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## Survey of Recent Mandamus Decisions of the Texas Supreme Court

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# SURVEY OF RECENT MANDAMUS DECISIONS OF THE TEXAS SUPREME COURT

*Douglas S. Lang\**

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## I. INTRODUCTION

The purpose of this article is to analyze, summarize, and categorize the published Texas Supreme Court mandamus opinions delivered during the survey period of January 1, 2013, through December 31, 2013. During that survey period, the supreme court issued six published opinions involving mandamus relief. Four of those opinions involved relators seeking relief based on a claimed abuse of discretion by a lower court and no adequate remedy by appeal.<sup>1</sup> In the remaining two opinions, the realtors sought mandamus relief

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1. See *In re Blevins*, No. 12-0636, 2013 WL 5878910 (Tex. Nov. 1, 2013) (orig. proceeding);

respecting actions of courts or public officials pursuant to statutes or rules specifically providing for such relief.<sup>2</sup>

## II. BACKGROUND

### A. MANDAMUS FUNDAMENTALS

Texas appellate courts' statutory jurisdiction over writs of mandamus is rooted in the Texas Constitution and the Texas Government Code.<sup>3</sup> The supreme court and the courts of appeals have concurrent jurisdiction to issue writs of mandamus: (1) to enforce their jurisdiction and (2) against judges of certain courts.<sup>4</sup> Further, the supreme court may issue writs of mandamus against the courts of appeals and any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals.<sup>5</sup> Additionally, a number of statutes and rules provide for mandamus review within specific parameters.<sup>6</sup>

Unless mandamus review is specifically provided for by statute or rule, mandamus relief generally requires a showing of: (1) a clear abuse of discretion and (2) "no adequate remedy by appeal."<sup>7</sup> "A trial court clearly abuses its discretion if 'it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.'"<sup>8</sup> The determination of whether a remedy by appeal is adequate is not a "formulaic one," but rather is "practical and prudential" and "resists categorization."<sup>9</sup>

Mandamus proceedings in both the supreme court and the courts of appeals are governed by Texas Rule of Appellate Procedure 52.<sup>10</sup> Lack of adherence to the provisions of Rule 52 may result in denial of relief.<sup>11</sup> Further, if the supreme

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*In re Lee*, 411 S.W.3d 445 (Tex. 2013) (orig. proceeding); *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746 (Tex. 2013) (orig. proceeding); *In re Office of the Attorney Gen.*, 422 S.W.3d 623 (Tex. 2013) (orig. proceeding).

2. See *In re Blair*, 408 S.W.3d 843 (Tex. 2013) (orig. proceeding); *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168 (Tex. 2013) (orig. proceeding).

3. See TEX. CONST. ART. V, §§ 1, 3, 6; TEX. GOV'T CODE ANN. §§ 22.002, 22.221 (West 2004 & Supp. 2013).

4. TEX. GOV'T CODE ANN. §§ 22.002, 22.221.

5. *Id.* § 22.002.

6. For example, mandamus relief may be proper respecting the state comptroller's denial of a former prisoner's claim for compensation for wrongful conviction and imprisonment, see TEX. CIV. PRAC. & REM. CODE ANN. § 103.051(e) (West 2011) (following comptroller's denial of application for compensation for wrongful imprisonment, claimant may bring action for mandamus relief); a duty relating to an election, see TEX. ELEC. CODE § 273.061 (West 2010) ("The supreme court or a court of appeals may issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer."); or review of a court of appeals' ruling on a motion challenging a trial court's determination of the amount of security required to supersede a judgment, see TEX. R. APP. P. 24.4(a).

7. See *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

8. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (quoting *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding)).

9. See *In re Prudential*, 148 S.W.3d at 136.

10. TEX. R. APP. P. 52.

11. *Id.* Bases on which relief may be denied include, *inter alia*, (1) defects of form in the petition (see *In re Butler*, 270 S.W.3d 757, 758 (Tex. App.—Dallas 2008, orig. proceeding)); *In re*

court and a court of appeals have concurrent jurisdiction in a mandamus matter, the petition must first be presented to the court of appeals, unless there is a compelling reason not to do so.<sup>12</sup>

#### B. RECENT MANDAMUS STATISTICS

During the supreme court's 2013 fiscal year, extending from September 1, 2012, to August 31, 2013, 219 new petitions for writ of mandamus were filed in the supreme court and dispositions were rendered in 222 cases.<sup>13</sup> The petition for writ of mandamus was denied in 175, or 78.8%, of those dispositions, and was conditionally granted in five, or 2.25% of those dispositions.<sup>14</sup> These statistics show that while the number of new mandamus petitions filed in the supreme court has not changed significantly in the last few years,<sup>15</sup> the percentage of petitions conditionally granted continues to decline.<sup>16</sup> Further, these numbers indicate mandamus remains an extraordinary and limited remedy.<sup>17</sup>

