

COMMENT

THE ONLY GUARANTEE IS THERE ARE NO GUARANTEES: THE TEXAS SUPREME COURT’S INABILITY TO ESTABLISH A MANDAMUS STANDARD*

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I. INTRODUCTION

“It is emphatically the province and duty of the judicial department to say what the law is.”¹ Every law student reads Justice Marshall’s famous words in constitutional law. Every law student learns that in *Marbury v. Madison*, Justice Marshall establishes the principle of judicial review.² However, many law students cannot tell you the relief that Marbury sought from Secretary Madison—a “writ of mandamus.”³ Two hundred years have passed, and the principle of judicial review is firmly established. However, great uncertainty still exists regarding mandamus law.

In Texas, the general rule is a party can only appeal a final judgment.⁴ A writ of mandamus allows a party to appeal a court’s ruling before final judgment and is appropriate only when the party’s inability to appeal before final judgment substantially

1. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

2. *See id.* at 177–78 (establishing the now-fundamental concept that the Supreme Court has the power to strike down any law that is in conflict with the U.S. Constitution).

3. *Id.* at 137–38.

4. *See, e.g.*, *Davis v. McCray Refrigerator Sales Corp.*, 150 S.W.2d 377, 377 (Tex. 1941); *see also* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3906 (2d ed. 1992) (observing that despite a lack of “historic guidance” for the reasons underlying the final judgment rule, the rule is “enduring”). Express statutory exceptions to the final judgment rule exist when a court makes certain interlocutory orders. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon 1997 & Supp. 2006). However, this Comment does not discuss these statutory exceptions.

deprives him of his rights.⁵ Mandamus is therefore an essential procedural device for the preservation of litigants' rights.⁶ For example, if a trial court orders the discovery of privileged documents,⁷ orders the discovery of patently irrelevant information,⁸ or enforces or refuses to enforce an arbitration agreement pursuant to a federal statute,⁹ a person's rights may be substantially deprived if he is unable to immediately appeal the court's ruling.¹⁰ A writ of mandamus is appropriate in these situations.

At common law, a writ "was issued in the name of the King to enforce his commands."¹¹ Today, a superior court issues a writ of mandamus to compel a lower court or government officer to perform a mandatory or purely ministerial duty correctly.¹² Since the 1950s, the Texas Supreme Court has issued writs of mandamus to lower courts to correct a "clear abuse of discretion."¹³

The Texas Supreme Court and appellate courts derive part of their power to issue writs of mandamus directly from the Texas Constitution.¹⁴ The Texas Legislature may also confer original jurisdiction on the courts to issue writs of mandamus in specified cases.¹⁵ Accordingly, the courts' power to issue writs of mandamus is extensive, making it essential for the Texas Supreme Court to articulate a clear and workable mandamus

5. See *Iley v. Hughes*, 311 S.W.2d 648, 652 (Tex. 1958) (stressing that interference is only justified when a party stands to lose its substantial rights).

6. See GEORGE C. PRATT, EXTRAORDINARY WRITS, 19 MOORE'S FEDERAL PRACTICE § 204.01[2][b], at 204-7 (3d ed. 2006) (commenting that [m]andamus "affords an avenue of relief to litigants and a tool for the courts to supervise the proper administration of justice").

7. See *D.N.S. v. Schattman*, 937 S.W.2d 151, 158-59 (Tex. App.—Fort Worth 1997, no writ) (granting mandamus where the court ordered the production of a privileged report).

8. See *Tex. Water Comm'n v. Dellana*, 849 S.W.2d 808, 810 (Tex. 1993) (granting mandamus where the court ordered the discovery of "patently irrelevant" information).

9. See *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272-73 (Tex. 1992) (holding that mandamus was appropriate because petitioner was entitled to the benefits of the arbitration clause for which he had contracted).

10. *Id.*

11. See *State ex rel. Lyons v. McDowell*, 57 A.2d 94, 97 (Del. Super. Ct. 1947) (citing *Kendall v. United States*, 37 U.S. 524 (1838)).

12. BLACK'S LAW DICTIONARY 980, 1642 (8th ed. 2004).

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

14. TEX. CONST. art. V, § 3 ("The Supreme Court . . . may issue . . . writs of mandamus . . . as may be necessary to enforce its jurisdiction."); TEX. CONST. art. V, § 8 ("District Court judges shall have the power to issue writs necessary to enforce their jurisdiction.").

15. TEX. CONST. art. V, § 3 ("The Legislature may confer original jurisdiction on the Supreme Court to issue writs of . . . mandamus in such cases as may be specified . . .").

standard. With this said, the Texas Supreme Court has been unable to articulate a clear and workable standard.¹⁶ Moreover, in 2004, the Texas Supreme Court's opinion in *In re Prudential* contradicted the standard the court had applied for the previous twelve years.¹⁷

Part II of this Comment examines the development of the mandamus standard from its inception through the Texas Supreme Court's *In re Prudential* decision in 2004. Part III discusses the problems created by the *In re Prudential* decision, arguing that mandamus petitioners are now more uncertain than ever about their mandamus appeals. Part IV identifies the criteria the Texas Supreme Court should consider when creating the mandamus standard. Finally, Part V proposes a new mandamus standard, which requires the court to determine the underlying reason for the action. Significantly, this standard is predictable, workable, and adheres to constitutional values, such that, if adopted, it would become an enduring rule of law.

II. THE MANDAMUS STANDARD

Over the past fifteen years, the mandamus standard has been anything but predictable.¹⁸ However, this was not always the case. Part II of this Comment examines the development of the mandamus standard from the 1850s to the current standard articulated by the Texas Supreme Court.

A. *The Early Years*

In 1853, the Texas Supreme Court stated that mandamus is not appropriate "to control the action of an inferior court in a matter involving the exercise of judgment."¹⁹ Early Texas law provided that mandamus would issue only when the duty

16. See Beth K. Neese, Comment, *Texas in the Wake of Canadian Helicopters: Are Nonresident Defendants' Due Process Rights Going Down in Flames?*, 34 HOUS. L. REV. 503, 506-07 (1997) (commenting that the mandamus standard is inconsistent and confusing as applied to nonresident defendants seeking relief for denial of a special appearance).

17. Compare *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (stressing that the decision of whether to grant mandamus is dependent upon a "careful balance of jurisprudential considerations"), with *Walker*, 827 S.W.2d at 840 (emphasizing that mandamus is an "extraordinary remedy, available only in limited circumstances").

