

Extraordinary Writs

25th Annual Juvenile Law Conference

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What Is An Extraordinary Writ?

A judicial order issued, generally by an appellate court, to make available the remedies not regularly within the powers of lower courts

Several types, but focus here is on:

Writ of mandamus

Equitable bill of review

Writ of Habeas Corpus

What Is An Extraordinary Writ?

“These sequestered nooks are the public offices of the legal profession, where the writs are issued, judgments signed, declarations filed, and numerous other ingenious machines put in motion for the torture and torment of His Majesty’s subjects, and the comfort and emolument of the practitioners of the law.”

- The Pickwick Papers

Writ of Mandamus

A legal remedy governed by equitable principles that permits appellate courts to review trial court proceedings before the trial court's jurisdiction in the matter has ended.

Authority is given to Supreme Court and courts of appeals by:

1. The Texas Constitution
art. V §§ 3, 6
2. The Texas Government Code
§§ 22.002, 22.221(a)

Writ of Mandamus

Odds are against you:

Annual Report of the Texas Judicial System, Fiscal Year 2010

Total petitions for writ of mandamus filed - 266

Total petitions for writ of mandamus granted - 13* (or 4.8%)

*including conditional writs granted

Writ of Mandamus

 SPECIAL COURT REPORT
OFFICIAL COURT REPORTER
COUNTY CLERK

MR Case No. 11-0407 DATE: 1/27/2012
COURT # 04.11-00104-CV FILE # 2009-100-03651 00.320
TITLE: IN RE: M.L. COURT REPORTER'S OFFICE

Today the Supreme Court of Texas denied the petition for writ of mandamus as requested in the above-referenced case. The Motion to Seal is DISMISSED as moot.

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Writ of Mandamus

Elements of a ripe mandamus:

1. Clear abuse of discretion

Walker v. Packer, 827 S.W.2d 833, 839-840 (Tex. 1992)

2. No adequate remedy at law

In re Union Pac. Resources Co., 969 S.W.2d 427, 428-29 (Tex. 1998)

Writ of Mandamus

Clear Abuse of Discretion

"A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Walker v. Packer*

Two types of abuse of discretion:

1. **Factual Disputes** – Must show that trial court could reasonably have only one decision.

Liberty Nat'l Fire Ins. Co. v. Akin, 927 S.W.2d 627, 630 (Tex. 1996)

If there are factual disputes between the parties, mandamus is not appropriate.

2. **Error of Law**- If the trial court does not analyze or apply the law correctly, it commits an abuse of discretion. (less deference to trial court) *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 437 (Tex. 1997)

Writ of Mandamus

No Adequate Remedy at Law

- Relator unable to appeal the decision
- An appellate remedy is not inadequate merely because it involves more expense or delay than a writ of mandamus.

Walker 827 S.W.2d at 842

Filing

Filing The Writ

- Follow Texas Rules of Appellate Procedure Rule 52
- Follow Filing Rules of Local Court
- Generally, petition should be filed with court of appeals first.
 - Must show compelling reason for bypassing court of appeals if you file with the Supreme Court first.

Filing

1. File with appeals court
2. If petition denied, File a motion for rehearing under Rule 49
3. If rehearing is denied, File a motion for rehearing en banc
4. If rehearing en banc is denied, File with Supreme Court

Filing

Mandatory Electronic Filing Rules of Supreme Court

- Familiarize yourself with the rules
- Juvenile cases MUST be redacted
- Must sign up for specified e-filing service

Link to rules

- <http://www.supreme.courts.state.tx.us/rules/rules.asp>
- Guide to Creating Electronic Appellate Briefs
 - <http://www.supreme.courts.state.tx.us/pdf/AppellateBriefsOfTheFuture.pdf>

Equitable Bill of Review

"...an independent equitable action brought by a party to a former action seeking to set aside a judgment which is no longer appealable or subject to motion for new trial." *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979)

- Example: Judgment has been rendered against a party who had no knowledge or improper notice of the suit and the time for appeal and motion for new trial has passed.

