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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*
Rachel A. Campbell**

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I. INTRODUCTION

The remedy of mandamus is available in the Texas Supreme Court only in limited circumstances.1 This article focuses on opinions 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.2 The purpose of this article is to analyze, summarize, and categorize the sixteen published Texas Supreme Court mandamus opinions of that type delivered from January 1, 2011, through December 31, 2012, to identify and describe current standards and methods of analysis.3

Additionally, this article places particular focus on the supreme court’s treatment of the element of no adequate remedy by appeal. As demonstrated by the sixteen cases described herein, the supreme court has not identified definitive rules for determining whether an appellate remedy is “adequate.”4 Indeed, that court has stated that “rigid rules are necessarily inconsistent with the flexibility that is the [mandamus] remedy’s principal virtue.”5 Further, the supreme court has not indicated any change to its expressed view that the determination of whether a remedy by appeal is adequate is not a “formulaic one,” but rather is “practical and prudential” and “resists categorization.”6 Nevertheless, while the opinions described below vary in the amount and depth of analysis of whether the appellate remedy is adequate, the supreme court’s conclusions appear consistent with prior cases involving similar underlying fact situations.

Mandamus statistics for the supreme court’s 2011 fiscal year, which ran from September 1, 2010, to August 31, 2011, show 227 new petitions for writ of mandamus were filed with the supreme court. Dispositions were made in 222 mandamus cases.7 In 71.17%, or 158, of those dispositions, the petition for writ of mandamus was denied, and in 8.55%, or nineteen, 1.

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1. In addition to the category of cases addressed in this article, mandamus relief may be proper respecting a ministerial act of a court or public officer, see In re Allen, 366 S.W.3d 696, 701 (Tex. 2012) (involving a relator seeking to compel a state comptroller to pay compensation for wrongful conviction and imprisonment); a duty relating to an election, see TEX. ELEC. CODE ANN. § 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 certain statutes, see In re Nestle USA, Inc., No. 12-0518, 2012 WL 5073315, at *1, *4 (Tex. Oct. 19, 2012) (mandamus review of constitutionality of franchise tax statute was proper where legislature used language that gave supreme court power for such review).


3. For a survey of supreme court mandamus opinions of the same type issued from November 1, 2009, through December 31, 2010, see Douglas S. Lang, Pamela D. Koehler, & Genevra M. Williams, Mandamus Decisions of the Texas Supreme Court, 64 SMU L. REV. 393 (2011).

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

5. Id.

6. Id.

of those dispositions, the petition was conditionally granted.\textsuperscript{8} During the 2012 fiscal year, which ran from September 1, 2011, to August 31, 2012, 214 new petitions for writ of mandamus were filed with the supreme court and dispositions were made in 221 mandamus cases.\textsuperscript{9} The petition for writ of mandamus was denied in 73\%, or 161, of those dispositions, and was conditionally granted in 6.3\%, or fourteen, of those dispositions.\textsuperscript{10} These statistics indicate that the supreme court continues to view mandamus as an extraordinary remedy limited to "significant rulings in exceptional cases."\textsuperscript{11} Further, when compared with statistics for the 2010 fiscal year,\textsuperscript{12} these figures indicate a decrease in the number of new petitions for writ of mandamus over the past three years and in the percentage of dispositions in which the writ was conditionally granted.

During the Survey period addressed in this article, from January 1, 2011, through December 31, 2012, the supreme court issued twenty-three opinions involving petitions for mandamus relief.\textsuperscript{13} Sixteen of those twenty-three opinions fell within the scope of this article in that the party seeking relief claimed an abuse of discretion by a lower court and no adequate remedy by appeal.\textsuperscript{14} Oral argument was heard by the supreme

\begin{itemize}
\item[8.] See id. Cases otherwise disposed of were generally dismissed.
\item[9.] See Supreme Court Activity: FY 2008–2012, TEX. COURTS ONLINE, http://www.courts.state.tx.us/pubs/AR2012/sc/2-sc-activity.pdf (last visited Aug. 8, 2013). 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.
\item[10.] See id.
\item[11.] In re Prudential, 148 S.W.3d at 136; see In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P., 290 S.W.3d 204, 209 (Tex. 2009) ("mandamus review remains discretionary, not of right").
\item[12.] During fiscal year 2010, 276 new petitions for writ of mandamus were filed with the supreme court, while 288 mandamus cases were disposed of. The petition for writ of mandamus was denied in 69\%, or 199 of those dispositions, and was conditionally granted in 10.4\%, or thirty of those dispositions. See Supreme Court Activity: FY 2000–2010, TEX. COURTS ONLINE, http://www.courts.state.tx.us/pubs/AR2010/sc/2-sc-activity.pdf (last visited Aug. 8, 2013).
court in seven of those sixteen cases. In fourteen of those sixteen opinions, the petition for writ of mandamus was granted in full or in part. The petition for writ of mandamus was denied in only two of those cases.

Part II of this article, Mandamus Fundamentals, provides a brief overview of the statutory jurisdiction and standard of proof for mandamus. In Part III of this article, Categorization of Recent Texas Supreme Court Mandamus Cases, we categorize and describe each of the sixteen mandamus opinions that are the focus of this article. The descriptions provide a basis for comparison of the supreme court's treatment regarding the standard of proof in particular categories of cases. In Part IV we address the supreme court's approach to analyzing the adequacy of an appellate remedy in those sixteen cases. The cases show that the supreme court's treatment of that element ranges from specific discussion and analysis, to conclusory statements, to no mention at all. However, regardless of the level of analysis, the outcomes are not inconsistent. Further, those cases demonstrate that mandamus remains an extraordinary remedy granted sparingly.

II. MANDAMUS FUNDAMENTALS

We begin with a brief overview of the fundamentals of mandamus. The Texas Constitution, Texas Government Code, and various other statutes provide the basis for statutory jurisdiction over writs of mandamus. Pursuant to the government code, each of Texas's fourteen courts of appeals "may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court." Further, the courts of appeals may issue writs of mandamus respecting certain district and county court judges or the performance of certain election duties. The Texas Supreme Court has mandamus jurisdiction concurrent with the courts of appeals as to district and county court judges and election duties. Additionally, the supreme court may issue writs of mandamus (1) respecting Texas executive offices; (2) to "compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are au-

S.W.3d 582; (2) duties relating to an election, see In re Uresti, 377 S.W.3d 696; In re Palomo, 366 S.W.3d 193; or (3) review of a statute that contained language granting mandamus review, see In re Nestle USA., Inc., 2012 WL 5073315.


16. The petition for writ of mandamus was denied in In re XL Specialty Ins. Co., 373 S.W.3d 46, and In re Puig, 351 S.W.3d 301.


18. See TEX. CONST. art. V, §§ 1, 3, 6; TEX. GOV'T CODE ANN. § 22.002 (West 2011); TEX. GOV'T CODE ANN. § 22.221 (West 2004); TEX. ELEC. CODE ANN. § 273.061 (West 2010).