18. See David M. Johnston, Comment, *In re Prudential*, 41 TEX. J. BUS. L. 91, 97 (2005) (observing that *Walker's* two-part test "offered too many chances for mandamus review to be incorrectly applied").

19. *Little v. Morris*, 10 Tex. 263, 267 (1853).

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performed is ministerial in nature.²⁰ This was the standard for more than 100 years.²¹

In the 1960s and 1970s, however, a lesser standard began to replace the strict standard expressed by the *Morris* court.²² This lesser standard was particularly prevalent in the area of discovery, where courts were determining “whether a discovery order [was] right or wrong” and not whether the act was ministerial or judicial in nature.²³ Moreover, some courts began to ignore the requirement that no adequate remedy by appeal must exist for mandamus to issue.²⁴

B. Walker v. Packer

In 1992, the Texas Supreme Court attempted to tighten the mandamus standard in *Walker v. Packer*.²⁵ By reaffirming the requirement that there must be no adequate remedy by appeal, the court went to great lengths to characterize mandamus as an “extraordinary remedy, available only in limited circumstances.”²⁶

The Walkers were parents of a child born with brain damage.²⁷ They brought a medical malpractice lawsuit against

20. See *Comm’r of the Gen. Land Office v. Smith*, 5 Tex. 471, 478 (1849) (relying on the Supreme Court of the United States). The court explained, “where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial.” *Id.* at 479. However where the act “involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial.” *Id.*

21. See Helen A. Cassidy, *The Instant Freeze-Dried Guide to Mandamus Procedure in Texas Courts*, 31 S. TEX. L. REV. 509, 510 (1990) (citing *Morris*, 10 Tex. at 267) (commenting that for more than a century, only acts that left nothing to the exercise of discretion were properly subject to mandamus).

22. *Id.* at 511.

23. *Id.* at 511–12 (citing *Barker v. Dunham*, 551 S.W.2d 41, 46 (Tex. 1977)) (holding that mandamus was appropriate because the judge was wrong not to require the party to answer the questions); *Houdaille Indus., Inc. v. Cunningham*, 502 S.W.2d 544, 548 (Tex. 1973) (commenting that the “judge properly ordered discovery of the reports”). A ministerial act is “performed without the independent exercise of discretion or judgment,” whereas a judicial act involves “the exercise of judicial power.” BLACK’S LAW DICTIONARY 26 (8th ed. 2004).

24. See generally *Barker*, 551 S.W.2d at 42 (granting mandamus with no discussion of the requirement that in order to do so there must exist no adequate remedy by appeal). See also *Allen v. Humphreys*, 559 S.W.2d 798, 801 (Tex. 1977) (citing *Barker* as the reason why the court did not need to consider whether an adequate remedy by appeal existed).

25. *Walker v. Packer*, 827 S.W.2d 833, 836 (Tex. 1992) (denying writ because petitioner failed to show a clear abuse of discretion and a lack of adequate remedy by appeal).

26. *Id.* at 840 (emphasizing that “[m]andamus is intended to be an extraordinary remedy”).

27. *Id.* at 836.

the hospital where the child was born, the obstetrician, and the nurse attending at delivery.²⁸ After the trial court denied two pre-trial discovery requests, the Walkers brought a petition for a writ of mandamus to the Texas Supreme Court.²⁹ The Texas Supreme Court denied the first discovery request because no sufficient evidence existed to prove that the trial court had clearly abused its discretion.³⁰ The court also denied the second discovery request, this time because the Walkers had an adequate remedy by appeal.³¹

The significance of the *Walker* opinion, however, is not in the court's holding, but rather the court's detailed analysis of the mandamus standard. After emphasizing that a writ of mandamus will only issue when there is (1) a clear abuse of discretion and (2) no adequate remedy by appeal, the court analyzed each requirement in detail.³²

1. *Clear Abuse of Discretion.* Mandamus is used to correct a clear abuse of discretion committed by the trial court.³³ A clear abuse of discretion occurs when the trial court "reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law."³⁴ The application of this standard depends on the circumstances.³⁵

In reviewing a factual issue or a matter committed to the trial court's discretion, the superior court cannot substitute "its judgment for that of the trial court."³⁶ Only when the trial court's decision was "arbitrary and unreasonable," can the decision be disturbed.³⁷ However, in reviewing a legal issue, rather than a factual issue, the trial court is granted much less deference.³⁸ A

28. *Id.*

29. *Id.* at 837. The Walkers were unsuccessful in seeking relief from the court of appeals. *Id.*

30. *Id.* at 836.

31. *Id.*

32. *Id.* at 839 ("Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law." (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985))).

33. *Id.* (noting that the court can now use a writ of mandamus to correct a "clear abuse of discretion," although it was traditionally issued only "to compel the performance of a ministerial act or duty").

34. *Id.* (citing *Johnson*, 700 S.W.2d at 917).

35. *Id.*

36. *Id.*

37. *Id.* at 840.

38. *Id.* ("A trial court has no 'discretion' in determining what the law is or applying the law to the facts.").

failure “to analyze or apply the law correctly will constitute an abuse of discretion.”³⁹

2. *Adequate Remedy by Appeal.* Once a clear abuse of discretion is established, a reviewing court will then determine whether an adequate remedy by appeal exists.⁴⁰ If there is “a clear and adequate remedy at law,” mandamus will not issue.⁴¹ This is a “fundamental tenet” of mandamus practice.⁴² The party seeking mandamus “must demonstrate that the remedy offered by an ordinary appeal is inadequate.”⁴³ Significantly, expense or delay does not make a remedy inadequate.⁴⁴ “[O]nly when parties stand to lose their substantial rights” is the remedy by appeal inadequate and interference through mandamus justified.⁴⁵

3. *The Court’s Language.* Going beyond bare legal analysis, the powerful language expressed in the *Walker* opinion demonstrates the court’s intent to tighten the mandamus standard.⁴⁶ The court emphasized that mandamus is an “extraordinary remedy, available only in limited circumstances.”⁴⁷ The writ will only issue when “manifest and urgent necessity” exist.⁴⁸ The court stressed that the judicial system cannot handle immediate review every time a party has a grievance.⁴⁹

39. *Id.*

40. *See id.* (proceeding to decide whether the petitioner had an adequate remedy by appeal after finding an abuse of discretion).

41. *Id.* (quoting *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984)).

42. *Id.* (citing *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989)). The Texas Supreme Court was concerned that this “fundamental” requirement had at times been overlooked by the courts. *See generally id.* at 840–42 (discussing decisions that had “not focused on this requirement when applying mandamus review”). *See also supra* note 24 and accompanying text (noting that the court’s *Barker v. Dunham* decision allowed courts to grant mandamus without considering whether an adequate remedy by appeal existed).