- Can also be used if new discovery has been found that would change the outcome of the trial.

Equitable Bill of Review

- Not an appeal of the prior case, but an attack on the judgment of the prior case.

- Called an "independent" equitable action because it is filed as a new law suit.

- Defendant in the prior suit becomes the plaintiff.

Equitable Bill of Review

A bill-of-review plaintiff must prove three elements:

1. A meritorious defense to the cause of action alleged to support the judgment, or a meritorious claim,
2. Which he or she was prevented from making by the fraud, accident, or wrongful act of the opposing party or by official mistake, which is
3. Unmixed with the fault or negligence of the plaintiff.

Hanks v. Rosser, 378 S.W.2d 31, 34-35 (Tex. 1964)
Alexander v. Hagedorn, 226 S.W. 2d 996, 998 (Tex. 1950)

- Bill-of-review relief is available only if a party has exercised due diligence in pursuing all adequate legal remedies.

Wembley Investment Co. v. Herrera, 11 S.W.3d 924, 926-27 (Tex. 1999)

Equitable Bill of Review

Procedure — *Baker v. Goldsmith*, 582 S.W.2d 404 (Tex. 1979)

1. File a petition alleging with particularity the facts establishing the three elements.
2. Present, as a pretrial matter, prima facie proof to support the meritorious defense alleged in the petition.
3. In trial, prove by a preponderance of the evidence that you meet all three elements.
 - If plaintiff satisfies the burden, the underlying controversy between the parties is retried.
 - plaintiff can demand a jury trial for the bill of review hearing.

Writ of Habeas Corpus

A judicial mandate to a prison official ordering that an inmate be brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody.

Writ of Habeas Corpus

Authority

Adult — Texas Code of Criminal Procedure 11.07

Juvenile — Texas Constitution art. V, § 8

“District Court judges shall have the power to issue writs necessary to enforce their jurisdiction.”

• Juvenile cannot use 11.07

• *In re DeBrow*, 2001 WL 121103, (Tex.App.—San Antonio 2001, writ dismissed)

• *Ex parte Valle*, 104 S.W.3d 888 (Tex.Crim.App.2003)

Writ of Habeas Corpus

Relationship to appeal

- Supplements appeal, does not replace it.
- If direct appeal is available, it must be used instead of petition for habeas corpus.
 - Texas Family Code § 56.01 gives list of what juvenile can appeal.

Writ of Habeas Corpus

Juvenile writ of habeas can be used in two ways:

1. Post-adjudication – same as the adult habeas, used to attack convictions.
2. Pre-adjudication – used to contest a child's detention if the probable cause determination is not made within 48 hours as required by § 58.01 Texas Family Code.

Writ of Habeas Corpus

When to file

State – no time limit

Federal – one year

- The start time for this one year period can vary depending on the disposition of the case and is tolled in the event of an appeal.

Writ of Habeas Corpus

“Even an attorney of moderate talent can postpone doomsday year after year, for the system of appeals that pervades American jurisprudence amounts to a legalistic wheel of fortune, a game of chance, somewhat fixed in the favor of the criminal, that the participants play interminably.”

- Truman Capote

THE END

THANK YOU

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Grand Hyatt, San Antonio, Texas

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EXTRAORDINARY WRITS

An extraordinary writ is a judicial order issued, generally by an appellate court, to make available the remedies not regularly within the powers of lower courts. Although there are several types of extraordinary writs, this paper will focus on three: mandamus, equitable bill of review, and writs of habeas corpus, and how they can be applied in a juvenile case setting. Although it is not a complete “How To” handbook, this paper will outline the basic steps to take in writing and filing the various writs, the location of the rules that outline the steps to take, and several helpful practice tips along the way.

WRIT OF MANDAMUS

The Writ of Mandamus (mandamus) is a legal remedy governed by equitable principles that permits appellate courts to review trial court proceedings before the trial court’s jurisdiction in the matter has ended. It is allowed, in some cases, where interlocutory appeal is barred. The authority to issue writs of mandamus is given to the Supreme Court and courts of appeals by The Texas Constitution art. V, §§3, 6 and The Texas Government Code §§ 22.002, 22.221(a).