19. TEX. GOV'T CODE ANN. § 22.221.

20. Id.; TEX. ELEC. CODE ANN. § 273.061.

authorized to perform”; or (3) as to rulings of the courts of appeals. Finally, the language of certain statutes may provide a basis for mandamus jurisdiction in cases involving those statutes.

Mandamus proceedings in both the supreme court and the courts of appeals are governed by Rule 52 of the Texas Rules of Appellate Procedure. Strict adherence to the provisions of Rule 52 is essential. Relief may be denied for, among other things, defects of form in the petition, failure to properly authenticate evidence, or lack of a complete record. Further, pursuant to Rule 52.3(e), if the supreme court and a “court of appeals have concurrent jurisdiction, the petition must be presented first to the court of appeals unless there is a compelling reason not to do so.”

As described above, the focus of this article is the particular type of mandamus relief that corrects a clear abuse of discretion when there is no adequate remedy by appeal. The supreme court has extensively explained that:

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.” This standard, however, has different applications in different circumstances. With respect to resolution of factual issues or matters committed to the trial court’s discretion, for example, the reviewing court may not substitute its judgment for that of the trial court. The relator must establish that the trial court could reasonably have reached only one decision. Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court’s decision unless it is shown to be arbitrary and unreasonable. On the other hand, review of a trial court’s determination of the legal principles controlling its ruling is much less deferential. A trial court has no “discretion” in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to ana-

22. Id.
26. See id. at 758.
28. See In re Le, 335 S.W.3d 808, 813 (Tex. App.—Houston [14th Dist.] 2011, orig. proceeding).
29. Tex. R. App. P. 52.3(e).
30. 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)).
lyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ.37

Furthermore, the supreme court has said the following as to the adequate remedy requirement:

The operative word, "adequate", has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate both public and private interests. Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is "adequate" when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.38

Thus, "the adequacy of an appeal depends on the facts involved in each case."39 Further, while "'an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ' . . . the word 'merely' carries heavy freight."40

III. CATEGORIZATION OF RECENT TEXAS SUPREME COURT MANDAMUS CASES

The sixteen Texas Supreme Court mandamus opinions that are the focus of this article involve a range of topics, including arbitration, venue, jurisdiction, severance of a case, discovery, contempt, law firm disqualification, enforcement of an insurance appraisal clause, enforcement of a jury waiver, and the granting of a new trial. This section briefly states the facts and outcome of each case and describes how the supreme court analyzed the adequacy of the appellate remedy.

37. Id.
40. In re Prudential, 148 S.W.3d at 136 (quoting Walker, 827 S.W.2d at 842).
A. Mandamus and Arbitration

1. Trial Court's Denial of Motion to Compel Arbitration

In the case of In re Rubiola, the Texas Supreme Court granted mandamus relief after a trial court refused to compel arbitration under an arbitration agreement that was not signed by the parties who sought to compel arbitration. The case involved the sale and financing of a home that Brian and Christina Salmon agreed to purchase from Greg and Catherine Rubiola. The transaction was handled by real estate broker J.C. Rubiola, Greg Rubiola's brother, "who served as the listing broker for the property." Additionally, the Salmons applied for mortgage financing with Rubiola Mortgage Company, a corporation operated by Greg Rubiola and J.C. Rubiola as president and vice president, respectively. "As part of the loan process, the Salmons executed an arbitration agreement with the mortgage company." The arbitration agreement defined "parties" as "Rubiola Mortgage Company, and each and all persons and entities signing this agreement or any other agreements between or among any of the parties as part of this transaction" and provided that "[t]he parties' shall also include individual partners, affiliates, officers, directors, employees, agents, and/or representatives of any party to such documents, and shall include any other owner and holder of this agreement." J.C. Rubiola signed the arbitration agreement on behalf of Rubiola Mortgage Company. Several months after closing, the Salmons sued Greg, Catherine, and J.C. Rubiola and others involved in repairing the home (collectively, the Rubiolas). The Rubiolas "moved to compel arbitration." The trial court denied the Rubiolas' motion to compel," and the Fourth Court of Appeals in San Antonio denied mandamus relief. The Rubiolas filed a petition for writ of mandamus in the Texas Supreme Court, seeking enforcement of the arbitration agreement as non-signatories. The supreme court observed that the parties did not

41. It is important to note that in the cases in this category the parties did not dispute applicability of the Federal Arbitration Act (FAA). Section 51.016 of the Texas Civil Practice and Remedies Code, which became effective September 1, 2009, expanded state court interlocutory review of certain FAA arbitration matters. See TEX. CIV. PRAC. & REM. CODE ANN. § 51.016 (West 2012). Thus, mandamus relief may no longer be available in certain FAA cases. See CMH Homes v. Perez, 340 S.W.3d 444, 448–52 (Tex. 2011) (describing recent changes to Texas law respecting availability of judicial review of interlocutory arbitration order).

42. In re Rubiola, 334 S.W.3d 220, 222 (Tex. 2011).
43. Id.
44. Id.
45. Id.
46. Id.
47. Id. at 222–23.
48. Id. at 223.
49. Id.
50. Id.
52. In re Rubiola, 334 S.W.3d at 223.
contest the applicability of the Federal Arbitration Act (FAA). That court stated "'[a] party denied the right to arbitrate pursuant to an agreement subject to the FAA does not have an adequate remedy by appeal and is entitled to mandamus relief to correct a clear abuse of discretion.'" The supreme court reasoned that "Rubiola Mortgage Company signed the arbitration agreement, and the Rubiola brothers are clearly officers and representatives of the mortgage company and thus non-signatory parties to the arbitration agreement under the agreement's terms." Therefore, the Rubiolas were entitled to compel arbitration under that agreement. Further, the supreme court reasoned that the language of the arbitration agreement indicated it "was not limited to the financing part of the transaction but rather extended to the real estate sales contract and the Salmons[' complaints regarding that sale." In light of those determinations, the supreme court concluded the trial court's order denying arbitration constituted an abuse of discretion.