Oral argument was heard by the supreme court in all six of the cases addressed in this article. In four of those six cases, the writ was conditionally granted.<sup>18</sup> In one of the remaining two cases, the petition for writ of mandamus was denied;<sup>19</sup> in the other, the mandamus proceeding was abated pending specified proceedings in the trial court.<sup>20</sup>

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Amir-Sharif, No. 07-11-00294-CV, 2011 WL 3568940, at \*1 (Tex. App.—Amarillo Aug. 15, 2011, orig. proceeding) (mem. op.); (2) failure to properly authenticate evidence (see *In re Cullar*, 320 S.W.3d 560, 567–68 (Tex. App.—Dallas 2010, orig. proceeding)); *In re Vasquez*, No. 08-12-00267-CV, 2012 WL 4714492, at \*1 (Tex. App.—El Paso Oct. 3, 2012, orig. proceeding) (mem. op.); and (3) lack of a complete record (see *In re Le*, 335 S.W.3d 808, 813 (Tex. App.—Houston [14th Dist.] 2011, orig. proceeding)); *In re Barnhill*, No. 12-11-00052-CV, 2011 WL 1532352, at \*1 (Tex. App.—Tyler Apr. 20, 2011, orig. proceeding) (mem. op.).

12. TEX. R. APP. P. 52.3(e). For example, election cases requiring a speedy, final resolution and cases presenting issues of statewide importance have met the “compelling reasons” standard. See *In re Univ. Interscholastic League*, 20 S.W.3d 690 (Tex. 2000).

13. See *Supreme Court Activity: FY 2008–2013*, TEX. COURTS ONLINE, [www.txcourts.gov/media/652335/sc-Activity-2014.pdf](http://www.txcourts.gov/media/652335/sc-Activity-2014.pdf) (last visited Nov. 23, 2014). Dispositions for a given fiscal year can include cases pending at the start of the fiscal year and therefore can exceed the number of new cases added.

14. See *id.* Cases otherwise disposed of were generally dismissed or abated.

15. See *Supreme Court Activity: FY 2008–2012*, TEX. COURTS ONLINE, [www.txcourts.gov/All\\_Archived\\_documents/JudicialInformation/pubs/AR2012/SC/2-sc-activity\(2\).pdf](http://www.txcourts.gov/All_Archived_documents/JudicialInformation/pubs/AR2012/SC/2-sc-activity(2).pdf) (last visited Jan. 3, 2015). For the 2012 fiscal year, that number was 214. For the 2013 fiscal year, the number of new petitions for writ of mandamus filed in the supreme court was 211. See *Supreme Court Activity: FY 2009–2013*, TEX. COURTS ONLINE, [www.txcourts.gov/media/449754/2-SC-Activity-2013.pdf](http://www.txcourts.gov/media/449754/2-SC-Activity-2013.pdf) (last visited Jan. 3, 2015). See *id.*

16. See *id.* The percentage of petitions for writ of mandamus conditionally granted during the 2011 fiscal year was 8.55% and the percentage conditionally granted during the 2012 fiscal year was 6.3%.

17. See *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding); *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 209 (Tex. 2009) (orig. proceeding).

18. See *In re Lee*, 411 S.W.3d 445, 447 (Tex. 2013) (orig. proceeding); *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 749 (Tex. 2013) (orig. proceeding); *In re Office of the Attorney Gen.*, 422 S.W.3d 623 (Tex. 2013) (orig. proceeding); *In re Nalle Plastics Family Ltd. P'Ship*, 406 S.W.3d 168, 169 (Tex. 2013) (orig. proceeding).

19. See *In re Blair*, 408 S.W.3d 843, 845 (Tex. 2013) (orig. proceeding).

20. See *In re Blevins*, No. 12-0636, 2013 WL 5878910, at \*3 (Tex. Nov. 1, 2013) (orig. proceeding).

### III. MANDAMUS RELIEF TO CORRECT CLEAR ABUSE OF DISCRETION WHERE NO ADEQUATE REMEDY BY APPEAL

This section focuses on the four supreme court decisions rendered during the survey period involving the availability of mandamus relief to correct a clear abuse of discretion by a lower court when there is no adequate remedy by appeal.<sup>21</sup> Further, this section specifically examines the supreme court's treatment of the element of no adequate remedy by appeal.

