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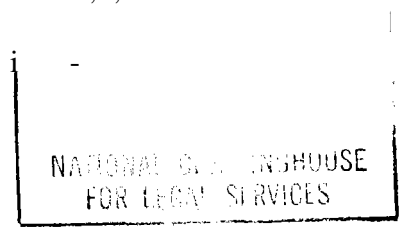
NO. 09-95-0019%CV

IN THE COURT OF APPEALS  
FOR THE NINTH SUPREME JUDICIAL DISTRICT  
BEAUMONT, TEXAS

GERALDINE D. (SMART) G&ENFIELD  
V.  
DENNIS K. SMART

7  
1-;

BRIEF OF APPELLANT IN SUPPORT OF  
PETITION FOR WRIT OF ERROR



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NO. 09-95-00198~CV

GERALDINE D. (SMART) GREENFIELD \* IN THE COURT OF APPEALS  
\*

V. \* FORTHENINTH SUPREME  
\* JUDICIAL DISTRICT OF TEXAS,  
\*  
DENNIS K. SMART  
\* BEAUMONT, TEXAS

LIST OF PARTIES

Pursuant to Texas Rules of Appellate Procedure Rule 74(a), the following is a list of names and addresses of all parties to the trial court's final judgment and their counsel:

Petitioner: Dennis K. Smart  
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Buna, Jasper County, Texas

Attorney for Petitioner: Michael s. Ratcliff, Esq.  
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Respondent: Geraldine D. (Smart) Greenfield  
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Attorney for Respondent: Steven E. Hollimon, Esq.  
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NO. 09-95-00198~CV

GERALDINE D. (SMART) GREENFIELD \* IN THE COURT OF APPEALS

V. \* FORTHENINTH SUPREME  
\* JUDICIAL DISTRICT OF TEXAS,  
DENNIS K. SMART \*  
\* BEAUMONT, TEXAS

#### PRELIMINARY STATEMENT

This is a petition by Appellant, GERALDINE D. (SMART) GREENFIELD, for a writ of error. Appellee, DENNIS K. SMART, obtained a postanswer default judgment in the District Court of Jasper County, Texas, against Appellant without notice to Appellant pursuant to Rules 245 and 21a of the Texas Rules of Civil Procedure or without reasonable notice of trial. Appellant's timely motion for new trial was considered by the District Court of Jasper County, Texas, but was overruled by Order Denying New Trial dated March 27,1995. The trial court abused its discretion in refusing to grant a new trial in this cause. Further, the failure of Appellee to give notice of trial to Appellant was a violation of due process guaranteed by the Fourteenth Amendment of the United States Constitution and is, therefore, grounds for reversal of the default judgment obtained in this cause.

#### STATEMENT OF FACTS

The pertinent facts are set forth in the verified Motion for New Trial, the Petition for Writ of Error and the Court decrees and orders attached thereto.

On December 01,1993, DENNIS K. SMART, filed an Original Petition in Suit Affecting the Parent-Child Relationship in the District Court of Jasper County, Texas. This suit was styled In the Interest of James Edward Smart and numbered as cause 16,680 /1. In this Original Petition, DENNIS KING SMART, sought the appointment of sole managing conservator of the subject child to which, as stated in his petition, "[n]o Court has [ad] continuing jurisdiction . . . of the child, subject of this suit" and "no Court ordered conservatorship, guardianship, or other Court ordered relationships in regards to the child," were in effect /2. This petition further states that the parents of the subject child had divorced and that the child's mother, GERALDINE DAVIS (SMART) GREENFIELD, Respondent, was currently residing in Beauregard Parish, Louisiana

On or about December 06,1994, DENNIS KING SMART filed a Motion to Modify in Suit Affecting a Parent-child Relationship in the District Court of Jasper County, Texas, in cause numbered 16,428 /3.