2. Appointment of Arbitrator by Trial Court

In the case of In re Service Corp. International, a cemetery operator (SCI) entered into a contract with Gabriel and Yolanda Serna respecting interment rights and services. Subsequently, the Sernas filed suit against SCI alleging, among other things, that SCI had "failed to properly maintain the cemetery." The parties did not dispute that FAA arbitration was required pursuant to the terms of the contract. The contract provided that an arbitrator would either be selected by mutual agreement of the parties or appointed by the American Arbitration Association (AAA) upon application of one or both of the parties. After several months, during which the parties were unable to agree on an arbitrator, "the Sernas asked the trial court to appoint an arbitrator, arguing that SCI had waived its right to seek an appointment by the AAA." The trial court appointed a former district judge as arbitrator. "SCI filed a motion for rehearing arguing that the contractual provision required that the AAA appoint the arbitrator, and that the Sernas were responsible for initiating proceedings with the AAA." This motion was denied. "SCI

53. Id.
54. Id. (quoting In re Labatt Food Serv., L.P., 279 S.W.3d 640, 642-43 (Tex. 2009) (mandamus relief granted where party was denied right to arbitrate under agreement subject to FAA)).
55. Id. at 224-25.
56. Id. at 225.
57. Id. at 226.
58. Id.
60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
unsuccessfully sought a writ of mandamus from the court of appeals."\textsuperscript{667} Then, SCI filed a petition for writ of mandamus in the Texas Supreme Court, requesting that court to direct the trial court to vacate its order naming the former judge as arbitrator.\textsuperscript{668} The supreme court observed that "[b]efore the trial court can intervene and appoint an arbitrator, section 5 [of the FAA] requires that parties follow the previously agreed method of arbitrator selection."\textsuperscript{669} That court stated that the record showed the appointment in question occurred when "the disagreement of the parties as to the selection of the arbitrator was at most one month old."\textsuperscript{670} According to the supreme court, "[a]s a matter of law, a one-month interval following an impasse, by itself, cannot reasonably be construed as a lapse in appointing an arbitrator."\textsuperscript{671} The supreme court concluded the trial court abused its discretion by appointing an arbitrator "without allowing a reasonable opportunity to procure an appointment by AAA."\textsuperscript{672} Further, the supreme court stated that "[n]o adequate remedy by appeal exists when a trial court erroneously appoints an arbitrator pursuant to [the FAA]. . . because the FAA does not provide for review of the trial court's actions in state court."\textsuperscript{673} The supreme court conditionally granted mandamus relief to SCI, directing "the trial court to vacate its prior order appointing an arbitrator and allow the parties a reasonable opportunity to select an arbitrator pursuant to their agreement."\textsuperscript{674}

In another case involving facts similar to those described above, also styled \textit{In re Service Corp. International}, two sisters, Norma Sandoval and Nora Martinez, jointly filed suit against a cemetery operator (SCI).\textsuperscript{675} The sisters alleged "tort claims arising from their respective services contracts for family burial plots."\textsuperscript{676} The parties agreed the disputes were required to be arbitrated pursuant to the FAA.\textsuperscript{677} The contracts that Sandoval and Martinez signed both included arbitration clauses but specified different contractual methods for appointing the arbitrators.\textsuperscript{678} Martinez's contract allowed the court to appoint an arbitrator, while Sandoval's contract required the AAA to appoint the arbitrator if the

\begin{itemize}
  \item \textsuperscript{667} \textit{Id}.
  \item \textsuperscript{668} \textit{Id}.
  \item \textsuperscript{669} \textit{Id} at 659.
  \item \textsuperscript{670} \textit{Id} at 660.
  \item \textsuperscript{671} \textit{Id} at 661.
  \item \textsuperscript{672} \textit{Id} at 657.
  \item \textsuperscript{673} \textit{Id} at 658 (citing \textit{In re La. Pac. Corp.}, 972 S.W.2d 63, 65 (Tex. 1998) (no adequate remedy where trial court abused discretion by naming substitute arbitrator)). Additionally, the supreme court noted "[t]his case was filed prior to the 2009 addition of section 51.016 to the Texas Civil Practice and Remedies Code expanding state court interlocutory review of certain FAA arbitration matters." \textit{Id} at 658 n.1; see CMH Homes v. Perez, 340 S.W.3d 444, 448–52 (Tex. 2011) (discussing appellate remedies available to parties in arbitration proceedings following the 2009 amendment to the Texas Civil Practice and Remedies Code).
  \item \textsuperscript{674} \textit{In re Serv. Corp. Int'l}, 355 S.W.3d at 662.
  \item \textsuperscript{675} \textit{In re Serv. Corp. Int'l}, 355 S.W.3d 662, 662 (Tex. 2011).
  \item \textsuperscript{676} \textit{Id}.
  \item \textsuperscript{677} \textit{Id} at 662–63.
  \item \textsuperscript{678} \textit{Id} at 663.
\end{itemize}
parties could not reach an agreement.\textsuperscript{79} The trial judge severed the cases and appointed an arbitrator for Martinez’s case.\textsuperscript{80} Then, Sandoval asked the trial court to appoint an arbitrator in her case.\textsuperscript{81} Over SCI’s objection, the trial court appointed the Martinez case arbitrator to also arbitrate Sandoval’s case.\textsuperscript{82} SCI unsuccessfully sought a writ of mandamus from the court of appeals.\textsuperscript{83} In the Texas Supreme Court, SCI requested a writ of mandamus directing the trial court to vacate its order naming the arbitrator in Sandoval’s case.\textsuperscript{84} Specifically, SCI argued that the trial court’s appointment of an arbitrator interfered with the contractual rights of the parties and was not authorized by the FAA.\textsuperscript{85} The supreme court stated “[t]he disputed issue is whether SCI allowed a lapse or mechanical breakdown in the contractual process for selection of an arbitrator, thereby validating the trial court’s intervention to appoint the arbitrator.”\textsuperscript{86} The supreme court reasoned that, “[a]s a matter of law, the two-month delay in the selection of an arbitrator in this case, by itself, [did] not establish a lapse or failure of the parties to avail themselves of the contractual selection method.”\textsuperscript{87} The supreme court concluded SCI was entitled to mandamus relief because (1) “the trial court abused its discretion by appointing an arbitrator instead of following the agreed-upon method of selection outlined in the contract” and (2) there was no adequate remedy by appeal from that abuse of discretion.\textsuperscript{88}

B. MANDAMUS AND VENUE

In the case of \textit{In re Lopez},\textsuperscript{89} members of a patient’s family (the Lopezes) entered into a written agreement with Regency Nursing Center Partners of Yoakum, Ltd. (Yoakum) for admission of the patient to Yoakum’s nursing home. The agreement specified that arbitration relating to the agreement was to take place in Victoria County.\textsuperscript{90} However, in an action by the Lopezes against Yoakum following the patient’s death, the arbitration hearing took place in Travis County.\textsuperscript{91} The arbitration resulted in a ruling in the Lopezes’ favor.\textsuperscript{92} Yoakum filed an application in district court in Victoria County to vacate the arbitration award.\textsuperscript{93} The Lopezes filed a motion to transfer venue to Travis County based on