Before you get all worked up about the possibility of persuading the Appeals and/or Supreme Court of Texas to overturn the trial court’s ruling in your case, there are some factors you should consider. The odds are against you. If you file a writ of mandamus, in the Appeals Court or the Supreme Court of Texas, you will probably lose. According to the ANNUAL REPORT OF THE TEXAS JUDICIAL SYSTEM, FISCAL YEAR 2010, of the 266 petitions for writ of mandamus, the Supreme Court only granted (conditionally) 13 of them (4.8%). Further, mandamus is an extraordinary writ, only available in very limited

circumstances. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). Despite these sobering facts, mandamuses are filed quite frequently.

There are two elements to a case that make it ripe for mandamus. First, the action or inaction of the respondent constituted a clear abuse of discretion. *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992). Second, there must be no other adequate legal remedy at law. *In re Union Pac. Resources Co.*, 969 S.W.2d 427, 428-29 (Tex. 1998). If either or both of these elements are missing, a writ of mandamus will not be granted.

“A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Walker*, 827 S.W.2d at 839. The issue of abuse of discretion can be broken down into two subsections. The first subsection is factual disputes. If there are factual disputes between the parties, mandamus is not appropriate. When the trial court’s decision is based on the resolution of factual issues, the relator must establish that the trial could reasonably have reached only one decision. *Id.* at 839-40. Further, in reviewing a trial court’s decision on the facts, the appellate court cannot substitute its judgment for that of the trial court. *Id.*

The second subsection of abuse of discretion is error of law. The trial court is given little deference in matters involving the determination of legal principles. *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 437 (Tex. 1997). If the trial court does not analyze or apply the law correctly, it commits an abuse of discretion. *Id.* Further, a lower court’s legal conclusion, based correctly on existing precedent, can be an abuse of discretion if the reviewing court decides to reconsider or clarify the precedent. *In re Smith Barney, Inc.*, 975 S.W.2d 593, 598-599 (Tex. 1998).

The requirement that there be no adequate remedy at law means that the relator will not be able to undo the court's ruling by appeal. If an appeal can resolve the situation, mandamus is not appropriate. An appellate remedy is not inadequate merely because it involves more expense or delay than a writ of mandamus. *Walker v. Packer*, 827 S.W.2d at 842.

Even if a case meets the above two elements, the mandamus can still be denied if the petition for writ of mandamus does not comply with the Texas Rules of Appellate Procedure. In order to boost the chances of success of your mandamus, it is imperative that the Rules are followed exactly as written. The procedural requirements for original proceedings seeking extraordinary relief (e.g. mandamus, habeas corpus, etc.) are found in the Texas Rules of Appellate Procedure (TRAP) Rule 52. The following is a brief outline of the requirements found in the TRAP.

Procedural Requirements for Filing Petition for Writ of Mandamus and Writ of Habeas Corpus

- 52.1 – File petition to commence.
 - Petition must be captioned “In re [name of relator].”
- 52.2 – Petition must properly designate all parties.
 - Relator - Party seeking relief.
 - Respondent - Party against whom relief is sought (usually a judge).
 - Real Party in Interest – Person whose interest would be directly affected by the relief sought.
- 52.3 – Form and Contents of Petition (in following order)
 - Complete list of all parties w/ names and addresses of all counsel.
 - Table of contents with references to the pages of the petition.
 - Index of Authorities with page number reference
 - Statement of the Case
 - Statement of jurisdiction
 - Issues Presented
 - Statement of Facts
 - Argument
 - Prayer
 - Certification

- Appendix
- 52.4 – A response to the petition is not mandatory unless requested by court.
- 52.5 - Relator may file a reply to the response.
- 52.6 – Length of petition, Response and Reply
 - Excluding pages containing: Identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, signature, proof of service, certification, and the appendix...
 - Appeals court: Not to exceed 50 pages (Petition/Response), 25 pages (Reply)
 - Supreme Court: Not to exceed 15 pages (Petition/Response), 8 pages (Reply)
 - Court may permit longer on motion.
- 52.7 – Record
 - Must be filed by Relator with petition:
 - Certified sworn copies of every document material to relator's claim for relief.
 - Properly Authenticated transcript of any relevant testimony from any underlying proceeding.