In this cause, DENNIS KING SMART states in his Motion to Modify, in pertinent part, as follows:

“Your Movant is a former spouse of the Respondent Joint Custodial or Managing Conservator of the child the subject of this suit. Your Movant would show unto the Court that the parties obtained a divorce in the 36th Judicial District, Parish of Beauregard, State of Louisiana, under Cause No. C-85-133, styled Geraldine D. Smart vs. Dennis K. Smart. A Judgment of Final Divorce was entered on March 10,1986.” 14

Although the parties’ child, JAMBS EDWARD SMART, was born to them on July 16, 1985 /5, he was not mentioned as a subject child in their divorce proceeding in Cause No. C-85-133, in the 36th Judicial District, Parish of Beauregard, State of Louisiana. The District Court of Jasper County, Texas, issued Temporary Orders regarding this child in cause numbered 16,680 on January 10,1994 /6.

Under cover of letter dated December 05,1994, the attorney for DENNIS KING SMART sent a copy of a Motion to Mod@ in Suit A&cting Parent-Child Relationship and a copy of an Application to Extend Protective Order in cause number 16,428 to the attorney of record for GERALDINE (SMART) GREENFIELD /7. Upon receipt of Appellee’s letter dated December 05,1994 and accompanying documents, Appellant was thereby notified that a hearing on said Motion and Application was set for December 16,1994 at 9:00 o’clock am. in the Jasper County Courthouse, Jasper, Texas /8.

Appellee’s cover letter references cause numbered 16,680, In the Interest of James Edward Smart, but no mention of a trial setting in this case is made in its content /9. Further, a form, unsigned, order was sent as an accompanying document with Appellee’s letter dated December 05,1994 /10. This document is styled In the Interest of James Edward Smart, Minor Child and is numbered 16,680. However, this document is entitled ORDER SETTING HEARING ON MOTION TO MODIFY IN SUIT AFFECTINGPARENT CHILD RELATIONSHIP. It reads as follows:

“IT IS ORDERED that the Clerk shall issue notice to Respondent, GERALDINE D. (SMART) GREENFIELD, to appear, and Respondent is hereby ordered to appear in person, before this Court in the courthouse at Jasper, Jasper County, Texas, on the 16th day of December, 1994, at 9:00 o’clock A.M. for &al hearing in this cause.” /1 1

The Clerk of the District Court of Jasper County, Texas, did not issue notice to the Respondent of a final hearing on Petitioner’s Original Petition in Suit Affecting Parent-Child Relationship in cause numbered 16,680. The attorney of record for the Respondent in cause number 16,680 attempted to obtain clarification of the cover letter and form order from counsel for Petitioner prior to December 16,1994, but was unable to do so /12.

On December 16,1994, a final hearing in cause numbered 16,680 was held and GERALDINE D. (SMART) GREENFIELD, Respondent, and her attorney of record were not present. As a result, on January 09,1995, a default judgment entitled ORDER ON PETITION ON SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP was signed by the presiding judge of the District Court of Jasper County, Texas /13. There is no record on file with the trial court of a Motion to Modify in Suit Affecting Parent Child Relationship being heard on December 16,1994, in cause numbered 16,680.

## ARGUMENT

Failure to comply with the rules of notice in a contested case deprives a party of his constitutional right to be present at the hearing, to voice his objections in an appropriate manner, and results in a violation of fundamental due process. *Armstrong v. Manzo*, 380 U.S. 545,550,85 S.Ct. 1187,1190,14L.Ed62(1965);*Langdale v. Villamil*, 813 S.W.2d 187,191 (Tex. App.-Houston [ 14th Dist.] 1991). Contrary to the recitation in the ORDER ON PETITION ON SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP that “[t]he Respondent, GERALDINE D. (SMART) GREENFIELD . . . [was] duly and properly notified.” /14, Appellant was not given sufficient or adequate notice of trial 115. Our courts have repeatedly held that due process requires: 1) a party be given notice of a lawsuit, and 2) an opportunity to be heard *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306,3 12, 70 S.Ct. 652,656,94 LEd. 865 (1950); *Cunningham v. Parkdale Bank*, 660 SW.2d 810,813 (Tex.1983); *Anderson v. Anderson*, 698 SW.2d 397,399 (Tex.App.-Houston [14th] 1985, Dismissed). If a timely answer has been filed, or the defendant [respondent] has otherwise made an appearance, in a contested case, he is entitled to notice of the trial setting as a matter of due process. *Peralta v. Heights Medical Center, Inc., Inc.*, 485 U.S. 80,84-86, 108 S.Ct. 896,899,99 LEd. 2d 75 (1988); *Gonzales v. State*, 832 SW.2d 706,707 (Tex. App.-Corpus Christi 1992, no writ); *Langdale v. Villamil*, 813 SW.2d 187,190-91 (Tex.App.-Houston [14th Dist.] 1991, no writ); *Brunei v. Bruneio*, 890 SW.2d 150, 154 (Tex.App.-Corpus Christi 1994, no writ). Accordingly, the notice requirements of Rule 245 are satisfied by serving the party himself, his agent, or his attorney, under the provisions of Texas Rule of Civil Procedure 21a. *Brunei v. Bruneio*, supra, @ 155. These requirements are mandatory absent agreement between the parties. *Mansfield State Bank v. Cohn*, 573 SW.2d 181,184 (Tex. 1978); *Anderson v. Anderson*, supra, (ZJ 399).