43. *Walker*, 827 S.W.2d. at 842.

44. *Id.*; *Iley v. Hughes*, 311 S.W.2d 648, 652 (Tex. 1958) (holding that a “delay in getting questions decided through the appellate process” does not justify mandamus).

45. *Walker*, 827 S.W.2d at 842 (citing *Iley*, 311 S.W.2d at 652).

46. *See id.* at 840 (using words such as “extraordinary,” “limited,” “manifest,” and “urgent necessity” to describe circumstances where mandamus is appropriate).

47. *Id.*

48. *Id.* (citing *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989)).

49. *Id.* at 842.

C. Life After Walker

The *Walker* opinion appeared once again to make mandamus an extraordinary remedy.⁵⁰ However, it did not take long for courts to depart from *Walker's* requirements.⁵¹ In *Canadian Helicopters, Ltd. v. Witting*, for example, the court opined that mandamus may be granted because the remedy by appeal—though available—may actually be inadequate.⁵²

The plaintiffs in *Canadian Helicopters* sued after a fatal helicopter crash.⁵³ Defendant Canadian Helicopters contested the trial court's personal jurisdiction.⁵⁴ The trial court, however, overruled defendant's special appearance.⁵⁵ Canadian Helicopters was subsequently denied mandamus relief in the court of appeals and sought mandamus in the Texas Supreme Court.⁵⁶ The Texas Supreme Court also denied the writ, holding that "a challenge to personal jurisdiction may ordinarily be adequately reviewed on appeal."⁵⁷ The court, citing *Walker*, emphasized that mandamus is "an extraordinary remedy, available only in limited circumstances."⁵⁸ Moreover, in line with the narrow interpretation of mandamus under *Walker*, the petitioner bears the "heavy" burden to prove an abuse of discretion and an inadequate remedy by appeal.⁵⁹

While *Canadian Helicopters* appears to support *Walker*, it departs in one significant aspect. *Walker* held that mandamus is only appropriate when there is a "clear abuse of discretion" and no "adequate remedy by appeal."⁶⁰ Conversely, in *Canadian Helicopters*, the court stated that where the trial court acts with such extreme disregard "for guiding principles of law that the harm to the defendant becomes irreparable," the defendant may

50. See PAMELA STANTON BARON, TEXAS SUPREME COURT MANDAMUS UPDATE 2 (2005), available at http://tex-app.org/articles/60264_01.pdf (noting that "*Walker* reaffirmed the stringent application of the traditional requisites for mandamus relief").

51. *Id.* (observing that the court made numerous exceptions to the *Walker* standard).

52. *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 308–09 (Tex. 1994) ("We do not foreclose the possibility that a trial court . . . may act with such disregard for guiding principles of law that the harm to the defendant becomes irreparable In such a situation, a defendant's remedy by appeal may be inadequate.").

53. *Id.* at 305.

54. *Id.* (relating defendant's argument that it lacked minimum contacts with Texas).

55. *Id.*

56. *Id.*

57. *Id.* at 307.

58. *Id.* at 305 (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)).

59. *Id.*

60. *Walker*, 827 S.W.2d at 839.

not have an adequate remedy by appeal, and mandamus may be appropriate.⁶¹ In other words, when the abuse of discretion is extreme, the inadequate remedy by appeal requirement need not be satisfied.⁶² The court did not explain how extreme the abuse of discretion must be, but in this case it held that the abuse of discretion did not rise to a level sufficient to satisfy the no adequate remedy by appeal requirement.⁶³ Accordingly, *Canadian Helicopter* contradicts *Walker*. *Walker* expressly requires that the clear abuse of discretion and inadequate remedy by appeal analyses be distinct inquiries that are independent from one another.⁶⁴ The *Canadian Helicopters* opinion suggests that in some situations, the two analyses are not independent from one another.⁶⁵

One year after *Canadian Helicopters* declared that the court may grant mandamus without looking to the inadequacy of the remedy by appeal, the Texas Supreme Court decided *National Industrial Sand Ass'n v. Gibson*.⁶⁶ Significantly, *National Industrial Sand* went a step further than *Canadian Helicopters* when it actually granted mandamus without looking to the inadequacy of the remedy by appeal.⁶⁷

In *National Industrial Sand*, defendant, National Industrial Sand Association (“NISA”), argued that it lacked the necessary minimum contacts with Texas for the trial court to assert personal jurisdiction.⁶⁸ The court denied NISA’s special appearance and held that it had personal jurisdiction over NISA.⁶⁹ The court of appeals, in turn, denied NISA’s mandamus request, holding that NISA had an adequate remedy by appeal.⁷⁰

61. *Canadian Helicopters*, 876 S.W.2d at 308–09.

62. *See id.* at 310 (Hecht, J., dissenting) (criticizing the majority’s “new concept” that “a super-clear abuse of discretion can make appeal an inadequate remedy when a merely clear abuse cannot”).

63. *See id.* at 309, 310 (majority opinion) (holding that *Canadian Helicopters* had an adequate remedy by appeal).

64. *See Walker*, 827 S.W.2d at 839 (declaring that mandamus relief is only available where there is a clear abuse of discretion *and* no adequate remedy by appeal); *see also Canadian Helicopters*, 876 S.W.2d at 310 (Hecht, J., dissenting) (“The two prerequisites for mandamus relief are logically independent.”).

65. *See supra* note 62 and accompanying text (noting an extreme abuse of discretion can make a remedy by appeal inadequate).

66. *Nat’l Indus. Sand Ass’n v. Gibson*, 897 S.W.2d 769 (Tex. 1995).

67. *Id.* at 776 (finding that the trial court’s overruling of the relator’s special appearance was a “total and inarguable” abuse of discretion that justified mandamus relief).

68. *Id.* at 771.