\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 663–64
\textsuperscript{88} Id. at 663. \textit{See also In re Serv. Corp. Int’l}, 355 S.W.3d 655 (Tex. 2011) (no adequate remedy where trial court abused discretion by appointing arbitrator).
\textsuperscript{89} \textit{In re Lopez}, 372 S.W.3d 174, 175 (Tex. 2012).
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
§ 171.096(c) of the Texas Civil Practice and Remedies Code, which provides that “[i]f a hearing before the arbitrators has been held, a party must file the initial application [to vacate the arbitration award] with the clerk of the court of the county in which the hearing was held.” Yoakum filed a response stating that venue was proper in Victoria County pursuant to § 171.096(b) of the Texas Civil Practice and Remedies Code, which states in part that if an arbitration agreement “provides that the hearing before the arbitrators is to be held in a county in this state, a party must file the initial application [to vacate the arbitration award] with the clerk of the court of that county.” The trial court denied the Lopezes’ motion to transfer, and the Thirteenth Court of Appeals in Corpus Christi denied mandamus relief. The Lopezes pursued mandamus relief in the Texas Supreme Court, contending § 171.096(b) applies only when there was an agreement to arbitrate in a particular county and no arbitration hearing had yet taken place. The supreme court agreed with the Lopezes and stated “that when an arbitration hearing has already been held, venue is determined by section 171.096(c), which mandates venue be in the same county where the arbitration hearing was held.” The supreme court concluded the “trial court clearly abused its discretion” by applying § 171.096(b) instead of 171.096(c) since an arbitration hearing had already been held. Additionally, the supreme court stated “[m]andamus relief is the proper remedy to enforce a mandatory venue provision when the trial court has denied a motion to transfer venue.” The supreme court observed that “mandamus relief is proper when the trial court has abused its discretion and a party has no appellate remedy.” However, where a party seeks to enforce a mandatory venue provision a party is only required to show that the trial court clearly abused its discretion by failing to transfer the case and is not required to prove that it lacks an adequate appellate remedy. The supreme court reasoned that § 171.096(c) is a mandatory venue provision because it states “that a

94. Id. at 175–76; TEX. CIV. PRAC. & REM. CODE ANN. § 171.096(c) (West 2011).
95. Id. at 176; TEX. CIV. PRAC. & REM. CODE ANN. § 171.096(b) (West 2011).
96. In re Lopez, 392 S.W.3d at 176.
97. Id.
98. Id.
99. Id.
100. Id. (citing TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (West 2002) (“A party may apply for a writ of mandamus with an appellate court to enforce the mandatory venue provisions of this chapter.”)).
101. Id.
102. Id. at 176–77 (citing In re Applied Chem. Magnesias Corp., 206 S.W.3d 114, 117 (Tex. 2006) (because declaratory judgment suit to determine rights of parties to contract to acquire surface and mineral leases fell within scope of mandatory venue provision, showing of inadequate remedy was not required in mandamus proceeding respecting venue); In re Mo. Pac. R.R. Co., 998 S.W.2d 212, 216 (Tex. 1999) (because § 15.0642 of the Texas Civil Practice and Remedies Code authorizes mandamus to enforce mandatory venue provisions generally, requirement of inadequate remedy was inapplicable in mandamus proceeding respecting venue in suit against railroad under Federal Employers’ Liability Act); In re Cont’l Airlines, Inc., 988 S.W.2d 733, 735 (Tex. 1998) (applying abuse of discretion standard in mandamus proceeding involving mandatory venue statute respecting injunctive relief)).
party 'must' file the initial application in the county where the arbitration hearing was held.”

Therefore, the supreme court concluded, “the Lopezes [were] not required to prove that they [had] no adequate appellate remedy in order to obtain mandamus relief.” The supreme court conditionally granted mandamus relief, directing the trial court (1) to vacate the order denying the Lopezes’ motion and (2) to “grant the Lopezes’ motion to transfer venue.”

C. MANDAMUS AND JURISDICTION

1. Dominant Jurisdiction in Matter Involving Estate Property

In re Puig involved mandamus relief sought to correct a district court’s denial of a plea to the jurisdiction. “The plea challenged the district court’s jurisdiction to determine the ownership of a ranch allegedly owned, in part, by an estate undergoing administration in a county court at law.” The county court was sitting in probate. The Fourth Court of Appeals in San Antonio denied the relators’ petition for writ of mandamus, and the relators sought mandamus relief in the Texas Supreme Court. The supreme court agreed with the relators that, because the issues raised in the district court suit were “appertaining and incident to” the estate in question, the county court sitting in probate had the power to hear the ownership matters in dispute in the district court suit. However, the supreme court determined the issue was “one of dominant, rather than exclusive, jurisdiction,” and “the proper method for contesting a court’s lack of dominant jurisdiction is the filing of a plea in abatement, not a plea to the jurisdiction . . . .” The supreme court concluded that “[b]ecause the . . . district court did not commit a clear abuse of discretion in denying the relators’ plea to the jurisdiction, any further inquiry into the relators’ appellate remedy is unnecessary.” The petition for writ of mandamus was denied.

2. Jurisdiction in Interstate Child Custody Matter

In the case of In re Dean, the Texas Supreme Court considered “whether a Texas court ha[d] jurisdiction over a custody determination

103. Id. at 177.
104. Id.
105. Id.
106. In re Puig, 351 S.W.3d 301, 303 (Tex. 2011).
107. Id.
108. Id.
109. Id. at 304.
110. Id. at 305.
111. Id. at 306.
112. Id. at 303. The supreme court stated, “We note that the improper denial of a plea in abatement may, on occasion, warrant mandamus relief.” Id. at 306. Specifically, according to the court, “when a court issues an ‘order which actively interferes with the exercise of jurisdiction’ by a court possessing dominant jurisdiction, mandamus relief is appropriate.” Id. (quoting Noor v. Black, 695 S.W.2d 564, 567 (Tex. 1985)).
113. Id.
114. Id.
involving a child[,] J.S.D.,] who was born in New Mexico and . . . lived there all his life.”115 J.S.D.'s father, Richard Hompesch III, and mother, Carrie Dean, were married in 2010 and lived together in Texas. While pregnant with J.S.D., Dean moved to New Mexico, where J.S.D. was subsequently born. In February 2011, Hompesch filed for divorce in Dallas County and sought orders concerning J.S.D. While that case was pending, Dean petitioned a New Mexico court to adjudicate custody of J.S.D. Dean alleged that the New Mexico court, and not the Texas court, had jurisdiction because New Mexico was J.S.D.'s “home state” pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which has been adopted by both Texas and New Mexico.116 Simultaneously, Dean sought dismissal of the Texas proceeding. The New Mexico trial judge concluded that New Mexico was J.S.D.'s “home state,” but deferred to the Texas court to “make the first call.”117 An associate judge in the Texas case “concluded that Texas had jurisdiction over the proceedings because [Hompesch] filed his divorce petition in Texas first.”118 Based on that decision, and even though it thought that “New Mexico [did] have jurisdiction,” the New Mexico court dismissed Dean's pending custody suit without prejudice. Then, “the Texas district court adopted the associate judge's recommendations” as to custody “and set forth guidelines for both parents’ access to J.S.D.”119 Dean appealed the New Mexico trial court's dismissal order to the New Mexico Court of Appeals, and that appellate court “issued two proposed summary dispositions proposing to hold that New Mexico was J.S.D.'s home state with exclusive jurisdiction over custody and visitation.”120 While those dispositions remained pending, Dean unsuccessfully sought mandamus relief in the Texas case from the Fifth Court of Appeals in Dallas and then petitioned the Texas Supreme Court for a writ of mandamus.121 Following an analysis of the UCCJEA, the supreme court concluded New Mexico was J.S.D.'s “home state” under that act and therefore “jurisdiction in that state's courts is exclusive unless that state properly cedes jurisdiction based on circumstances the statute prescribes.”122 Further, the supreme court concluded the New Mexico trial court improperly ceded jurisdiction to Texas without basing that declination on UCCJEA § 207 (inconvenient forum) or § 208 (jurisdiction declined by reason of conduct).123 Finally, the supreme court concluded the Texas court improperly assumed jurisdiction because the New Mexico court had not yet properly declined ju-