Rules 245 and 21(a) of the Texas Rules of Civil Procedure read, in pertinent part, as follows:

Rule 245: The court may set contested cases on written request of any party, or on the court’s own motion, with reasonable notice of not less than forty-five days to the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties. . . .

Rule 21 a: Every notice required by these rules, and every pleading, plea, motion or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party’s duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery

or by certified or registered mail, to the party's last known address, or by telephonic document transfer to the recipient's current telecopier number, or by such other manner as the court in its discretion may direct....

Once a judgment has been obtained, the law presumes that each party had an opportunity to be heard because proper notice to the parties was given. *Brunei0 v. Bruneio*, supra, @ 155. Notice of a trial setting ordinarily does not appear in the transcript and need not affirmatively appear in the record. Id. In order to rebut this presumption, there must be a showing of lack of notice by competent evidence. Id. See *Jones v. Dept. of Public Safety*, 803 SW.2d 760,761 (Tex.App.-Houston [14th Dist.] 1991, no writ); *Welbom-Hosler v. Hosler*, 870 SW.2d 323, 328 (Tex.App.-Houston [14th Dist. J 1994, no writ). The appellate court will look only to the record on file in the trial court to determine the invalidity of the judgment. *Bloom v. Bloom*, 767 SW.2d 463 (Tex.App.-San Antonio 1989 - Denied, Mand Overr).

The appellate court will not reverse a trial court's ruling on a motion for new trial in the absence of an abuse of discretion. *Stum v. Stum*, 845 SW.2d 411 (Tex.App.-Forth Worth 1992, no writ); *Hanners v. State Bar of Texas*, 860 SW.2d 903,908( Tex.App.-Dallas 1993, no writ).

POINT OF ERROR ONE: IT WAS ERROR FOR THE TRIAL COURT TO PROCEED TO TRIALWHENANANSWERHADBEENFILEDANDAN APPEARANCE MADE WITHOUT GIVINGNOTICE OF TRIALSETTING

On record in the trial court is the Order Setting Hearing on Motion to Modify in Suit Affecting Parent-Child Relationship /16. Appellant never received a copy of this signed order. This document was signed by a presiding judge of the trial court on December 08,1994 and it bears a file stamp dated December 09,1994 /17. There is no record on file with the trial court of any previous trial setting of this cause and there is no record of an agreement between the parties as to a setting date for trial on Appellee's Original Petition In Suit Affecting the Parent-Child Relationship. Therefore, the Respondent was entitled to forty-five days notice of trial in accordance with Rule 245 of the Texas Rules of Civil Procedure. The Order Setting Hearing on Motion to Modify does not comply with Rule 245 of the Texas Rules of Civil Procedure in that it does not provide forty-five days notice and it is not adequate as a result of its title 118. *Brunei0 v. Bruneio*, 890 SW.2D 150,155 (Tex.App.-Corpus Christi 1994, no writ); *Langdale v. V&nil*, 813 SW.2d 187, 191 (Tex.App.-Houston [14th Dist.] 1991, no writ).

Moreover, the record on file with the trial court is devoid of any showing that the signed and filed Order for hearing on Motion to Modify was served on Respondent pursuant to Rule 211a of the Texas Rules of Civil Procedure.