#### A. CASE SUMMARIES

##### 1. *Mandamus and Family Law Matters*

*In re Blevins*<sup>22</sup> involved an original proceeding arising from an order in a Suit Affecting the Parent-Child Relationship (SAPCR). In 2010, the Texas Department of Family and Protective Services (Department) placed siblings R.M.R. and A.L.R. in foster care with the relator, Melissa Blevins, and her husband. In August 2011, the trial judge signed an order in the SAPCR that: (1) contained findings that appointment of the children's father (Father) as managing conservator "would not be in the best interests of the children;" and (2) "appointed the Department as Permanent Managing Conservator and Father as Possessory Conservator."<sup>23</sup> "Father's possession of and access to the children was limited to supervised visitation."<sup>24</sup> Blevins intervened in December 2011, requesting that she be appointed sole managing conservator. Following an April 2012 hearing, the trial court signed an order stating the children were to be placed with Father "in accordance with the prior order of this Court."<sup>25</sup> However, no prior order of the trial court placed the children with Father.<sup>26</sup> Subsequently, the trial judge recused from the case and a replacement judge was assigned. Blevins filed a petition for writ of mandamus in the Texas Supreme Court, requesting that the current trial judge be directed to vacate the April 2012 order placing the children with Father.<sup>27</sup> The supreme court observed that Texas Rule of Appellate Procedure 7.2 provides that "in an original proceeding where the judge who signed the order at issue has 'cease[d] to hold office,' an appellate court 'must abate the proceeding to allow the successor to reconsider the original party's decision.'"<sup>28</sup> However, the supreme court stated that the courts of appeals were split as to whether Rule 7.2 applies in cases where "the trial judge who signed the order being attacked in the case has not ceased to hold office, but has only recused from further participation in the case."<sup>29</sup>

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proceeding).

21. See *In re Prudential*, 148 S.W.3d at 135-36. The party seeking mandamus relief has the burden to establish both of these requirements. *Id.*; see also *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003) (orig. proceeding) (per curiam).

22. *In re Blevins*, 2013 WL 5878910, at \*1.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at \*2.

28. *Id.*

29. *Id.*

Specifically, some courts of appeals had denied mandamus petitions under such circumstances because “it ‘would be premature’ to compel the successor judge to take any action before having an opportunity to review the relator’s complaint,”<sup>30</sup> while others had abated the mandamus proceeding and instructed the successor judge to prepare and send back his ruling on the underlying cause, thus affording the successor judge “an opportunity to rule on the matter being challenged.”<sup>31</sup> The supreme court concluded that “under circumstances such as those before us, appellate courts should either deny the petition for mandamus . . . or abate the proceedings pending consideration of the challenged order by the new trial judge.”<sup>32</sup> Further, the supreme court stated that “[b]ecause mandamus is a discretionary writ, the appellate court involved should exercise discretion to determine which of the two approaches affords the better and more efficient manner of resolving the dispute.”<sup>33</sup> The supreme court reasoned that in the case before it, the “better and more efficient approach” would be to abate the proceedings.<sup>34</sup> Accordingly, the supreme court did so and directed the trial court assigned to the case to “take whatever actions and hold whatever hearings it determines are necessary” for it to reconsider the April 2012 order and the matters underlying it.<sup>35</sup> Additionally, the supreme court stated it did not intend to limit the trial court to considering only the evidence on which the April 2012 order was based.<sup>36</sup>

In the case of *In re Lee*,<sup>37</sup> relator Stephanie Lee and real party in interest Benjamin Redus were the joint managing conservators of their minor daughter. Under a 2007 order adjudicating parentage, Stephanie was granted the exclusive right to designate the child’s primary residence. Subsequently, Benjamin petitioned the trial court to modify that order.<sup>38</sup> After a pretrial mediation at which both parties were represented by counsel, the parties executed a mediated settlement agreement (MSA) modifying the 2007 order. The MSA: (1) gave Benjamin “the exclusive right to establish the child’s primary residence;” (2) gave Stephanie “periodic access to and possession of the child;” and (3) included a restriction enjoining Stephanie’s husband, Scott Lee, “from being within five miles [of the child]” at all times.<sup>39</sup> After the MSA was executed, Benjamin appeared before an associate judge to prove up the MSA. During his testimony in support of the MSA, Benjamin testified Scott: (1) was a registered sex offender; (2) “violated conditions of his probation with [Benjamin’s] daughter in th[e] house;” and (3) “sle[pt] naked in bed with [Benjamin’s] daughter between [Scott and Stephanie].”<sup>40</sup> Based on that testimony, the associate judge refused to

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30. *Id.* (quoting *In re Toups* Law Firm, No. 10-10-00226-CV, 2010 WL 3911420, at \*2 (Tex. App.—Waco Oct. 6, 2010, orig. proceeding) (mem. op.)).

31. *Id.* (citing *In re Gonzales*, 391 S.W.3d 251, 252 (Tex. App.—Austin 2012, orig. proceeding)).

32. *Id.*

33. *Id.*

34. *Id.* at \*3.

35. *Id.*

36. *Id.*

37. *In re Lee*, 411 S.W.3d 445, 447 (Tex. 2013) (orig. proceeding).