Another set of rules to follow are those of the Court in which you will be filing. The Court's all have different requirements which must be followed for the Court to even consider your case. For instance, the Fourth Court of Appeals requires a docketing statement to be filed. This statement lets the Court know what relief is requested, who the parties are, and the identity of the court in the underlying cause.

Generally, the petition should be filed with the court of appeals first. There is an exception that allows for filing with the Supreme Court first, but it is very narrow and must state a compelling reason for bypassing the court of appeals. Tex. R. App. P. 52.3(e).

If you are fortunate enough to get your petition granted...Congratulations! But if you are like the majority and the petition is denied, there are a few further options available. Rule 49 allows for a motion for rehearing. In this situation the petition will be reviewed again by the same panel of appeals court justices who ruled on it the first time. If the

motion for rehearing is disposed of with no relief, the relator can file an en banc motion for reconsideration. In this situation the petition will be reviewed by the entire panel of appeals court justices. If the motion for en banc reconsideration is disposed of with no relief, the relator has two options: 1. drop the mandamus and wait for the trial court to rule and then appeal the ruling; or 2. file a petition in the Supreme Court.

The rules for filing a petition in the Supreme Court are also found in TRAP 52. Again, following the rules exactly is very important. Another important point to note is that as of March 14, 2011, there are new mandatory electronic filing rules. Before filing your petition in the Supreme Court it would be wise to familiarize yourself with the Court rules found at: <http://www.supreme.courts.state.tx.us/rules/rules.asp>. Another excellent resource for deciphering the complexities of the electronic filing system is "[A Guide to Creating Electronic Appellate Briefs](#)" by Blake A. Hawthorne, Supreme Court Clerk, <http://www.supreme.courts.state.tx.us/pdf/AppellateBriefsOfTheFuture.pdf>.

EQUITABLE BILL OF REVIEW

"A bill of review is an independent equitable action brought by a party to a former action seeking to set aside a judgment which is no longer appealable or subject to motion for new trial." *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979). The classic situation that gives rise to a bill of review is where a judgment has been rendered against a party who had no knowledge or improper notice of the suit and the time for appeal or motion for new trial has passed. A bill of review can also be used if new discovery has been found on a case that would change the outcome and the time for appeal has passed.

A bill of review is not an appeal of the prior case, but an attack on the judgment of the prior case. *McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706, 709 (Tex. 1961). It is called an “independent” equitable action because it is filed as a new law suit. The defendant in the prior suit becomes the plaintiff when he/she files the bill of review. A successful petitioner of a bill of review will see the judgment in the underlying case set aside and a new trial will be had on the merits. If the petitioner’s bill of review is not successful, the case is dismissed. The unsuccessful petitioner may appeal the denial of his/her bill of review. However, the defendant in a successful bill of review may not appeal the court’s decision to grant the bill because the ruling is interlocutory. *Warren v. Walter*, 414 S.W.2d 423 (Tex. 1967).

A bill-of-review plaintiff must prove three elements: (1) a meritorious defense to the cause of action alleged to support the judgment, or a meritorious claim, (2) which he or she was prevented from making by the fraud, accident, or wrongful act of the opposing party or by official mistake, which is (3) unmixed with the fault or negligence of the plaintiff. *Hanks v. Rosser*, 378 S.W.2d 31, 34-35 (Tex. 1964); *Alexander v. Hagedorn*, 226 S.W.2d 996, 998 (Tex. 1950). Bill-of-review relief is available only if a party has exercised due diligence in pursuing all adequate legal remedies. *Herrera*, 11 S.W.3d at 927. If legal remedies were available but ignored, relief by bill of review is unavailable. *Id.* Although a bill of review is an equitable proceeding, the fact that an injustice has occurred is not sufficient to justify relief by bill of review. *Id.*