Appellant admits that an unsigned copy of the Order Setting Hearing on Motion to Modify was received from Appellee under cover of letter dated December 05,1994, but Appellant denies receiving notice of trial (or final hearing) on Appellee's Original Petition in Suit Affecting the Parent-Child Relationship when inquiry was made to Petitioner's attorney of

record /19. Appellant received notice of hearing on Appellee's Motion to Modify in Suit Affecting the Parent-child Relationship and on Appellee's Application to Extend Protective Order as stated in his cover letter dated December 05,1994 /20.

Further, the Order for hearing on Motion to Modify raises the question of whether the unsigned order provided reasonable sufficient notice. The heading of Petitioner's cover letter makes reference to causes numbered 16,680 and 16,428. However, the content of Petitioner's notice letter does not specifically give notice of trial or final hearing on Petitioner's Original Petition In Suit Affecting the Parent-child Relationship:

"Enclosed you will find a Motion to Modify in Suit Affecting Parent-Child Relationship and an Application to Extend Protective Order in Cause No. 16,428.

Both matters have been set for final hearing on December 16,1994 at 9:00 o'clock A.M. in the Jasper County Courthouse, Jasper, Texas 75951." /21

There is no mention in this letter of an order setting final hearing on cause numbered 16,680 or that an unsigned form order was also enclosed. When counsel for Respondent attempted to clarify Petitioner's unsigned form order entitled Order Setting Hearing on Motion to Modify in Suit Affecting Parent-child Relationship, he was told that the Motion to Modify and the Application to Extend Protective Order in cause 16,428 would be heard on December 16, 1994.

In *Strum v. Stum*, 845 SW.2d 407 (Tex.App.-Fort Worth 1992, no writ), that Court of Appeals considered whether an unsigned order provided reasonably sufficient notice of trial in accordance with Rule 245 of the Texas Rules of Civil Procedure and local rules. In its determination of the facts, the appellate court found that a temporary injunction setting the case for trial the week of March 02,1992, was signed and filed on October 15,1991; that a copy of this order was sent to appellants' attorney by appellee's attorney by telephonic document transfer before it was signed on October 03,1991; that on October 03,1991, appellants' attorney mailed appellants a copy of this unsigned order under cover of letter which explained that the unsigned order would be signed and entered by the court unless appellants objected; that one of the appellants contacted the attorney to discuss the order after receipt of the letter and unsigned order and decided not to pose an objection; that the attorney did not send the appellants a signed order because he never received a signed copy; and that the attorney of record for appellants withdrew before trial of the case. *Stum v. Stum*, supra, @ p. 412. In affirming the trial court's decision overruling a motion for new trial, the appellate court held:

Considering these facts, we hold that appellants received sufficient notice of the trial setting under both the local rules and state procedural rules, even though a signed order was never sent to appellants. *Id*

In the case at bar, Appellee's cover letter dated December 05, 1994 and unsigned order, and the signed order which was filed with the court on December 09, 1994 but a copy of which was never mailed to Appellant, failed to give Appellant sufficient notice of trial on Petitioner's Original Petition in Suit Affecting Parent-Child Relationship in accordance with Rule 245 of the Texas Rules of Civil Procedure.

Notwithstanding the requirement of forty-five days notice, Appellee's attempted notice was not reasonable. Appellant was left to guess whether trial on Appellee's Original Petition in Suit Affecting the Parent-Child Relationship was set for trial /22. Further, assume that the attorney for Appellant telephoned the Clerk of the trial Court to ascertain whether trial had been set as Appellee stated in the hearing on motion for new trial /23, the Clerk would have informed Appellant that an ORDER SETTING HEARING ON MOTION TO MODIFY IN SUIT AFFECTING PARENT-CHILD RELATIONSHIP was in the court's tie setting final hearing 124.

Therefore, the trial court's Order on Petition in Suit Affecting Parent-Child Relationship is void for lack of due process guaranteed by our United States Constitution and courts and should be vacated.