115. In re Dean, 393 S.W.3d 741, 743 (Tex. 2012).
117. In re Dean, 393 S.W.3d at 744–45.
118. Id. at 745.
119. Id.
120. Id.
121. Id. Additionally, Dean concurrently sought a stay of the Texas trial court's order, which the supreme court granted. Id.
122. Id. at 746–47.
123. Id. at 750.
risdiction under the UCCJEA. According to the supreme court, Dean, Hompesch, and J.S.D. were left with an "intolerable interregnum" during which they, "seemingly, [had] nowhere to turn." Without specifically discussing the lack of an adequate appellate remedy, the supreme court conditionally granted mandamus relief. The Texas district court was ordered to "communicate promptly with the New Mexico Court of Appeals" and dismiss the child custody portion of the case unless the New Mexico court "decline[s] to exercise jurisdiction on the ground that [Texas] is the more appropriate forum to determine [J.S.D.'s] custody . . . under [UCCJEA] Section 207 or 208."

D. MANDAMUS AND SEVERANCE OF CASE BY TRIAL COURT

In the case of In re State, the State of Texas sought to condemn a tract of land to be used in constructing a highway. After the State filed a petition to condemn, "the owners subdivided the property into eight separate parcels." Then, upon motion by the owners, the trial court "severed the case into eight different proceedings." The State contended the severance was improper and sought a writ of mandamus requiring the trial court to vacate the order. The Third Court of Appeals in Austin denied mandamus relief. However, the supreme court conditionally granted the State's petition for writ of mandamus. The supreme court reasoned that the duplication that would result from the severance of the case was "inconvenient, and, worse, prejudicial to the State, which has a right to offer evidence that the entire property being taken should be valued as a single economic unit." The supreme court stated:

Because of this, and because of the waste involved in having valuation experts give testimony eight times that they could give once, we hold that the trial court abused its discretion by ordering a severance that, by breaking up a deeply interrelated set of legal and factual issues, prejudices the parties and causes great inconvenience.

Further, the supreme court concluded, "We believe that the circumstances of this case also make the appellate remedy inadequate because of the enormous waste of judicial and public resources that compliance with the trial court's order would entail.

124. Id. at 747.
125. Id. at 750.
126. Id. (citing Powell v. Stover, 165 S.W.3d 322, 328 (Tex. 2005) (writ of mandamus is appropriate means to require trial court to comply with UCCJEA's jurisdictional requirements)).
127. Id. (quoting TEX. FAM. CODE ANN. § 152.201(a)(3) (West 2008)).
129. Id.
130. Id.
131. Id.
132. Id. at 613.
133. Id. at 612.
134. Id. at 614.
135. Id.
136. Id. at 615.
that "[r]equiring eight separate suits here, when only one is proper, would be a clear waste of the resources of the State, the landowners, and the courts."137

E. MANDAMUS AND DISCOVERY

1. Pre-suit Discovery

In the case of In re Does,138 the Texas Supreme Court addressed whether a trial court may order pre-suit discovery by agreement of the witness over the objections of other interested parties without making the findings required by Rule 202.4(a) of the Texas Rules of Civil Procedure. Philip R. Klein owned two corporations (collectively, PRK).139 Two anonymous bloggers (collectively, relators) criticized Klein extensively on their blogs.140 "Relators subscribe[d] to Blogger.com, a subsidiary of Google, Inc., . . . which host[ed] them on the Internet. PRK petitioned the district court under Rule 202 to order discovery from Google of [the] relators' identities in anticipation of a lawsuit by Klein and PRK against relators for copyright law violations, defamation, and invasion of privacy."141 "After being served, Google agreed with PRK that it would respond to a subpoena duces tecum."142 Further:

Google gave relators notice of its receipt of the subpoena. Relators moved to quash the subpoena, arguing that the petition's allegations were insufficient to show PRK had a cause of action against relators, and that their identities are constitutionally protected from disclosure. PRK responded, arguing that the information sought was not constitutionally protected, and moved to compel discovery. . . . After a brief hearing, at which relators did not appear, the trial court denied relators' motions and granted PRK's.143

The Ninth Court of Appeals in Beaumont denied mandamus relief.144 In their mandamus action in the supreme court, relators argued the trial court abused its discretion by failing to comply with Rule 202's requirement that the trial court find that "(1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit, or (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure."145 The supreme court granted mandamus relief, reasoning that because PRK and Google were not the only parties to the proceeding, they "could not modify the procedures pre-

137. Id.
139. Id. at 863.
140. Id.
141. Id.
142. Id. at 864.
143. Id.
144. Id.
145. Id.
scribed by Rule 202 by an agreement that did not include the relators."  

The supreme court observed that Rule 202 expressly requires that discovery may be ordered “only if” the required findings are made and concluded the trial court “clearly abused its discretion in failing to follow Rule 202.”  

Additionally, as to the adequacy of an appellate remedy, the supreme court stated “Rule 202.5 provides that use of a deposition may be restricted or prohibited ‘to prevent abuse of this rule’ but that remedy for noncompliance affords relators no relief from their complaint that their identities not be disclosed.”

In the case of *In re Wolfe*, the Texas Supreme Court conditionally granted a petition for writ of mandamus after concluding that “without joinder of a proper state official, individual citizens may [not] obtain pre-suit discovery under Rule 202 [of the Texas Rules of Civil Procedure] to investigate grounds for removal of a county official.”  

“The Harris County Department of Education and four of its seven trustees . . . (collectively, the Department), petitioned the district court under Rule 202 to order the deposition of another trustee, Michael Wolfe, in order to investigate suspected wrongdoing that might lead to a removal suit.”  

At the court of appeals, Wolfe’s petition for mandamus was denied. The supreme court observed that “[i]ndividual citizens . . . have no right to maintain an ouster suit without being joined by a proper state official.”  