The procedure for conducting a bill-of-review proceeding is set out in *Baker v. Goldsmith*, 582 S.W.2d 404 (Tex. 1979). First, the bill-of-review plaintiff must file a petition alleging with particularity the facts establishing the three elements of a bill of

review. *Id.* at 408. The plaintiff must then present, as a pretrial matter, prima facie proof to support the meritorious defense alleged in the petition. *Id.* 408-09. If the court determines that the plaintiff has presented a prima facie meritorious defense, the court may then conduct a trial, during which the plaintiff must prove, by a preponderance of the evidence: (1) whether Plaintiff was prevented from asserting the meritorious defense due to fraud, accident, or wrongful conduct by the opposing party or by official mistake (2) unmixed with the fault or negligence of the plaintiff. *Id.* If the plaintiff satisfies this burden, the underlying controversy between the parties is retried. *Id.* The district court may try these remaining two elements in conjunction with the retrial of the underlying case or may conduct a separate trial on the elements. *Id.*; *Martin v. Martin*, 840 S.W.2d 586, 591 (Tex. App.--Tyler 1992, writ denied). The plaintiff may demand a jury trial on the two remaining elements. *Martin*, 840 S.W.2d at 592.

HABEAS CORPUS

The writ of habeas corpus, Latin for “you have the body”, is a judicial mandate to a prison official ordering that an inmate be brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody. The writ of habeas corpus differs from the habeas corpus petition in that the latter is a petition with the court by a person who objects to his own or another’s detention or imprisonment.

A juvenile cannot use Texas Code of Criminal Procedure section 11.07 as grounds for his/her writ of habeas corpus because the 11.07 procedure only applies to applicants sentenced to prison after conviction of a felony. *In re Debrow*, 2001 WL 121103, (Tex.App.—San Antonio 2001, writ disp’d). Instead, a juvenile can use the

Texas Constitution as grounds for the writ. Article V, Section 8 of the Texas Constitution states that “...District Court judges shall have the power to issue writs necessary to enforce their jurisdiction.” This section should be the basis for jurisdiction in any juvenile writ of habeas corpus. *Ex parte Valle*, 104 S.W.3d 888 (Tex.Crim.App. 2003)

It is also important to note that a juvenile writ of habeas corpus does not replace an appeal, it supplements an appeal. If a direct appeal is available, it must be used instead of filing a petition for writ of habeas corpus. *Ex parte Powell*, 558 S.W.2d 480 (Tex.Crim.App. 1977). Texas Family Code section 56.01 gives a list of what a juvenile can appeal.

The juvenile writ of habeas corpus can be utilized both post-adjudication and pre-adjudication. Pre-adjudication, the writ of habeas corpus can be used to contest a child’s detention if the probable cause determination is not made within 48 hours as required by section 58.01(o) of the Texas Family Code. The argument is that the child is being detained in violation of his or her Fourth Amendment rights because the absence of a probable cause determination. Post-adjudication, the writ of habeas corpus can be used to attack convictions. At the state level there is no time limit for filing a writ of habeas corpus. At the federal level the defendant has one year to file a habeas corpus petition. The start time for this one year period can vary depending on the disposition of the case and is tolled in the event of an appeal. *see 28 U.S.C. §2244.*

CONCLUSION

Preparing extraordinary writs can be a daunting experience. The odds are heavily against the petitioner getting one granted, the cost can be exorbitant with filing fees and

reporter's records, and the multitude of rules governing the filing from both the Texas Rules of Appellate Procedure and the Court's local rules can easily get the writ poured out before it is even heard. It is very important to carefully follow the rules and calculate the filing deadlines correctly. If you come across a question you don't have an answer for; call the clerk's office at the Court you are filing. Another tip is to download the electronic briefs of a writ that was successful. This can be done at the Supreme Court of Texas Website. Finally, don't be discouraged if your writ is not granted. You are in the majority. Just keep your head up and look for alternate routes to get results for your client.