#### POINT OF ERROR TWO: THE TRIAL COURT ERRED BY ITS REFUSAL TO GRANT A NEW TRIAL

The record of the trial court is completely absent of any notice to Appellant of a setting for trial or final hearing on Appellee's Original Petition in Suit affecting Parent-Child Relationship. Appellant's motion for new trial, which was timely filed, informed the trial court that Appellee failed to give Appellant notice of a trial setting on their Petition in Suit Affecting Parent-Child Relationship in accordance with Rule 245 of the Texas Rules of Civil Procedure, and that no notice of trial of this cause was effectively or actually given /25.

On hearing of the motion for new trial, the trial court took judicial notice of the signed Order Setting Hearing on Motion to Modify and thereby found that notice was given and proceeded to overrule Appellant's motion /26. However, the trial court did not determine whether that order setting hearing was sufficient notice given the context or circumstance of the instant case, whether the signed order was ever served upon Appellant prior to trial, or whether Appellant's failure to appear was intentional or due to conscious indifference /27.

The test to determine whether the trial court abused its discretion in refusing to grant a new trial in a case decided by a post-answer default judgment is threefold 1) the failure of appellant to appear for trial must not have been intentional, or the result of conscious indifference on their part, but due to a mistake or an accident; 2) the motion for new trial sets up a meritorious defense; and 3) the granting thereof will occasion no delay or otherwise work injury to appellee. See *Caddock v. Sunshine Bus Lines*, 134 Tex. 388, 133 SW.2d 124 (1939); *Stum v. Stur* supra, @ 411.

A person who is not notified of a trial setting and consequently suffers a default judgment need not establish a meritorious defense to be entitled to a new trial. *Hanners v. State Bar of Texas*, 860 SW.2d 903, 907 (TexApp.-Dallas 1993, no writ); See *Bumeio*, supra; *Langdale v.*

V&nil, supra; Anderson v. Anderson 698 SW.2d 397,399 (Tex.App.-Houston [14th Dist.] 1985, Dismissed).

Appellant successfully met her burden of rebutting the presumption that proper notice to the parties of hearing on Appellee's Original Petition in Suit Affecting the Parent-Child Relationship was given by her verified Motion for New Trial supported by the uncontroverted affidavits. Strackbein v. Prewitt, 671 SW.2d 37,38-39 (Tex. 1984). Appellant states in her uncontroverted affidavits that no notice of a trial setting on Petitioner's Original Petition in Suit Affecting the Parent-Child Relationship was served upon her in the case at bar; that her failure to appear at trial was due to lack of notice and was not intentional or a result of conscious interference; that she received notice of final hearing on Motion to Modify in Suit Affecting Parent-Child Relationship in cause numbered. 16,428; that she received notice of final hearing on an Application to Extend Protective Order in cause numbered 16,428 /28. Appellant's uncontroverted affidavit also established a meritorious defense in that it states various reasons why it is in the best interest of the subject child that appellant be appointed as sole managing conservator and showed that the granting of a new trial would not cause delay or injury to Appellee 129.

Appellee's unsigned order sent under cover of letter dated December 05,1994 /30 was not sufficient notice of trial for the following reasons:

- a. the cover letter makes no mention of a trial setting on Appellee's Original Petition in Suit Affecting the Parent-Child Relationship;
- b. the cover letter makes no mention of an enclosed unsigned order which intended to set a final hearing on Appellee's Original Petition in Suit Affecting the Parent-Child Relationship on December 16,1994, and failing objection thereto said case would be so set for trial;
- c. the appellee's unsigned order was entitled Order Setting Hearing on Motion to Modify in Suit Affecting Parent-Child Relationship in cause 16,680; and
- d. appellee's cover letter explicitly states in content that a Motion to Modify in Suit Affecting Parent-Child Relationship and an Application to Extend Protective Order in Cause No. 16,428 were enclosed. And, further, that both matters have been set for final hearing on December 16, 1994... 131.

Appellee's unsigned order and cover letter do not constitute notice of trial setting on Appellee's ORIGINAL PETITION IN SUIT AFFECTING PARENT-CHILD RELATIONSHIP /32.