Further, the supreme court (1) reasoned that the proper party to prosecute the anticipated ouster action against Wolfe was the State, represented by the county attorney, and (2) rejected the Department’s argument that because a Rule 202 proceeding is not a removal proceeding, the county attorney’s joinder was not required. The supreme court stated that “[t]o prevent an end-run around discovery limitations that would govern the anticipated suit, Rule 202 restricts discovery in depositions to ‘the same as if the anticipated suit or potential claim had been filed,’” and “[t]he Department cannot obtain by Rule 202 what it would be denied in the anticipated action.”  

Consequently, the supreme court concluded the trial court “clearly abused its discretion in ordering Wolfe to testify regarding grounds for his removal from office without the request of the county attorney who must prosecute an ouster action for the

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146. *Id.* at 865.
147. *Id.*
148. *Id.* (citing *In re Jorden*, 249 S.W.3d 416, 420 (Tex. 2008) (party to Rule 202 proceeding had no adequate remedy on appeal where trial court abused discretion in ordering discovery)).
150. *Id.* at 932.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 933.
156. *Id.* (quoting TEx. R. Civ. P. 202.5).
Survey of Recent Mandamus Decisions

2. Discovery of Privileged Communications

In re XL Specialty Insurance Co. involved a lawsuit by an injured employee against a workers’ compensation insurer, XL Specialty Insurance Company (XL), “for breach of the common law duty of good faith and fair dealing and violations of the Insurance Code and Texas Deceptive Trade Practices Act.” During discovery, the employee sought to compel production of communications made between XL’s outside counsel and the insured employer during the underlying administrative proceedings that preceded the “bad faith action.” The trial court ordered relators to produce the documents in question, ruling that the attorney-client privilege did not apply to such communications. After XL’s request for mandamus relief was denied by the Fifth Court of Appeals in Dallas, XL sought relief in the Texas Supreme Court, arguing that the attorney-client privilege protected the communications in question. The supreme court observed that “under certain circumstances, communications between an insurer and its insured may be shielded from discovery by the attorney-client privilege.” However, the supreme court stated, before it could reach that conclusion here, XL was required to show that the communications in question were among those protected by Texas Rule of Evidence 503, which provides in part that a client has a privilege to prevent disclosure of certain “confidential communications” made for the purpose of facilitating the rendition of professional legal services to the client. The supreme court concluded XL had “not brought the relevant communications within Rule 503’s parameters.” Therefore, mandamus relief was denied.

F. Mandamus and Constructive Criminal Contempt in Civil Case

In the case of In re Reece, a litigant in a civil case was held in contempt by the trial court and confined for perjury committed during a deposition. “The relator challenged his confinement by seeking a writ of habeas corpus in the Court of Criminal Appeals, but that court declined to exercise its jurisdiction citing, among other things, the civil nature of

157. Id.
158. Id. (citing In re Jorden, 249 S.W.3d 416, 419–20 (Tex. 2008) (party to Rule 202 proceeding had no adequate remedy on appeal where trial court abused discretion in ordering discovery)).
160. Id. at 49.
161. Id.
162. Id. at 53.
163. Id. at 49, 53; Tex. R. Evid. 503(b).
165. Id.
the case.”\textsuperscript{167} The litigant then filed a petition for writ of mandamus in the Texas Supreme Court.\textsuperscript{168} The supreme court concluded the trial court abused its discretion by holding the litigant in constructive criminal contempt for perjury occurring during a deposition because such perjury was not an act that “additionally obstructs the court in the performance of its duties.”\textsuperscript{169} Further, because the underlying suit was civil in nature and the Court of Criminal Appeals declined to grant the litigant leave to file a habeas corpus petition, the litigant had no adequate remedy on appeal.\textsuperscript{170} Thus, mandamus was an appropriate remedy to fix the abuse of discretion.\textsuperscript{171}

G. MANDAMUS AND LAW FIRM DISQUALIFICATION

\textit{In re Guaranty Insurance Services, Inc.} involved a paralegal, Clyde Williams, who changed employment from the law firm of Godwin Pappas Langley Ronquillo, LLP (Godwin Pappas) to the law firm of Strasburger & Price, LLP (Strasburger).\textsuperscript{172} Williams failed to recognize a conflict and consequently performed work on opposite sides of an ongoing litigation matter.\textsuperscript{173} Trans-Global Solutions, Inc., a litigant that had been represented by Godwin Pappas in the matter, moved to disqualify Strasburger.\textsuperscript{174} The trial court granted Trans-Global’s motion.\textsuperscript{175} Guaranty Insurance Services, Inc. (Guaranty), sought mandamus relief in the Third Court of Appeals in Austin but was unsuccessful.\textsuperscript{176} The Texas Supreme Court “conditionally grant[ed] mandamus relief and direct[ed] the trial court to vacate its disqualification order.”\textsuperscript{177} The court stated that “[t]he presumption of shared confidences” applicable in conflict-of-interest cases involving a nonlawyer “is rebuttable if the nonlawyer has actually performed work on the matter at a lawyer’s directive and the lawyer reasonably should not know about the conflict of interest.”\textsuperscript{178} The supreme court concluded the record showed (1) the supervising attorney in question “reasonably should not have had such knowledge, rendering the presumption rebuttable,”\textsuperscript{179} and (2) Strasburger had met its burden to rebut such presumption.\textsuperscript{180} Further, the supreme court concluded “the im-

\textsuperscript{167} Id. at 363.
\textsuperscript{168} Id. at 364.
\textsuperscript{169} Id. at 369.
\textsuperscript{170} Id. at 363, 368–77. In its analysis, the supreme court stated, “The parties agree this Court lacks jurisdiction to grant habeas relief in this matter; we may only exercise our habeas jurisdiction when the contemnor’s confinement is on account of a violation of an order, judgment, or decree previously made in a civil case.” Id. at 369.
\textsuperscript{171} Id. at 374.
\textsuperscript{172} In re Guaranty Ins. Servs., Inc., 343 S.W.3d 130, 132–33 (Tex. 2011).
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 133.
\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 132.
\textsuperscript{178} Id. at 135.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
proper disqualification was a clear abuse of discretion for which there is no adequate remedy by appeal” and mandamus relief was warranted.181

H. MANDAMUS AND ENFORCEMENT OF CONTRACTS

1. Appraisal Clause in Insurance Contract

In re Universal Underwriters of Texas Insurance Co. involved an action by an insured against an insurer alleging breach of contract for underpayment of a claim pertaining to hail damage to buildings on the insured’s property.182 The insurer moved to compel an appraisal and stay the proceedings, but the motion was denied by the trial court.183 After the court of appeals denied the insurer’s petition for a writ of mandamus, the insurer sought mandamus relief from the Texas Supreme Court.184 The supreme court concluded a party demanding an appraisal pursuant to an appraisal clause in an insurance contract after suit has been filed has not waived its right to insist on the contractual appraisal procedure “absent conduct indicating waiver and a showing of prejudice.”185 No such conduct constituting waiver was present in this case.186 Further, the supreme court stated “that mandamus relief is appropriate to enforce an appraisal clause because denying the appraisal would vitiate the insurer’s right to defend its breach of contract claim.”187