69. *Id.*

70. *Id.* This case was subsequently superseded by statute. *See Raymond Overseas Holding, Ltd. v. Curry*, 955 S.W.2d 470 (Tex. App.—Fort Worth 1997, no pet.). The

The Texas Supreme Court, however, disagreed with the court of appeals and granted mandamus relief.⁷¹ The court held that “the erroneous assertion of jurisdiction was so arbitrary . . . as to place this case within the limited exception recognized in *Canadian Helicopters*.”⁷² Notably, the court focused almost exclusively on the extreme nature of the abuse of discretion; with respect to the adequacy of a remedy by appeal, the court only made the conclusory statement that “[a]n ordinary appeal is inadequate to remedy the irreparable harm to NISA.”⁷³ Moreover, the court did not even acknowledge its divergence from *Walker*.⁷⁴

The facts of *National Industrial Sand* are very similar to those of *Canadian Helicopters*.⁷⁵ However, the court arrived at two different outcomes: it granted mandamus in *National Industrial Sand*, but denied mandamus in *Canadian Helicopters*.⁷⁶ This inconsistency creates an unclear rule. A party can no longer rely on a Texas court’s previous holding when seeking mandamus and can only guess whether the court will or will not grant mandamus.⁷⁷

More significantly, these two decisions illustrate the court’s willingness to overlook the strict mandamus requirements in *Walker* and substitute a more lenient standard.⁷⁸ In *Walker*, the

legislature provided for interlocutory appeal of denials of special appearance. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon 1997 & Supp. 2006).

71. *Nat’l Indus. Sand*, 897 S.W.2d at 776.

72. *Id.*

73. *Id.*; see also *id.* at 777 (Cornyn, J., dissenting) (“Neither NISA nor the Court even offers an argument that an appeal in this case will be inadequate.”).

74. *Id.* at 771, 776 (majority opinion) (quoting *Walker*’s language that mandamus is only available to correct a clear abuse of discretion “when there is no other adequate remedy by law” but nevertheless failing to address this requirement).

75. See *supra* notes 53–55, 68–69 and accompanying text (explaining how defendants in both cases contested the trial court’s assertion of personal jurisdiction, and had special appearances denied by the trial court).

76. Compare *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 305 (Tex. 1994) (denying mandamus because *Canadian Helicopters* had an adequate remedy by appeal), with *Nat’l Indus. Sand*, 897 S.W.2d at 771 (granting mandamus because NISA had no adequate remedy by appeal).

77. See Alan T. Cooperman & Lanny D. Ray, *Mandamus Granted or Mandamus Denied? Confusing Standards to Remedy an Improperly Overruled Special Appearance*, 48 BAYLOR L. REV. 1175, 1177 (1996) (commenting that the Texas Supreme Court has failed to establish a workable and predictable mandamus standard; therefore, “non-resident defendants . . . are left to guess as to the availability of mandamus relief”); see also *Grapevine Excavation, Inc. v. Md. Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000) (noting that the principle of stare decisis promotes consistency and predictability).

78. See Cooperman & Ray, *supra* note 77, at 1192 (asserting that the *Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954 (Tex. 1990), and *National Industrial Sand* decisions “open the door for further confusing expansion of . . . mandamus jurisprudence” that could “eventually eviscerate the *Walker* standard”); see also *supra* notes 60–62, 73–74 and accompanying text (examining the court’s assertions in each case that an extreme

Texas Supreme Court reaffirmed the requirement that mandamus will issue only when there is no adequate remedy by appeal.⁷⁹ The court declared that this is a “fundamental tenet” of mandamus practice.⁸⁰ However, *Canadian Helicopters* noted that the court can overlook this fundamental tenet of mandamus practice in situations where there has been an extreme disregard for guiding principles of law.⁸¹ Furthermore, despite citing *Walker*, the court in *National Industrial Sand* went on to ignore this fundamental tenet by granting mandamus without looking to the adequacy of the remedy by appeal.⁸²

Thus, only three years after *Walker's* proclamation that mandamus is an extraordinary remedy and “available only in limited circumstances,”⁸³ the Texas Supreme Court had chipped away at these mandamus requirements.⁸⁴ Moreover, courts subsequently applied the mandamus rule inconsistently, leaving parties uncertain about their mandamus appeals.⁸⁵

D. In re Prudential

In 2004, the Texas Supreme Court attempted to more clearly articulate its mandamus standard in *In re Prudential*.⁸⁶ However, the *Prudential* court erroneously interpreted the *Walker* opinion and introduced a balancing test that has further confused mandamus law.⁸⁷ Restaurateurs Francesco and Jane Secchi leased space for a restaurant in a Dallas shopping center in October 2000.⁸⁸ They actively negotiated the lease agreement over a six-month period with the landlord, The Prudential

abuse of discretion may warrant a grant of mandamus despite the existence of an adequate remedy by appeal).

79. *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992).

80. *Id.* at 840.

81. *Canadian Helicopters*, 876 S.W.2d at 309–10; see also *supra* notes 61–62 and accompanying text (discussing *Canadian Helicopter* court's statement that despite available appellate remedies, mandamus may be appropriate where an extreme abuse of discretion has caused “irreparable” harm).

82. See *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 771, 776 (Tex. 1995); see also *supra* note 74 and accompanying text (describing the *National Industrial Sand* court's divergence from *Walker's* requirement of no adequate appellate remedy).

83. *Walker*, 827 S.W.2d at 840.

84. See *supra* notes 78–82 and accompanying text (discussing this development).

85. See Neese, *supra* note 16, at 507 (noting that the inconsistent *National Industrial Sand* and *Canadian Helicopter* opinions lead to a confused mandamus standard).

86. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004); see also Johnston, *supra* note 18, at 95 (recognizing the court's attempt to refine *Walker's* two-pronged test).

87. See *infra* Part III (discussing the problems with the *Prudential* opinion).

88. *Prudential*, 148 S.W.3d at 127.

Insurance Co. of America (“Prudential”), and its agent.⁸⁹ The lease contained a clause stating that both tenant and landlord “waive a trial by jury of any or all issues arising . . . under or connected with this Lease.”⁹⁰

Nine months after they executed the lease, the Secchis sued Prudential, claiming that a “persistent odor of sewage” made it “impossible to do business on the premises.”⁹¹ After the trial court notified the parties that it had set a date for a non-jury trial, the Secchis filed a jury demand and paid the jury fee.⁹² The court then set a date for jury trial.⁹³ Prudential subsequently moved to quash the jury demand based on the waiver in the lease agreement.⁹⁴

In a brief order, the trial court denied Prudential’s motion to quash the jury demand without explanation.⁹⁵ Prudential then petitioned the court of appeals for a writ of mandamus.⁹⁶ The court of appeals denied relief, stating only that Prudential had “not shown [itself] entitled to the relief requested.”⁹⁷ However, the Texas Supreme Court disagreed and granted mandamus relief.⁹⁸

In its opinion, the *Prudential* court attempted to clarify the mandamus standard by focusing on the second mandamus requirement: the petitioner must demonstrate it has no adequate remedy by appeal.⁹⁹ Emphasizing that the operative word in this requirement is “adequate,” the court stated that “adequate” has no fixed definition and “is simply a proxy for the careful balance of jurisprudential considerations.”¹⁰⁰ When the detriments of mandamus review outweigh its benefits, an appellate remedy is “adequate.”¹⁰¹ However, when the benefits of mandamus review

89. *Id.*

90. *Id.* at 127–28.

