacy they have in their electronic communications.

In mid April, 2013, a Freedom of Information Act request by the ACLU revealed that the Internal Revenue Service claimed the authority to read our and our clients' emails, instant messages, and text messages, without the bother of a warrant. The IRS pointed to authority granted by the *Electronic Communications Privacy Act* (ECPA - 18 USC § 2510 *et seq*). This statute was written and passed in 1986, before electronic communications and cell phones were essential to everyday life. Yet, based on this ancient law (ancient - when it comes to electronic data), the IRS believes it can access our emails, without warning and without notification, once opened or left on a third-party server for more than 180 days. Had those same communications been sent on paper, the IRS would need to get a judge to sign a warrant for them.

What is really scary is the fact that the ECPA has gone almost three decades without substantial revision. No one can dispute that we have seen a technological revolution since

1986, and the internet is now the main communication force within everyday life and cloud computing is an essential part of doing private and governmental business.

How many emails or text messages did you send in 1986? FEW, if ANY. Now, over one hundred and forty billion emails are sent every day for business and personal purposes. There is no way that Congress could have envisioned the enormous growth of this new technology. Government has manifested a preference for electronic records--for example, in health care, social security, etc. Every ideological position (liberals, conservatives, and independents for legislative reform) should be on the same page to protect privacy from any unauthorized intrusion, private and governmental. Self--anointed government agencies should not presume that their ends justify their means. We, as lawyers, are well acquainted with due process that requires an orderly method to acquire information, ie. probable cause and a warrant from a neutral and detached magistrate. Did the separation of powers doctrine slip out the back door? A warrant may not be convenient for those who want the information, but LIBERTY is not a concept rooted in convenience.

At present, it appears that some think the ECPA allows government officials to invade all of our/our clients' electronic private lives based on hunches and suspicions. An unequivocal extension of the standard that exists for paper records to those stored electronically is a common-sense solution that strengthens individual liberties, while giving government a single standard across all platforms of communication.

We all know that the FBI, IRS and other government agencies can easily gain access to our and/or our clients' emails and phone records. It appears that some of these agencies do not think its easy enough for them to listen in on conversations in real-time, as they need a warrant.

In a recent talk given by FBI general council Andrew Weissmann to the American Bar Association, he discussed how the increased use of cloud services like Gchat, Google Voice, Gmail, Dropbox and Skype have made it difficult for the FBI and other law enforcement and intelligence agencies to monitor these services in real time. Because Google uses SSL (Secure Socket Layer) encryption to communicate between the various communication device (Ipads, IPhones, Android Pads and other smart cell phones, *etc*.) and the Google servers, the FBI is forced to get this information directly from Google, instead of just intercepting the data themselves. The laws and policies surrounding this issue are somewhat mysterious and convoluted.

In order to understand what the FBI wants to do, let us explore again the 1986 *Electronic Communications Privacy Act* (ECPA). This essentially extended the laws that applied to wiretaps to also cover any form of digital communication (email,VOIP, chat services etc). This act also provides that if a government agency has the legal right to access this information (obviously in their own opinion, ie IRS above), companies that store your data are compelled to provide it, and are required to have systems set up that allow for law enforcement and intelligence agencies to easily spy on their customers.

This does not apply to **cloud services**, because in 1994 congress passed the ***Communications Assistance for Law Enforcement Act*** (CALEA, 47 USC 1001, *et. seq*). This statute requires only phone companies and internet providers to give private information to government agencies that have the legal right to obtain them. Since a company that maintains cloud services like Google or Skype do not fall into either of those categories, they are only legally required to turn archived conversations over to organizations like the FBI. That means that presently, Google, Dropbox and Facebook are not legally compelled to have systems in place to allow for real-time spying on their users. The FBI wants to change that in 2013. Remember, CALEA does require companies like Google to provide "Technical assistance" to the FBI when the agency is listening in on conversations in real-time. Title III, aka, "The Wiretap Act," has provisions that force companies to provide this technical assistance. But, it appears that the FBI wants Google to actually do the surveillance for them, and wants a Congressional mandate (statute) to deputize private internet companies to gather the desired information. Essentially, the FBI is frustrated that it doesn't have the power to strong-arm corporations like Google, Facebook, and Skype into spying on people like you, me and OUR CLIENTS with or without a warrant signed by a judge.