2. Pre-suit Jury Waiver

In re Frank Kent Motor Co. involved enforcement of a jury waiver agreement between an employer and an at-will employee.188 The employee signed the jury waiver clause in question “after being told that he would lose his job if he refused.”189 “[W]hen the employee was later terminated, he demanded a jury trial.”190 The trial court refused to enforce the contractual jury waiver and denied the employer’s motion to strike the jury demand.191 The Second Court of Appeals in Fort Worth denied mandamus relief, and the employer filed a petition for writ of mandamus in the Texas Supreme Court.192 The supreme court concluded that

183. Id. at 406.
184. Id.
185. Id. at 405, 410–11.
186. Id. at 410–11.
187. Id. at 412 (citing In re Allstate Cnty. Mut. Ins. Co., 85 S.W.3d 193, 196 (Tex. 2002) (holding that refusal to enforce appraisal clause would “den[y] the development of proof going to the heart of a party’s case and cannot be remedied by appeal”)). However, the supreme court concluded the trial court’s failure to grant the motion to abate was not subject to mandamus. Id. at 412 n.5.
189. Id.
190. Id.
191. Id.
192. Id. at 630.
"[m]andamus review is appropriate and necessary to determine whether a
pre-suit jury waiver is enforceable."193 Further, that court stated "a jury
waiver agreement that is coerced is invalid."194 However, the supreme
court concluded the employee "did not allege coercion in such a way that
would invalidate the Jury Trial Waiver since an at-will employer's threat
to exercise its legal right to terminate an employee cannot amount to
coercion that invalidates a jury waiver agreement."195 Mandamus relief
was conditionally granted, directing the trial court (1) to vacate the chal-
lenged order denying the employer's motion to strike the employee's jury
demand and (2) to grant the employer's motion to strike the employee's
jury demand.196

I. MANDAMUS AND GRANTING OF NEW TRIAL

In In re United Scaffolding, Inc., James Levine sued United Scaffolding,
Inc. (United) for injuries suffered when he fell from a scaffolding unit
built by United.197 The jury assigned fifty-one percent responsibility for
Levine's injuries to United.198 "The jury declined to find past damages"
but "awarded $178,000 in projected future medical expenses."199 Levine's
motion for new trial was granted "in the interest of justice and fair-
ness."200 The Texas Supreme Court conditionally granted a petition for
writ of mandamus filed by United and directed "the trial court to specify
its reasons for disregarding the jury verdict and ordering a new trial."
201 The trial court amended its order to state four bases, separated by "and/
or."202 One of those bases was "[i]n the interest of justice and fair-
ness."203 United again sought mandamus relief. United contended the
amended order still failed to provide "adequate reasoning" for the grant-
ing of Levine's motion for new trial.204 Additionally, United argued the
record did not support any of the bases in the amended order and, there-
fore, the trial court should be ordered to render judgment on the ver-
dict.205 The supreme court began its analysis by discussing In re Columbia
Medical Center of Las Colinas,206 in which it "held that a trial court's

193. Id. at 631 (citing In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 138 (Tex. 2004)
issue of whether pre-suit waiver of trial by jury is enforceable "fits well within the types of
issues for which mandamus review is not only appropriate but necessary" because in no
real sense can a trial court's denial of one party's contractual right to have other party
waive jury ever be rectified on appeal)).
194. Id.
195. Id.
196. Id. at 632–33.
198. Id.
199. Id.
200. Id.
201. Id. (quoting In re United Scaffolding, Inc., 301 S.W.3d 661, 663 (Tex. 2010)).
202. Id. at 686–87.
203. Id. at 687.
204. Id.
205. Id.
206. In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P., 290 S.W.3d 204, 213
(Tex. 2009) (quoting In re Columbia Med. Ctr. of Las Colinas, 290 S.W.3d at 218).
order granting a motion for new trial must provide a reasonably specific explanation of the court's reasons for setting aside a jury verdict" and "rejected a new-trial grant that was premised solely 'in the interest of justice.'" According to the supreme court:

[A] trial court does not abuse its discretion so long as its stated reason for granting a new trial (1) is a reason for which a new trial is legally appropriate (such as a well-defined legal standard or a defect that probably resulted in an improper verdict); and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand.208

Then, the supreme court concluded the amended order in question did not meet that test.209 The supreme court reasoned that in the amended order, "the use of 'and/or' leaves open the possibility that 'in the interest of justice and fairness' is the sole rationale," and such rationale "is never an independently sufficient reason for granting a new trial."210 Consequently, the petition for writ of mandamus was conditionally granted in part and the trial court was instructed to vacate its amended order and issue a new order that met the requirements described.211 However, the supreme court disagreed with United that rendition on the jury verdict was warranted.212 The supreme court stated that "absent the trial court's having particularized its reasons [for granting the motion for new trial,] . . . United would be entitled to mandamus directing the trial court to render judgment on the verdict only if it showed no valid basis exists for the new-trial order."213 United had not done so because the record presented by United was only a "partial one" containing items pertaining to the motion for new trial.214

In re Cook involved a motion for new trial in a divorce action.215 After a jury verdict in the husband's favor, the trial court granted the wife's motion for new trial without stating the reasons for doing so.216 The Second Court of Appeals in Fort Worth denied the husband's petition for mandamus relief.217 In his petition for writ of mandamus before the Texas Supreme Court, the husband argued the trial court abused its discretion when it signed an order granting a motion for new trial "based [only] on all grounds in the motion."218 While the case was pending in the supreme court, the trial judge who signed the order in question resigned, and the

207. In re United Scaffolding, Inc., 377 S.W.3d at 689.
208. Id. at 688-89.
209. Id. at 689-90.
210. Id.
211. Id. at 690.
212. Id.
213. Id.
214. Id.
216. Id.
217. Id. at 495.
218. Id. at 494.
case was abated to allow the successor trial judge to reconsider the order.\textsuperscript{219} Subsequently, the successor trial judge signed an order stating his predecessor’s ruling “should remain unchanged.”\textsuperscript{220} Then, the supreme court “lifted the abatement order and reinstated the [mandamus] proceeding.”\textsuperscript{221} That court stated “the former trial court’s order is no longer at issue here, as the successor trial judge has since issued a subsequent order.”\textsuperscript{222} Further, the supreme court reasoned that the successor trial judge’s reaffirmation of “the former trial court’s order was tantamount to granting the motion for new trial.”\textsuperscript{223} Consequently, the supreme court explained, “the successor trial court must provide its own statement of the reasons for setting aside a jury verdict.”\textsuperscript{224} Relying heavily on \textit{In re Columbia Medical Center of Las Colinas}, the supreme court concluded the successor judge’s failure to state sufficient reasons for his ruling “was an abuse of discretion for which there [was] no adequate remedy by appeal.”\textsuperscript{225} Mandamus relief was conditionally granted and the successor trial judge was directed to specify the reasons for refusing to enter judgment on the jury verdict.\textsuperscript{226}