91. *Id.* at 128.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 129.

96. *Id.*

97. *Id.*

98. *Id.* at 140–41. The Texas Supreme Court had abated its proceedings because the trial judge who had denied Prudential’s motion to quash had left office. *Id.* at 129. After the sitting judge denied reconsideration, the Texas Supreme Court reinstated the case to the active docket. *Id.*

99. *See generally id.* at 135–37 (setting out a new standard to determine whether petitioner had an adequate remedy by appeal). The Court quickly dismissed the first requirement, stating that the trial court clearly abused its discretion because, as a matter of law, Prudential was entitled to enforcement of its jury waiver. *Id.* at 135.

100. *Id.* at 136.

101. *Id.*

outweigh the detriments, the appellate court must then determine “whether the appellate remedy is adequate.”¹⁰² This determination is not “formulaic,” but rather “depends heavily on the circumstances presented and is better guided by general principles than by simple rules.”¹⁰³

Under the facts in *Prudential*, the court held that Prudential would have no adequate remedy on appeal if its jury waiver was not enforced.¹⁰⁴ If it received a favorable jury verdict, Prudential could not appeal and would lose its contractual right forever.¹⁰⁵ On the other hand, if it suffered an unfavorable verdict, “Prudential could not obtain reversal for the incorrect denial of its contractual right ‘unless the court of appeals concludes that the error complained of . . . probably caused the rendition of an improper judgment.’”¹⁰⁶ Moreover, even if Prudential did “obtain reversal based on the denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive.”¹⁰⁷ Accordingly, under the circumstances, the court held that Prudential had no adequate remedy by appeal.¹⁰⁸

Prudential attempted to clarify the mandamus standard articulated in *Walker*¹⁰⁹ by requiring a “careful balance of jurisprudential considerations.”¹¹⁰ However, this balancing test was a significant departure from the *Walker* standard, which stressed that mandamus is an “extraordinary remedy, available only in limited circumstances.”¹¹¹

102. *Id.*

103. *Id.* at 136–37.

104. *Id.* at 138.

105. *Id.*

106. *Id.* (citing TEX. R. APP. P. 44.1(a)(1)).

107. *Id.*

108. *Id.* at 138–40.

109. See *supra* note 86 and accompanying text (noting that *Prudential* refines the *Walker* two-pronged mandamus test).

110. *Prudential*, 148 S.W.3d at 136.

111. See *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). The balancing test is also inconsistent with the mandamus jurisprudence of other courts. Compare *Prudential*, 148 S.W.3d at 136 (explaining that a mandamus analysis is a “balanc[ing] of jurisprudential considerations”), with *Ex parte Fahey*, 332 U.S. 258, 260 (1947) (declaring that mandamus must not serve as a substitute for a normal appeal and that federal courts should make mandamus available “only where appeal is a clearly inadequate remedy”), and *Hatten v. State*, 561 So. 2d 562, 563 (Fla. 1990) (stating that a petitioner must show that he has “a clear legal right to the performance of a clear legal duty by a public officer and that he has no other legal remedies available to him” for the court to issue mandamus), and *In re Grand Jury Sandoval County*, 750 P.2d 464, 466 (N.M. Ct. App. 1988) (asserting that “[m]andamus is a drastic remedy” and will only issue if no other remedy is available), and *N.Y. Civil Liberties Union v. State*, 824 N.E.2d 947, 953 (N.Y. 2005) (stressing that mandamus is available “only to enforce a clear legal right

III. THE PROBLEMS CREATED BY *IN RE PRUDENTIAL*

Prudential confuses an already muddled mandamus standard and creates additional problems that the Texas Supreme Court must resolve. First, in attempting to clarify *Walker*, the *Prudential* court erroneously interprets the *Walker* language.¹¹² Second, *Prudential* introduces a balancing test that leaves mandamus petitioners even more uncertain about their mandamus appeals.¹¹³ Finally, *Prudential* articulates a more lenient mandamus standard that will cause mandamus to become a writ that is far from extraordinary.¹¹⁴

A. In re *Prudential Erroneously Interprets Walker v. Packer*

Taken in isolation, the *Prudential* opinion appears rational. The benefits of granting mandamus are weighed against its costs.¹¹⁵ If the benefits outweigh the costs, then the court must consider whether the remedy is adequate.¹¹⁶ However, when the opinion is examined in the shadow of *Walker*, it becomes apparent that *Prudential* does more than just clarify *Walker*; it sets out a more lenient mandamus standard than the *Walker* court delineated.

In *Walker*, the Court held that “an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ.”¹¹⁷ Mandamus is justified “only when parties stand to lose their substantial rights.”¹¹⁸ Conversely, in *Prudential*, the court held that if the benefits outweigh the costs, then the appellate court must look to the circumstances of the case to determine whether mandamus is appropriate.¹¹⁹ This is a pure balancing test where expense and delay, the two factors the *Walker* court expressly states should not be considered, are, in fact, considered.¹²⁰

where the public official has failed to perform a duty enjoined by law”).

112. See *infra* Part III.A (discussing the *Prudential* court’s inappropriate conclusion that the word “merely” allows a court to consider the extent of the expense or delay).

113. See *infra* Part III.B (outlining the *Prudential* balancing test and its resulting increase in inexact and subjective outcomes).

114. See *infra* Part III.C (asserting that *Prudential*’s relaxed standard will increase the number of mandamus requests granted and increase the burden on trial courts).

115. See *Prudential*, 148 S.W.3d at 136 (describing the adequate remedy by appeal balancing test).

116. *Id.*

117. *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992).

118. *Id.* at 842 (quoting *Iley v. Hughes*, 311 S.W.2d 648, 652 (Tex. 1958)).

119. *Prudential*, 148 S.W.3d at 136.