38. *Id.*

39. *Id.*

40. *Id.* at 448.

render judgment on the MSA. Following that hearing, Stephanie filed a motion to render judgment on the MSA.<sup>41</sup> Additionally, “Benjamin filed a written objection withdrawing his consent to the MSA, arguing that it was not in the best interest of the child.”<sup>42</sup> The trial court concluded “the MSA was not in the best interest of the child and denied Stephanie’s motion to enter judgment.”<sup>43</sup>

Stephanie sought a writ of mandamus in the Fourteenth Court of Appeals in Houston, arguing “the trial court lacked discretion to refuse judgment based on the best interest determination.”<sup>44</sup> The court of appeals denied the petition for writ of mandamus, concluding the trial court did not abuse its discretion by “refusing to enter judgment on a mediated settlement agreement that is not in the child’s best interest.”<sup>45</sup> Stephanie then sought mandamus relief in the supreme court. The supreme court observed in a footnote that mandamus relief is generally “available to remedy a trial court’s erroneous refusal to enter judgment on an MSA,” and “[i]n a child-related dispute, the inadequacy of the appellate remedy in the context of refusal to enforce a settlement agreement is even more pronounced because the significant benefits to the family in peaceably resolving the dispute through mediation are lost.”<sup>46</sup> The supreme court stated in part:

While Texas courts have numerous tools at their disposal to safeguard children’s welfare, the Legislature has clearly directed that, subject to a very narrow exception involving family violence, denial of a motion to enter judgment on an MSA based on a best interest determination, where that MSA meets the statutory requirements of section 153.0071(d) of the Texas Family Code, is not one of those tools.<sup>47</sup>

Finally, the supreme court observed that the parties admitted that the family violence exception provided by the Legislature is not applicable in this case, and concluded the MSA complied with section 153.0071(d).<sup>48</sup> Accordingly, the supreme court concluded the trial court abused its discretion by denying the motion to render judgment on the MSA and conditionally granted mandamus relief.<sup>49</sup>

In the case of *In re the Office of the Attorney General*,<sup>50</sup> Noble Ezukanma, M.D. (Father) was ordered by the trial court to pay \$5,400 each month to Njideke Lawreta Ezukanma (Mother) for the support of their six children. As of June 9, 2008, Father had accumulated an arrearage of \$23,044.78.<sup>51</sup> In June 2008, the Tarrant County Domestic Relations Office filed a motion to enforce the support order, specifically alleging the total outstanding arrearage, asserting six violations

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41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 449.

45. *Id.*

46. *Id.* at 450 n.7.

47. *Id.* at 450.

48. *Id.* at 458.

49. *Id.* at 461.

50. *In re Office of the Attorney Gen.*, 422 S.W.3d 623, 625 (Tex. 2013) (orig. proceeding).

51. *Id.*

of the support order, and requesting Father be held in contempt for each of the six violations.<sup>52</sup> In late June 2008, Father paid the entire pled arrearage in one payment. However, by the time a hearing was held on the motion in February 2009, Father had accumulated a new arrearage of \$28,656.56. The trial court rendered a money judgment for that amount and held Father in contempt for the failure to make timely child support payments that were due under the support order prior to June 9, 2008.<sup>53</sup>

Father sought mandamus relief in the Second Court of Appeals in Fort Worth, arguing that the Texas Family Code “precluded a finding of contempt by the trial court.”<sup>54</sup> In support of that argument, Father cited Texas Family Code section 157.162(d), which provides in part that “[t]he court may not find a respondent in contempt of court for failure to pay child support if the respondent appears at the hearing with . . . evidence . . . showing that the respondent is current in the payment of child support as ordered by the court.”<sup>55</sup> Father contended this “provision prohibits a finding of contempt for missed payments alleged in the motion to enforce that, though untimely under the support order, had been satisfied prior to the hearing.”<sup>56</sup> The court of appeals agreed and ordered the trial court to vacate its contempt order.<sup>57</sup> Then, Mother and the Office of the Attorney General petitioned the supreme court for mandamus relief, seeking reinstatement of the trial court’s contempt order. After a discussion of contempt as a child support enforcement mechanism and an analysis of the language of section 157.162(d), the supreme court concluded that the section operates to “purge a respondent from contempt” only if the respondent “is current on *all* child support obligations at the time of the enforcement hearing, not just those pled in the motion to enforce.”<sup>58</sup> Therefore, the supreme court concluded, the trial court did not abuse its discretion by holding Father in contempt.<sup>59</sup> The supreme court conditionally granted a writ of mandamus and ordered the court of appeals to “vacate its judgment, thereby reinstating the trial court’s contempt order.”<sup>60</sup>

## 2. Mandamus and Granting of New Trial

*In re Toyota Motor Sales*<sup>61</sup> addressed issues of whether an appellate court may: (1) conduct a merits review of the bases for a new trial stated in an order granting a new trial after a trial court has set aside a jury verdict; and (2) grant mandamus relief if the record does not support the trial court’s rationale for

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52. *Id.*

53. *Id.* at 626. In the contempt order, the trial court sentenced Father to 174 days in jail to be served on the second and fourth weekends of every month.