We know that presidential executive orders in the past have bypassed Congress and allowed for warrant-less wiretapping and surveillance of American citizens. We now see a ramping up of a domestic drone program to allow for real-time monitoring of private citizens here in the United States. As the various agencies fight for more power to force private companies to help them spy on their own domestic users' conversations, as they happen, it is important that Americans pay attention to these issues. Security and safety are important, and it is safe to say that most Americans want agencies like the FBI to have the power to do what they need to keep us safe. A survey published in November 2001 (right after 9-11) indicated that over seventy percent of those responding to the survey were willing to give up basic freedoms to ensure safety.

Law-enforcement and intelligence agencies have proven that they cannot be trusted with unlimited power to monitor a free people. World history has proven that anyone with unlimited power will abuse it. That is why we have three guy wires on our governmental antenna, all pulling in their separate and counterpoising directions. In this way, the liberty antenna is straight and true. When one guy wire attempts to pull with more force, the other guy wires need to ratchet up and apply the power of freedom restraint. In the eighteenth century Benjamin Franklin said: They that can give up essential liberty to obtain a little temporary safety deserve neither safety nor liberty.

DAVID J. FERRELL is an El Paso attorney specializing in probate and criminal law. He also assists law firms in development of their computer trial and law office technology. He serves on the WEB Services Committee of the State Bar of Texas.

Governor Rick Perry signs the Chief Justice Jack Pope Act

By Randy Chapman

On May 28, 2013, Governor Rick Perry signed into law House Bill 1445 that expands the transfer of civil penalties collected by the Attorney General's office for expenditure by the Supreme Court for grants by the Texas Access to Justice Foundation for civil Legal Aid programs. The bill honors Justice Pope who first became a judge in 1946, before the United States Supreme Court opinion in *Gideon v. Wainright*; who as Chief Justice utilized the Court's inherent authority under the Texas Constitution to order the creation of the Texas IOLTA program; and who, still working for equal justice under the law, turned 100 years old last month.

Randy Chapman is Director of Texas Legal Services Center, located in Austin, Texas

Chief Justice Jack Pope at the signing of the Chief Justice Jack Pope Act

El Paso Bar Association endorses Access to Justice campaign

By Carlos Eduardo Cárdenas

This year the ATJ Commission is increasing its efforts in the endorsement and support of the Access to Justice Campaign on the State Bar of Texas Annual Dues Statement. The ATJ Foundation and Commission are committed to ensuring that all Texans have meaningful access to the civil justice system. As you know, every year Texas lawyers have the option to contribute $150 towards access to justice on their Bar dues statement. All contributions raised go to either the Texas Access to Justice Foundation or the Texas Bar Foundation to fund direct civil legal services to the poor..

Historically, only about 7% of licensed attorneys in Texas contribute to increase legal access to low income Texans through their dues statements. This year the ATJ Commission is not only seeking to increase the percentage of those attorneys participating in the Campaign, but also requesting contributions greater than the suggested $150. In that effort, the Commission has created the Champion of Justice Society. Lawyers can show their strong support of access to justice by contributing at a higher level. Attorneys can become a member of the Champion of Justice Society, at the Sustaining ($1,000 for 5 years), Gold ($1,000+), Silver ($500 - $999), and Bronze ($250 - $499) levels. Membership benefits include:

• Invitation to the Champion of Justice Society reception as well as recognition at the State Bar of Texas annual meeting on Thursday, June 20th at 5 p.m. at the Dallas Anatole,

•The Champion of Justice Society crest displayed next the attorney's name on the State Bar website "Find a Lawyer" page,

•Listing in the Texas Bar Journal and the Commission's Update newsletter, website, and Facebook page.