120. Compare *id.* (explaining that in deciding whether an appellate remedy is adequate, courts should consider, among other factors, the “time and money utterly

The *Prudential* court attempts to reconcile this disparity by focusing on the word “merely” used in the *Walker* opinion.¹²¹ *Walker* held that “an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ.”¹²² *Prudential* explained that “the word ‘merely’ carries heavy freight” and the court should consider extreme expense or delay.¹²³ However, this is not the interpretation of the word “merely” that *Walker* intended.¹²⁴

“Merely” should be understood to mean “only.”¹²⁵ When the costs to petitioner are *only* expense and delay, an appellate remedy is not inadequate.¹²⁶ Thus, the *Walker* court’s assertion that “an appellate remedy is not inadequate merely because it may involve more expense or delay” is clear and unambiguous: when expense or delay is the only cost to petitioner, *no matter how extreme the expense or delay*, the appellate remedy is not inadequate and mandamus should be denied.¹²⁷

Prudential’s balancing test allows the court to consider expense and delay when evaluating a request for mandamus.¹²⁸ *Walker* expressly disapproves of this approach.¹²⁹ As a result, *Prudential*’s articulation of the mandamus standard conflicts

wasted enduring eventual reversal of improperly conducted proceedings”), *with Walker*, 827 S.W.2d at 842 (emphasizing that the “delay in getting questions decided through the appellate process . . . will not justify intervention by appellate courts through the extraordinary writ of mandamus” (quoting *Iley*, 311 S.W.2d at 652)).

121. *Prudential*, 148 S.W.3d at 136.

122. *Walker*, 827 S.W.2d at 842 (emphasis added).

123. *Prudential*, 148 S.W.3d at 136; *see also* Johnston, *supra* note 18, at 97 (observing that extreme costs can be sufficient to make the appellate remedy inadequate under *Prudential*). To support this assertion, the *Prudential* court cited its earlier decision of *In re E.I. du Pont de Nemours & Co.*, 92 S.W.3d 517 (Tex. 2002). *Prudential*, 148 S.W.3d at 136. In *E.I. du Pont*, the court concluded that mandamus review was justified, despite the availability of appeal and E.I. du Pont’s withstanding the litigation, because defending against claims of more than 8,000 plaintiffs was not *mere* expense and delay. *In re E.I. du Pont de Nemours & Co.*, 92 S.W.3d at 523–24.

124. *See Walker*, 827 S.W.2d at 842 (expressly disapproving any authorities “to the extent that they imply that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus”).

125. *See* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1413 (1986).

126. *See Walker*, 827 S.W.2d at 842 (substituting the word “only” for the word “merely”).

127. *Id.*; *see* Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, J. SUP. CT. HIST. 13, 15–16 (1991) (discussing the merits of stare decisis and stressing the importance of adhering to prior decisions); *cf.* *State v. Lima*, 825 S.W.2d 733, 734 (Tex. App.—Houston [14th Dist.] 1992, no writ) (stating that “[c]ourts may not enlarge or alter the plain meaning of statutory language” (citing *State v. Hatten*, 600 S.W.2d 828, 830 (Tex. Crim. App. 1980))).

128. *See Prudential*, 148 S.W.3d at 136–37.

129. *See Walker*, 827 S.W.2d at 842 (holding that a remedy by appeal cannot be inadequate merely because it might “involve more expense or delay” than mandamus).

with the language in *Walker* and is thus erroneous if it purports to follow *Walker* and stare decisis.

B. Prudential's Balancing Test Makes Mandamus Law Even More Uncertain

Prudential's balancing test has further muddled mandamus law.¹³⁰ The *Prudential* court held that the appellate remedy is adequate when the benefits of granting mandamus are smaller than its costs.¹³¹ However, when the benefits are greater than the costs, the court must consider whether the appellate remedy is adequate.¹³² The court emphasized that the balancing test was a "careful balance of jurisprudential considerations."¹³³

A balancing test is a judicial test where competing interests are identified, valued, and compared.¹³⁴ Each interest is explicitly or implicitly assigned a value; competing interests are weighed against each other in a "head-to-head" comparison.¹³⁵ In simple cases, balancing tests work well.¹³⁶ In more complex cases, however, balancing tests cause confusion.¹³⁷ The fundamental problem with using a balancing test for any analysis is determining which factors the court should balance against each other.¹³⁸ The central issue is whether the various factors can be measured properly on the same scale.¹³⁹ If the factors cannot be

130. See David M. Johnston, *supra* note 18, at 99 (observing that courts are applying a "muddled" mandamus standard).

131. *Prudential*, 148 S.W.3d at 136.

132. *Id.*

133. *Id.*

134. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987) (exploring the "metaphor of balancing").

135. *Id.* (examining the theory behind judicial balancing tests).

136. James P. George, *International Parallel Litigation—A Survey of Current Conventions and Model Laws*, 37 TEX. INT'L L.J. 499, 517 (2002).

137. *Id.*; see also Laurie Reynolds, *The Judicial Role in Intergovernmental Land Use Disputes: The Case Against Balancing*, 71 MINN. L. REV. 611, 615 (1987) (noting that courts have criticized the balancing test as nebulous and unpredictable); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186 (1989) ("[W]hen balancing is the mode of analysis, not much general guidance may be drawn from the opinion."); David A. Sonenshein, *The Error of a Balancing Approach to the Due Process Determination of Jurisdiction Over the Person*, 59 TEMP. L.Q. 47, 60 (1986) (commenting that balancing tests "rob" parties of a predictable, bright-line standard).

138. See Posting of Lawrence B. Solum to Legal Theory Lexicon, *Balancing Tests*, http://lsolum.typepad.com/legal_theory_lexicon/2004/02/legal_theory_le_1.html (Feb. 22, 2004) (noting that courts cannot simply balance complex or abstract factors against each other); cf. David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits*, 75 TEX. L. REV. 1661, 1667 (1997) (commenting that in a "risk-utility" balancing test, the difficult question is "what should be balanced against what").

139. See Solum, *supra* note 138 (asserting that balancing tests weighing

weighed on the same scale, the balancing test will not work.¹⁴⁰ Disturbingly, courts acknowledge that they attempt to compare factors that should not be weighed on the same scale.¹⁴¹

When explaining its balancing test, the *Prudential* court simply stated that courts must weigh the benefits against the detriments.¹⁴² No clarification was offered as to which type of benefits the court could weigh against which type of detriments.¹⁴³ Consequently, the absence of any limiting language signifies that any type of benefit can be compared to any type of detriment. In other words, *Prudential* authorizes courts to balance an individual's substantive rights against, for example, extra expense to an individual.¹⁴⁴ Surely this cannot be the result the *Prudential* court intended.