54. *Id.* Because Father was imprisoned only on certain weekends, he sought both habeas corpus and mandamus relief from the trial court’s contempt order. Only the mandamus relief is addressed here.

55. *Id.* (citing TEX. FAM. CODE ANN. § 157.162(d) (West 2012)).

56. *Id.*

57. *Id.*

58. *Id.* at 628, 632 (emphasis original).

59. *Id.* at 632.

60. *Id.*

61. *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 749 (Tex. 2013) (orig. proceeding).



ordering a new trial.<sup>62</sup> Following Richard King's death resulting from being ejected from his vehicle during an accident, his family (family) filed suit against the vehicle manufacturer and dealership (collectively, Toyota) alleging strict products liability, negligence, wrongful death, and survivorship claims.<sup>63</sup>

According to the family, "King was wearing his seat belt at the time of the accident," and the vehicle's allegedly defective seat belt system caused King's ejection from the vehicle and his subsequent death.<sup>64</sup> In a videotaped pretrial deposition, Justin Coon, the state trooper who responded to the accident emergency call and investigated the scene, testified that based upon his observations of the seat belt at the scene, he believed King was not wearing the seat belt at the time of the "rollover" accident.<sup>65</sup> The trial court granted two motions in limine filed by the family to bar "[a]ny testimony . . . that [King] was not wearing his seat belt . . . before or during the [ac]cident."<sup>66</sup> During trial, Toyota's counsel offered a redacted version of Coon's testimony that excluded reference to his view that King had not used the seat belt. However, the family's counsel expressly requested that redacted testimony be included based on "optional completeness."<sup>67</sup> Toyota's counsel noted to the trial court that the testimony was excluded pursuant to the motion in limine, but the trial court did not exclude it.<sup>68</sup> Later, the excluded statement was offered as part of the testimony of Toyota's expert without objection by the family's counsel.<sup>69</sup> Finally, in jury argument, Toyota's counsel read Coon's testimony, the family's counsel objected, and the trial court sustained the objection.<sup>70</sup> The family's counsel, however, made no motion to strike nor a request for a curative instruction.<sup>71</sup> The jury returned a verdict in favor of Toyota.<sup>72</sup>

The family filed a motion for new trial, contending "Toyota's counsel had violated the trial court's limine rulings by reading, during closing argument," the excluded portion of Coon's deposition.<sup>73</sup> Toyota argued the family's attorney violated the limine rulings by offering the evidence based on "optional completeness" prior to closing argument, and therefore Toyota "had every right to make closing arguments regarding evidence already in the record."<sup>74</sup> The trial court granted the family's motion for new trial on two grounds: (1) "in the interest of justice" because Toyota had "violated the limine order" and "purported to present evidence outside the record;" and (2) "to sanction Toyota for violating the limine order, because a limiting instruction could not eliminate

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62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 750.

67. *Id.* at 750-51.

68. *Id.*

69. *Id.* at 751-52.

70. *Id.* at 753-54.

71. *Id.* at 754.

72. *Id.*

73. *Id.*

74. *Id.*

the harm.”<sup>75</sup>

Toyota filed a petition for writ of mandamus in the Eighth Court of Appeals in El Paso, which denied relief.<sup>76</sup> The court of appeals concluded there was no question the trial court’s order satisfied the specificity requirements for new trial orders established by the supreme court in *In re Columbia*,<sup>77</sup> and “rejected the notion that ‘*Columbia* supports further review of the *merits* of the grounds specified.’”<sup>78</sup> Subsequently, Toyota filed a petition for writ of mandamus in the supreme court. The supreme court stated that the trial court’s order comported with established “procedural ‘form’ requirements” and satisfied, facially, the requirement that “the reasons listed (if accurate) would have been ‘legally appropriate’ grounds for new trial, and are ‘specific enough’ that they are not simply *pro forma*.”<sup>79</sup> However, the supreme court concluded, “[i]f, despite conformity with the procedural requirements of our precedent, a trial court’s articulated reasons are not supported by the underlying record, the new trial order cannot stand.”<sup>80</sup> After a lengthy discussion and analysis of the trial record, the supreme court concluded the record “squarely conflicts with the trial judge’s expressed reasons for granting a new trial,” and “does not support the new trial order.”<sup>81</sup> Specifically, the supreme court stated:

The trial court’s pretrial limine rulings prevented Toyota from introducing the evidence, and the record—specifically, the redacted deposition Toyota offered—reflects Toyota’s compliance with those rulings. After the Kings’ attorney read the testimony into evidence, and after Toyota’s counsel repeated the excerpt subsequently, the parties sought clarification from the trial court, who repeatedly stated that the record would reflect what was in evidence. The trial court did not instruct Toyota not to mention Coon’s statement during closing; rather she warned that “appropriate sanctions [would] be issued to either party *if they argue outside the record*.” (Emphasis added). We agree with Toyota that it did not violate the trial court’s rulings by referencing Officer Coon’s deposition in closing.<sup>82</sup>

Additionally, the supreme court reasoned that, in light of its conclusion that Toyota’s reference to the testimony in question during closing argument was appropriate, the trial court abused its discretion by sanctioning Toyota for that conduct.<sup>83</sup> The supreme court conditionally granted mandamus relief and ordered the trial court to withdraw its order and render judgment on the verdict.<sup>84</sup>

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75. *Id.* at 754–55.