This year, more than ever, funding for legal services is critical. Federal funding for legal services was cut 15% in 2012. Stagnant state funding, persistent shortfalls in IOLTA revenues, and a half a million dollar loss in revenues due to the sequester have legal services in Texas in a dire financial situation; forcing these organizations to lay off employees. For example, Texas Rio Grande Legal Aid which serves the legal needs of low-income and poor El Pasoans, announced recently that they are implementing a 22% workforce reduction, including the closing of their Del Rio office.

On behalf of the 6 million Texans who qualify for Legal Aid and the 80% of those poor and low-income Texans whose civil legal needs are not met, the Commission is hopeful that El Paso lawyers will participate in this effort and contribute to meaningful "justice for all".

CARLOS EDUARDO CÁRDENAS
Is an El Paso attorney specializing in personal injury law. He is presently a member of the Texas Access to Justice Commission.

Association NEWS

El Paso County Legal Support Association

■The El Paso County Legal Support Association held its installation of officers for the 2013-14 term on May 8, 2013 with the Honorable M. Sue Kurita as installing marshal. New slate of officers are as follows:

Monica Acuña - President
Corina Mercier - President Elect
Martha Sena - Vice President
Jesse Molinar -Treasurer
Carol Gutierrez -Director
Patty Villalobos - Parliamentarian
Liliana Flaco - Historian

■ The El Paso County Legal Support Association's June Education meeting will be held on Wednesday, June 12, 2013 at noon at the El Paso Club, 201 E. Main, 18th Floor. Guest Speaker will be Bobbi Guerra who will speak on "The ABC's of Family Law"

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El Paso Young Lawyers Association
Run for Justice

June 9, 2013 Cathedral High School 7:30 A.M. 1309 N. Stanton St. El Paso, Texas 79902

Registration fees
Individual registration: **$20.00**
Teams registration: **$15.00** per team member
(*minimum 10 members for discount*)
Online registration- **$20.00** (plus aplicable fees)
No later than June 5, 2013
at www.raceadventuresunlimited.com
Mail in registration **$20.00** postmarked,
No later than June 3, 2013
Make check payable to: Race Adventures.
Please put ¨Run for Justice¨in the memo line.
Mail to: 3233 N. Mesa Suite 205, El Paso TX 79902
Late/Race Day Registration: **$25.00**
*registration fees are non-refundable
First 150 registrant guaranteed race t-shirt

Packet pick up: Saturday June 8, 2013, Cathedral High School Gym - 10:00 a.m. to 3:00 p.m.

Race Day Registration/Packet pick up:
6:30 a.m. - 7.15 a.m.

Awards & Prizes!!!
Refreshments available at finish line
Trophy to Overall Male & Female
Trophy to Largest Team
Medals to Top 3 finishers in male & female age groups 0-14, 15-19, 20-29, 30-39, 40-49, 50-59, 60-69, 70 & over.

****Course description:** Cathedral to intersection of Rim and Dede & back

Proceeds benefit
Return Lady Justice Fund: Hounchen Community Center; El Paso Young Layers Association

Name: _____
First Last

Address: _____

City, State, Zip Code: _____

Age on Race Day: _____ **Sex: M/F**

Event:(Circle one) 5k Run 1Mile walk

Telephone: _____ **E-mail:** _____

T-Shirt Size: (Please circle one) S M L XL

Waiver Information

In consideration of my application being accepted, I hereby for my self, my heirs, personal representatives and excentors, waive, release and forever discharge any and all injuries which might be suffered by me in this event. I attest and verify than I am physically fit and have sufficiently trained to complete this race. I hereby grant my full permission to use my name, photographs, videotapes and recordings of this event for any legitimate purpose without compensation/remuneration.

Signature: _____ Date: _____
(parent or guardian signature if under 18)
Contact info: Mike Coulter 915.274.5222