An additional problem with the use of balancing tests is that they are "imprecise and promote[] subjectivity."¹⁴⁵ Balancing tests favor the personal philosophical dispositions of individual judges.¹⁴⁶ In the wake of *Prudential*, this concern is certainly justified in the mandamus area. The *Prudential* court held that mandamus is not appropriate for incidental trial court rulings¹⁴⁷

"considerations that bear in complex ways on a decision . . . involve reasoning that doesn't actually weigh and compare commensurables).

140. *See id.* (arguing that many factors cannot be properly scaled and thus cannot be balanced).

141. *See, e.g., In re Ford Motor Co.*, 110 F.3d 954, 960–61 (3d Cir. 1997) (concluding that the "orange of the interests protected by the attorney-client privilege" outweighs the "apple of the interests protected by the final judgment rule").

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

143. *See generally id.* (announcing the balancing test to determine whether an adequate remedy by appeal exists, without explaining what benefits could be balanced against what detriments).

144. *Id.* at 136 ("Mandamus review of significant rulings in exceptional cases may be essential to . . . spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.").

145. Bethany A. Cook & Lisa C. Kahn, Note, *Justice Scalia's Due Process Model: A History Lesson in Constitutional Interpretation*, 6 ST. JOHN'S J. LEGAL COMMENT. 263, 277–78 (1991) (pointing to criticisms of balancing tests in the due process context); *see also* sources cited *supra* note 137 (listing various legal scholars who have examined additional problems with balancing tests).

146. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting) (criticizing the Court's frequent use of a balancing test because it favors the "personal . . . philosophical dispositions" of justices); *see also* Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 202 (2005) (noting Justice Scalia's scathing criticism of the Supreme Court majority's reliance on "a subjective, manipulable, incoherent balancing test" in *Blakely v. Washington* (citing 542 U.S. 296, 302 n.6, 307–08 (2004))).

147. *Prudential*, 148 S.W.3d at 136 (stating that mandamus review of incidental rulings "unduly interferes with trial court proceedings").

but is appropriate for significant rulings in exceptional cases.¹⁴⁸ However, *Prudential* did not address whether mandamus is appropriate in situations where the rulings are more than incidental but do not rise to the level of a significant ruling in an exceptional case.¹⁴⁹ Whether a particular ruling is important enough to warrant mandamus review is presumed to be left to the judge's personal philosophical disposition. As a result, balancing will become the dominant test in Texas mandamus law,¹⁵⁰ and the personal philosophical dispositions of each judge will influence a greater number of decisions, increasing the imprecision and subjectivity of mandamus decisions.¹⁵¹ Once again, this cannot be the result the *Prudential* court intended.

C. Making Mandamus not so Extraordinary

Prudential relegates mandamus from an extraordinary remedy to one that is less than extraordinary.¹⁵² This relaxed mandamus standard conflicts with the intent of earlier courts.¹⁵³ Moreover, it harms the individuals before the court and the judicial system as a whole.¹⁵⁴ Mandamus interrupts the trial proceedings and compels the parties to address an issue that the court might otherwise resolve as the trial develops.¹⁵⁵ The parties before the court can incur substantial delays and expenses through mandamus proceedings.¹⁵⁶ The appellate courts are also improperly burdened because “[t]he judicial system cannot afford immediate review of every discovery sanction.”¹⁵⁷ Accordingly, the court must strictly apply the mandamus standard “to

148. *Id.* (“Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss.”).

149. *See generally id.* (suggesting that the determination of whether mandamus is appropriate to review a particular ruling “resists categorization”).

150. *See generally* Aleinikoff, *supra* note 134, at 943–44 (observing that balancing “has become widespread, if not dominant, over the last four decades”).

151. *See* Cook & Kahn *supra* note 145 (noting criticism of balancing tests as imprecise and subjective); *see also* Sonenshein, *supra* note 137 (arguing that balancing tests lead to unpredictable standards).

152. *Prudential*, 148 S.W.3d at 136 (departing from *Walker*'s stringent requirements in favor of a “careful balance of jurisprudential considerations” that “is better guided by general principles than by simple rules”).

153. *See* *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (stressing that “[m]andamus is intended to be an extraordinary remedy”).

154. *See id.* at 842 (describing the negative effects of mandamus on parties before the court and the judicial system).

155. *Id.*

156. *Id.* (opining that the “delays and expense of mandamus proceedings may be substantial”).

157. *Id.* (quoting *Braden v. Downey*, 811 S.W.2d 922, 928 (Tex. 1991)).

preserve ‘orderly trial proceedings’ and to prevent the ‘constant interruption of the trial process by appellate courts.’¹⁵⁸

Because the court lessened the mandamus standard in *Prudential*, expense and delay can be the sole reasons for granting mandamus.¹⁵⁹ Moreover, mere expense and delay can now trump an individual’s substantive rights.¹⁶⁰ Consequently, mandamus is no longer an “extraordinary remedy, available only in limited circumstances.”¹⁶¹ It is a remedy that can be obtained merely by showing expense and delay.¹⁶² This relaxed standard will increase the number of mandamus requests granted,¹⁶³ which will result in more interruptions in trial court proceedings and an increased burden on the judicial system.¹⁶⁴

Prudential’s balancing test creates uncertainty because parties in a mandamus proceeding are subject to the personal philosophical disposition of each judge.¹⁶⁵ Furthermore, the *Prudential* court’s opinion erroneously interprets *Walker*, relegating mandamus to a proceeding that is far from extraordinary.¹⁶⁶ Consequently, the Texas Supreme Court must

158. See *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 305 (Tex. 1994) (explaining why limitations on mandamus are needed) (quoting *Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969), *cert. denied*, 397 U.S. 997 (1970)). *But see In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 137 (Tex. 2004) (observing that “[t]he unavailability of mandamus relief increases the pressure for expanded interlocutory appeals” and thus “[p]rudent mandamus relief” is favored over legislative enlargement of interlocutory appeals).

159. See *supra* notes 119–23 and accompanying text (critiquing *Prudential’s* treatment of the factors of expense and delay in determining whether mandamus review is appropriate).

160. See *supra* notes 142–44 and accompanying text (interpreting the absence of any limiting language in *Prudential’s* balancing test to indicate that the court can trump substantive rights with expense and delay).

161. *Walker*, 827 S.W.2d at 840.

162. *Prudential*, 148 S.W.3d at 135–36 (eroding *Walker’s* condition that expense and delay are not sufficient to satisfy the no “adequate remedy by appeal” requirement).