76. *Id.* at 755.

77. See *In re Columbia Med. Ctr. of Las Colinas Subsidiary, L.P.*, 290 S.W.3d 204, 206 (Tex. 2009) (orig. proceeding).

78. *In re Toyota Motor Sales*, 407 S.W.3d at 755 (emphasis original).

79. *Id.* at 759.

80. *Id.* at 758.

81. *Id.* at 759–60.

82. *Id.* at 761.

83. *Id.* at 762.

84. *Id.*

## B. TREATMENT OF THE “ADEQUACY” REQUIREMENT

Only one of the four cases described above, *In re Lee*, specifically addressed the adequacy of an appellate remedy.<sup>85</sup> However, in *In re Blevins*, the supreme court considered courts of appeals’ observations that where the trial judge who signed the order being attacked has recused from further participation in the case, “it ‘would be premature’ to compel the successor judge to take any action before having an opportunity to review the relator’s complaint,” and abatement would afford the successor judge “an opportunity to rule on the matter being challenged.”<sup>86</sup> The supreme court’s conclusion in *In re Blevins* that, under such circumstances, “appellate courts should either deny the petition for mandamus . . . or abate the proceedings pending consideration of the challenged order by the new trial judge,” essentially precluded any analysis as to the adequacy of an appellate remedy.<sup>87</sup> Further, in the remaining two cases, the supreme court cited prior opinions that involved similar fact situations and discussed the adequacy of an appellate remedy in such situations.<sup>88</sup>

These cases are consistent with the supreme court’s various approaches to addressing the adequacy requirement in prior mandamus cases,<sup>89</sup> indicating no change in the supreme court’s treatment of this requirement. The chart below sets out the supreme court’s approaches relative to the subject matter of the four cases.

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85. See *In re Lee*, 411 S.W.3d 445, 450 n.7 (Tex. 2013) (orig. proceeding) (“In a child-related dispute, the inadequacy of the appellate remedy in the context of refusal to enforce a settlement agreement is even more pronounced because the significant benefits to the family in peaceably resolving the dispute through mediation are lost.”).

86. *In re Blevins*, No. 12-0636, 2013 WL 5878910, at \*2 (Tex. Nov. 1, 2013) (orig. proceeding).

87. *Id.*

88. See *In re Toyota Motor Sales*, 407 S.W.3d at 755–56 (citing *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 209–10 (Tex. 2009) (orig. proceeding) (potential availability of review of new trial order following second trial was not adequate appellate remedy for party seeking to challenge order granting new trial because (1) if party suffered unfavorable verdict in second trial, “it could not obtain reversal unless it convinced an appellate court that the granting of the new trial was error and that the error either prevented [the party] from properly presenting its case on appeal or probably caused entry of an improper judgment” and (2) “even if an unfavorable verdict were reversed and rendered in [the party’s] favor, [the party] would have lost the benefit of a final judgment based on the first jury verdict without ever knowing why”); *In re Office of the Attorney Gen.*, 422 S.W.3d 623, 627 (Tex. 2013) (orig. proceeding) (citing *In re Reece*, 341 S.W.3d 360 (Tex. 2011) (orig. proceeding) (“mandamus is available to challenge an order of contempt not involving confinement given the unavailability of the Court’s statutory habeas corpus jurisdiction in that circumstance”)).

89. See Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 66 SMU L. REV. 1155 (2013).

Appellate Remedy Treatment	Opinion	Subject Matter of Case & Act Constituting Abuse of Discretion	Mandamus Disposition
Specific discussion of adequacy of party's appellate remedy	<i>In re Lee</i> , 411 S.W.3d 445 (Tex. 2013).	Family law case; trial court (t.ct.) improperly refused to render judgment on mediated settlement agreement	Granted
Adequacy of appellate remedy not addressed	<i>In re Blevins</i> , No. 12-0636, 2013 WL 5878910 (Tex. Nov. 1, 2013)	Family law case; trial judge recused from case and successor refused to vacate alleged erroneous order of prior judge	Proceeding Abated
	<i>In re Toyota Motor Sales, U.S.A., Inc.</i> , 407 S.W.3d 746 (Tex. 2013)	Granting of motion for new trial; t.ct.'s rationale for ordering new trial not supported by record	Granted
	<i>In re Office of the Attorney Gen.</i> , No. 11-0255, 2013 WL 854785, (Tex. Mar. 8, 2013)	Father held in contempt in t.ct. for failure to pay child support; ct. of appeals erroneously vacated contempt order	Granted

#### IV. OTHER MANDAMUS RELIEF

As described above, in addition to cases involving an alleged abuse of discretion and no adequate remedy by appeal, mandamus proceedings may be specifically authorized by statutes or rules. Such proceedings generally involve challenges to acts of courts or public officers<sup>90</sup> and may be limited to proceedings in the supreme court rather than the courts of appeals.<sup>91</sup> Further, the relator's burden in such cases generally consists of showing lack of compliance with the statute or rule in question.<sup>92</sup> Two of the six published opinions within the survey period involve proceedings of this type.