\section*{IV. THE TEXAS SUPREME COURT’S TREATMENT OF THE “ADEQUACY” REQUIREMENT}

The cases summarized above illustrate that the Texas Supreme Court’s approach in addressing the adequacy of an appellate remedy varies. In each of the sixteen cases included in this analysis, that court followed one of three approaches: (1) specifically discussing the adequacy of the appellate remedy; (2) making a conclusory statement as to whether the appellate remedy was adequate; or (3) not specifically addressing the adequacy of the appellate remedy. The chart below sets out those approaches relative to the subject matter of the cases.

\begin{table}
\centering
\begin{tabular}{|c|c|}
\hline
Subject Matter & Approach
\hline
Abatement & Specific Discussion
\hline
Mandamus 
relief & Conclusion
\hline
Successor 
trial judge & Conclusion
\hline
\end{tabular}
\caption{Texas Supreme Court’s Treatment of Adequacy Requirement}
\end{table}

\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id. at 495.
\textsuperscript{222} Id. (citing State v. Olsen, 360 S.W.2d 402, 403 (Tex. 1962) (“A writ of mandamus will not lie against a successor judge in the absence of a refusal by him to grant the relief Relator seeks.”)).
\textsuperscript{223} Id.
\textsuperscript{224} Id.
\textsuperscript{225} Id. (citing \textit{In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.}, 290 S.W.3d 204, 206, 209–10, 212–13 (Tex. 2009) (where successor trial court judge erred by reaffirming grant of new trial without stating specific grounds, party had no adequate remedy by appeal)).
\textsuperscript{226} Id. at 495–96.
<table>
<thead>
<tr>
<th>Appellate Remedy Treatment</th>
<th>Opinion</th>
<th>Subject Matter of Case &amp; Trial Court Act Constituting Abuse of Discretion</th>
<th>Mandamus Disposition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Specific discussion of adequacy of party's appellate remedy</td>
<td>In re State, 355 S.W.3d 611 (Tex. 2011).</td>
<td>Severance of case by trial court (t. ct.); t. ct. broke up “deeply interrelated” set of issues, thus prejudicing parties</td>
<td>Granted</td>
</tr>
<tr>
<td>Conclusory statement as to adequacy of appellate remedy</td>
<td>In re Reece, 341 S.W.3d 360 (Tex. 2011).</td>
<td>Constructive criminal contempt in civil case; t. ct. improperly used criminal contempt where court’s duties were not obstructed</td>
<td>Granted</td>
</tr>
<tr>
<td></td>
<td>In re Lopez, 372 S.W.3d 174 (Tex. 2012).</td>
<td>Mandatory venue provision; t. ct. denied transfer of case necessary to satisfy statutory venue requirement</td>
<td>Granted</td>
</tr>
<tr>
<td></td>
<td>In re Frank Kent Motor Co., 361 S.W.3d 628 (Tex. 2012).</td>
<td>Enforcement of pre-suit jury waiver; t. ct. refused to enforce contractual jury waiver although coercion not shown</td>
<td>Granted</td>
</tr>
<tr>
<td></td>
<td>In re Cook, 356 S.W.3d 493 (Tex. 2011).</td>
<td>Granting of motion for new trial; successor trial judge did not provide his own reasons for reaffirmation of former judge’s order granting new trial</td>
<td>Granted</td>
</tr>
<tr>
<td></td>
<td>In re Serv. Corp. Int’l, 355 S.W.3d 655 (Tex. 2011).</td>
<td>Appointment of arbitrator; t. ct. did not follow method agreed to by parties</td>
<td>Granted</td>
</tr>
<tr>
<td></td>
<td>In re Serv. Corp. Int’l, 355 S.W.3d 662 (Tex. 2011).</td>
<td>Appointment of arbitrator; t. ct. did not allow reasonable opportunity to follow method agreed to by parties</td>
<td>Granted</td>
</tr>
<tr>
<td></td>
<td>In re Universal Underwriters of Tex. Ins. Co., 345 S.W.3d 404 (Tex. 2011).</td>
<td>Demand for appraisal by insurer; t. ct. denied motion for appraisal pursuant to contract where waiver requirements not met</td>
<td>Granted</td>
</tr>
<tr>
<td></td>
<td>In re Guaranty Ins. Servs, Inc., 343 S.W.3d 130 (Tex. 2011).</td>
<td>Law firm disqualification; t. ct. wrongly disqualified paralegal where rebuttable presumption of knowledge was rebutted</td>
<td>Granted</td>
</tr>
<tr>
<td></td>
<td>In re Does, 337 S.W.3d 862 (Tex. 2011).</td>
<td>Pre-suit discovery; t. ct. failed to make required findings before ordering pre-suit discovery</td>
<td>Granted</td>
</tr>
<tr>
<td></td>
<td>In re Rubiola, 334 S.W.3d 220 (Tex. 2011).</td>
<td>Denial of motion to compel arbitration; t. ct. denied party’s right to arbitrate pursuant to agreement</td>
<td>Granted</td>
</tr>
</tbody>
</table>
While this chart indicates that the supreme court does not frequently present a detailed discussion of the adequacy of the appellate remedy in mandamus cases, one should not conclude that the adequate remedy element is of little consequence. It bears noting that, as to the two cases in which the supreme court specifically discussed the adequacy of the appellate remedy, research did not reveal prior mandamus cases with similar fact situations. Further, in each case in which the supreme court addressed the adequacy of the appellate remedy in a conclusory manner, the court cited at least one prior opinion that involved a similar fact situation and contained a more detailed explanation of the adequacy of an appellate remedy in those circumstances. Finally, there were five cases in which the adequacy of the appellate remedy was not addressed. Two of those cases involved a conclusion by the supreme court that no abuse of discretion had occurred, so adequacy of the appellate remedy was not at issue. In the remaining three cases, the supreme court cited earlier cases with similar facts in which the adequacy of the appellate remedy was addressed.

V. CONCLUSION

The foregoing survey of sixteen published Texas Supreme Court mandamus opinions issued during the period of January 1, 2011, through December 31, 2012, illustrates that the supreme court’s approach varies as to how it addresses the element of whether there is an adequate remedy by appeal. Sometimes the supreme court provides a conclusory analysis or
no analysis at all as to that element, and it infrequently provides a detailed discussion. However, regardless of the level of analysis, that court appears to reach consistent conclusions respecting that element in cases involving similar fact situations. Further, the case law does not signal any change by the supreme court in its view that the determination of whether an appellate remedy is adequate "resists categorization." Accordingly, a prudent practitioner in a mandamus proceeding must fully address the adequate remedy element.