See *Stun v. Stun*, supra, @ 412; *Mansfield State Bank v. Cohn*, 573 SW.2d 181,182-183 (Tex. 1978). Appellant's attorney of record attempted to gather information that would clarify the discrepancy created by Appellee's cover letter of December OS,1995 and unsigned order setting hearing on motion to modify in suit affecting the parent-child relationship in the instant case but was unable to do so /33. Therefore, Appellant's failure to appear on December 16, 1994 was not intentional or due to conscious indifference.

Appellant's motion for new trial met the requirements of law set out in *Craddock* as a result the trial court abused its discretion in refusing to grant a new trial. *Strackbein v. Prewitt*, supra @ 39.

### CONCLUSION

Appellant's writ of error should be granted because Appellee failed to give Appellant notice of final hearing on the Original Petition in Suit A.&cting the Parent-Child Relationship in this cause in accordance with Rules 245 and 21a of the Texas Rules of Civil Procedure. Contrary to the recitation in the ORDER ON PETITION ON SUIT AFFECTING THE PARENT-CHILD RELATIONSHES that "[t]he Respondent, GERALDINE D. (SMART) GREENFIELD . . . [was] duly and properly notified.. . ", Appellant was not given reasonable notice of not less than forty-five days to the parties first setting for trial.

This honorable Court should find that the trial court abused its discretion in overruling Appellant's motion for new trial. Appellant's uncontroverted affidavits satisfied the *Craddock* test and therefore the trial court should have granted the motion for new trial.

Respectfully submitted,

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### FOOTNOTES:

1. See Transcript p.02.

2. Id DENNIS KING SMART tied an Application for Protective Order on June 15,1993, in the District Court of Jasper County, styled In the Matter of the Marriage of Dennis K. Smart and Geraldine D. Smart and In the Interest of Dennis King Smart, II and James Edward Smart, Minor Children and numbered 16,428, and obtained an ex parte protective order that same day. The application for protective order was heard on December 20,1993, and Mr. Smart obtained a Protective Order in this proceeding on January 10,1994.

3. See Transcript p.49.

4. Id.

5. See Transcript pp. 02,36.

6. Transcript p. 15.

7. Motion for New Trial, See Transcript pp. 48,49,54.

8. See Id., Transcript p. 48.

9. Id.

10. Transcript p. 58.

11. Id.

12. See Statement of Facts pp. 3,4,5,6. At the hearing on Motion for New Trial, counsel for the Respondent testified that he had a telephone conversation with counsel for Petitioner regarding the matters to be heard by the Jasper County District Court on December 16,1994 and was told that the Motion to Modify In Suit Affecting a Parent-Child Relationship and Application for Extension of Protective Orders would be heard.

13. Transcript p. 35.

14. Id.

15. See Transcript pp. 30,41-58.

16. Transcript p. 30.

17. Transcript p. 30.

18. Id.

19. See Footnote 12.

20. Id.

21. Transcript p. 48.
22. Transcript pp.48,49, 54, 56, 58.
23. Transcript p.05. Here Appellee seems to admit that his correspondence to Appellant and accompanying documents were not clear. Due to the title of the signed order setting hearing, the issue of notice of trial on the Original Petition was not clear to the District Clerk as well.
24. Transcript p. 30.
25. Transcript p.41, See footnote 12.
26. Statement of Facts p. 07.
27. See TPX.RCIV.P. 245,21a (Vernon Supp. 1995); Craddock v. Sunshine Bus Lines, 134 Tex 388,133 SW.2d 124 (1939).
28. Transcript pp. 45,46.
29. Id.
30. See Transcript pp. 48,58.
- 3 1. See Transcript p. 48.
32. Transcript pp.48,58.
33. See footnotes 12 and 22.

## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Appellant's Brief in Support of Appellant's Writ of Error has been served on Dennis K. Smart, Appellee, P.O. Box 1072, Buua, Texas 77612 and to Michael Ratcm, Attorney at Law, P.O. Box 987, Jasper, Texas 7595 1, respectively, by certified mail, return of domestic receipt requested, in a wrapper properly addressed to each, by depositing same, postage prepaid, in au official depository under care and custody of the United States Postal Service on this the 1 lth day of August, 1995.

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Steven E. Hollimon

## INDEX OF AUTHORITIES

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