##### A. MANDAMUS AND CALCULATION OF SUPERSEDEAS AMOUNTS

In the case of *In re Nalle Plastics*,<sup>93</sup> the supreme court addressed an issue of first impression pertaining to whether attorney's fees awarded in a judgment constitute compensatory damages for purposes of calculating a supersedeas bond.<sup>94</sup> The case involved a breach of contract claim filed by a law firm, Porter, Rogers, Dahlman, & Gordon, P.C. (Porter), against a former client, Nalle

90. See, e.g., *In re Allen*, 366 S.W.3d 696, 701 (Tex. 2012) (orig. proceeding).

91. See, e.g., *id.* ("Only the supreme court may issue writ of mandamus against an officer of the executive department of this state."); TEX. R. APP. P. 24.4(a) (a party may seek supreme court mandamus review of a court of appeals' ruling on a motion respecting amount of security required to supersede execution of judgment).

92. See, e.g., *Simmons v. Kuznich*, 166 S.W.3d 342, 348 (Tex. App.—Fort Worth 2005, orig. proceeding).

93. *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 169 (Tex. 2013) (orig. proceeding).

94. See TEX. R. APP. P. 24.4(a), which addresses appellate review of rulings respecting the security required to supersede a judgment. That rule provides in part:

A party may seek review of the trial court's ruling by motion filed in the court of appeals with jurisdiction or potential jurisdiction over the appeal from the judgment in the case. A party may seek review of the court of appeals' ruling on the motion by petition for writ of mandamus in the Supreme Court.

Plastics Family Limited Partnership (Nalle), for alleged failure to pay legal fees.<sup>95</sup> A jury found that Nalle breached its agreement with Porter, resulting in \$132,661 in damages, and that \$150,000 was a reasonable attorney's fee for the necessary services of Porter's attorneys in collecting the amount Nalle owed.<sup>96</sup> The trial court signed a judgment awarding Porter those amounts. In order to suspend enforcement of the judgment pending appeal, Nalle made a deposit with the trial court that included the \$132,661 in breach of contract damages plus interest and costs of court.<sup>97</sup> "Porter complained that the judgment had not been properly superseded because Nalle's deposit did not include attorney's fees."<sup>98</sup> The trial court agreed and ordered Nalle to supplement the deposit to cover the fee award.<sup>99</sup> After an unsuccessful attempt to obtain relief by motion in the Thirteenth Court of Appeals in Corpus Christi-Edinburg, Nalle deposited the additional amount and filed a petition for writ of mandamus in the supreme court.<sup>100</sup>

The supreme court observed that the amount required to supersede a judgment must be "equal [to] the sum of . . . the amount of compensatory damages awarded in the judgment[,] . . . interest for the estimated duration of the appeal[,] and . . . costs awarded in the judgment."<sup>101</sup> Further, that court stated that the courts of appeals were divided on the issue of whether attorney's fees should be considered either compensatory damages or costs when calculating supersedeas amounts.<sup>102</sup> After discussion and analysis of the relevant statutes and case law, the supreme court concluded "[i]f the *underlying* suit concerns a claim for attorney's fees as an element of damages, as with Porter's claim for unpaid fees here, then those fees may properly be included in a judge or jury's compensatory damages award."<sup>103</sup> However, that court stated, "attorney's fees incurred in the prosecution or defense of a claim are not compensatory damages."<sup>104</sup> Additionally, that court concluded "costs awarded in the judgment" does not include anything other than court costs.<sup>105</sup> The supreme court conditionally granted the writ and directed the trial court to vacate its order and refund any monies overpaid by Nalle.<sup>106</sup>

#### B. MANDAMUS AND COMPENSATION FOR WRONGFUL IMPRISONMENT

The case of *In re Blair*<sup>107</sup> involved a relator seeking compensation from the Texas Comptroller for wrongful imprisonment pursuant to Chapter 103 of the

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95. *In re Nalle Plastics*, 406 S.W.3d at 169.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. See TEX. R. APP. P. 24.4(a).

101. *In re Nalle Plastics*, 406 S.W.3d at 169 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(a) (West 2008)); see also TEX. R. APP. P. 24.2.

102. *In re Nalle Plastics*, 406 S.W.3d at 170.

103. *Id.* at 175 (emphasis original).

104. *Id.* at 174.

105. *Id.* at 175.

106. *Id.* at 176.

107. *In re Blair*, 408 S.W.3d 843 (Tex. 2013) (orig. proceeding).

Texas Civil Practice and Remedies Code.<sup>108</sup> In November 1988, Michael N. Blair was sentenced to ten years' imprisonment for burglary and indecency with a child.<sup>109</sup> He served eighteen months and was paroled in April 1990.<sup>110</sup> His parole was revoked after he was arrested in September 1993 for the murder of a child. Blair was convicted of that crime and sentenced to death. While Blair was in prison awaiting execution, he was indicted for four counts of indecency with a child committed in 1992 and 1993. Blair pleaded guilty to those charges in 2004 and received four life sentences, three consecutive and one concurrent.<sup>111</sup>

In 2008, the Texas Court of Criminal Appeals "set aside Blair's murder conviction based on DNA evidence establishing his actual innocence."<sup>112</sup> In June 2009, while still serving his sentence pertaining to the 1992 and 1993 indecency with a child offenses, Blair applied to the Texas Comptroller pursuant to Chapter 103 for more than \$1 million in compensation "for having been wrongfully incarcerated from 1993, when he was arrested for murder, to 2004, when he was sentenced for the 1992-1993" indecency with a child offenses.<sup>113</sup> The comptroller denied Blair's application because Blair was: (1) currently incarcerated and "[t]he Legislature clearly intends [compensation under the Act] to be provided only to eligible applicants in order that they might put their lives back together after their release;"<sup>114</sup> and (2) incarcerated for another offense, the 2004 child molestation convictions, when he became eligible for compensation in 2009.<sup>115</sup>

Blair filed a petition for mandamus relief in the supreme court.<sup>116</sup> The supreme court disagreed with the comptroller's argument that Blair's claim must be rejected because it is inconsistent with purpose the of Chapter 103.<sup>117</sup> The supreme court, however, stated "there is another difficulty with Blair's claim."<sup>118</sup> Specifically, the supreme court observed that section 103.154(a) of Chapter 103 provides in part that "compensation payments to a person . . . terminate if, after the date the person becomes eligible for compensation . . . the person is convicted of a crime punishable as a felony."<sup>119</sup> The supreme court reasoned

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108. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001-.154 (West 2011 & Supp. 2013). Chapter 103 provides in part that in order to receive compensation from the State of Texas for wrongful imprisonment, the claimant must file an application with the comptroller that meets the requirements of the statute. *Id.* § 103.051(a). If the comptroller denies the claim, the claimant has thirty days to submit an application to cure any problem identified. *Id.* § 103.051(d). "If the comptroller denies a claim after the claimant submits an application under Subsection (d), the claimant may bring an action for mandamus relief." *Id.* § 103.051(e). The statute is silent as to the claimant's burden of proof respecting a mandamus action under Chapter 103.

109. *In re Blair*, 408 S.W.3d at 845.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 846.

115. *Id.*

116. *Id.*; see TEX. CIV. PRAC. & REM. CODE ANN. § 103.051(e) (following comptroller's denial of application for compensation for wrongful imprisonment, "claimant may bring action for mandamus relief").

117. *In re Blair*, 408 S.W.3d at 848.

118. *Id.*

119. *Id.* at 849.

that the phrase “is convicted” in Section 103.154(a):

can reasonably be read to refer to the claimant’s status and not only the moment guilt is adjudicated. Thus construed, the statute denies compensation payments for wrongful imprisonment to a claimant who, during the time he would receive them, is convicted of a felony, regardless of when the conviction was adjudicated, whether before or after he became eligible for compensation.<sup>120</sup>

Accordingly, the supreme court concluded the comptroller properly denied Blair’s claim for compensation, and denied Blair’s petition for writ of mandamus.<sup>121</sup>

## V. CONCLUSION

The foregoing survey of published Texas Supreme Court mandamus opinions issued during the period of January 1, 2013, through December 31, 2013, illustrates that mandamus remains an extraordinary remedy available only in limited circumstances.<sup>122</sup> Further, as in past years, the majority of the published mandamus opinions of the supreme court involve cases in which the relator’s burden included showing lack of an adequate remedy by appeal.<sup>123</sup> While the supreme court’s approach to that element varies from providing a specific analysis to providing no analysis at all, the court continues to reach conclusions that are consistent with cases involving similar fact situations. Accordingly, the case law does not indicate any change to the established requirements that must be satisfied in order to obtain mandamus relief.

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120. *Id.*

121. *Id.* at 851.

122. For analysis of the supreme court’s treatment of the mandamus remedy prior to the survey period of this article, see generally Lang & Campbell, *supra* note 89; Douglas S. Lang et al., *Mandamus Decisions of the Texas Supreme Court*, 64 SMU L. REV. 393 (2011).

123. See generally Lang & Campbell, *supra* note 89; Lang et al., *supra* note 122.