163. In 2004, thirteen mandamus requests were granted out of 237 that were filed with the Texas Supreme Court. OFFICE OF COURT ADMIN., TEX. JUDICIAL COUNCIL, ANNUAL REPORT OF THE TEXAS JUDICIAL SYSTEM 25 (2004), available at <http://www.courts.state.tx.us/pubs/AR2004/toc.htm> (follow “PDF - 1.2 MB” hyperlink). In 2005, one year after *Prudential*, twenty-two mandamus requests were granted out of 256 that were filed with the Texas Supreme Court. SUPREME COURT ACTIVITY: FY 2001–2005 3, available at http://www.courts.state.tx.us/pubs/AR2005/sc/2_SC_Activity_2005.pdf. (Representing a 57% increase in the percentage of mandamus requests granted).

164. See *supra* notes 154–57 and accompanying text (describing the negative effects of granting mandamus).

165. Cf. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting) (criticizing balancing tests as favoring the personal philosophical leanings of justices).

166. See *supra* notes 142–44 and accompanying text (interpreting the absence of any limiting language in *Prudential’s* balancing test to indicate that the court can trump substantive rights with expense and delay).

articulate a new mandamus standard that resolves the problems created by *Prudential*.

IV. DETERMINING THE CRITERIA AN “ADEQUATE REMEDY BY APPEAL” REQUIREMENT SHOULD CONTAIN

An understanding of the criteria that create a lasting rule of law will be invaluable when establishing a judicially correct “adequate remedy by appeal” standard. The Texas Supreme Court should consider multiple factors when crafting a rule of law. The following is not an exhaustive list of factors, but rather an analysis of three essential factors required to construct an enduring “adequate remedy by appeal” standard. These factors are predictability, workability, and adherence to constitutional values.

A. *Predictability*

Predictability may be the most significant feature of a well-crafted judicial standard.¹⁶⁷ It brings certainty to the law by allowing an individual to know what the law prescribes.¹⁶⁸ Accordingly, a court should develop and manage predictable jurisprudence. Two characteristics of a judicial opinion help establish predictability: a lack of vagueness¹⁶⁹ and a well-articulated, candid opinion.¹⁷⁰ First, a judicial opinion should not be vague.¹⁷¹ Vague opinions communicate unclear standards to lower courts, which make the law less predictable.¹⁷² Moreover,

167. See Scalia, *supra* note 137, at 1179 (observing that predictability is a “needful characteristic” and at times “a bad rule is better than no rule at all”); Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: A Positive Theory of Judicial Opinions* 3 (Mar. 28, 2005), http://www.fsu.edu/~polisci/research/documents/Vangerg_Staton.pdf. (commenting that “predictability may be the most important feature of a well functioning legal regime”); *cf.* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (stating that the ability to predict what type of activities will subject a person to suit is a core value of a due process analysis).

168. See Scalia, *supra* note 137, at 1179 (“Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes.”).

169. See Staton & Vanberg, *supra* note 167, at 3 (noting that “vague opinions render law less predictable”); *cf.* Scalia, *supra* note 137, at 1179 (“[W]e can less and less afford protracted uncertainty regarding what the law may mean.”).

170. See Bennett L. Gershman, *Now You See It, Now You Don't: Depublication and Nonpublication of Opinions Raise Motive Questions*, N.Y. ST. B.J. 36, 36 (Oct. 2001) (warning of the dangers of a poorly written judicial opinion—which “is the heart of the common law system” and, “to many[,] . . . the equivalent of a sacred text”).

171. See sources cited *supra* note 169.

172. See Staton & Vanberg, *supra* note 167, at 3 (discussing how vague appellate opinions undermine predictability in the law).

judges are more likely to manipulate vague opinions.¹⁷³ Second, a judicial opinion should be well-articulated and candid.¹⁷⁴ The better an individual understands a court's decision, the better he can predict the legal consequences of his actions.¹⁷⁵ Furthermore, a judge's candid disclosure of the reasons for his decision contributes to the clarity of the law.¹⁷⁶

In the 1930s, when discussing the "predictability of judicial decision" and "the desirability of a more generalized ability to anticipate the future,"¹⁷⁷ then-Justice Stone declared:

I can hardly see the use of writing judicial opinions unless they are to embody methods of analysis and of exposition which will serve the profession as a guide to the decision of future cases. If they are not better than an excursion ticket, good for this day and trip only, they do not serve even as protective coloration for the writer of the opinion and would much better be left unsaid.¹⁷⁸

B. *Workability*

A judicially created standard should also be workable.¹⁷⁹ Often, the principal reason a court should take a case is to articulate a workable standard.¹⁸⁰ In contrast to predictability,

173. See *id.* (noting that judges have a greater chance of manipulating vague opinions).

174. See Gershman, *supra* note 170, at 36 (observing that "[b]y authoritatively declaring and interpreting a general principle of law, the opinion promotes stability, certainty, and predictability of law"); see also Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 401 (1989) (discussing how candor can reduce uncertainty in the law).

175. Kathleen Waits, *Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction*, 1983 U. ILL. L. REV. 917, 934 (1983).

176. See ROBERT E. KEETON, *JUDGING* 19 (1990) ("Candid disclosure of the reasons for [a] choice contributes to the clarity of law and promotes understanding.").

177. RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 61 (1961).

178. CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 13 (1969) (citing ALPHEUS T. MASON, *THE SUPREME COURT: VEHICLE OF REVEALED TRUTH OR POWER GROUP, 1930-1937*, at 41 (1953)).

179. See Bruce A. Grabow, Note, *R.A.V. v. City of St. Paul: Dismantling Free Speech Jurisprudence to Make Room for Equal Treatment*, 3 WIDENER J. PUB. L. 577, 609-10 (1993) (opining that a judicially correct standard must be logically sound and workable); see also *Whitsey v. State*, 796 S.W.2d 707, 737 (Tex. Crim. App. 1989) (Teague, J., concurring on rehearing) ("Some workable standard must be created by this Court.").

180. See *Hill v. State*, 955 S.W.2d 96, 99 (Tex. Crim. App. 1997) (en banc) (stating that the court granted review "for the purpose of articulating a consistent and workable standard"); see also Donald S. Chisum, Professor of Law, Santa Clara Univ., Nies Memorial Lecture, *The Supreme Court and Patent Law: Does Shallow Reasoning Lead to Thin Law?* (Jan. 15, 2007), available at http://ipmall.info/hosted_resources/chisum.asp (commenting that articulating a workable standard is "the primary reason" the Supreme

which focuses on the individual, workability focuses on the court's ability to apply a standard.¹⁸¹ A standard articulated by an appellate court is workable if it can be applied reliably by lower courts under differing circumstances.¹⁸² This requires a balance between a clear standard that can be applied consistently—so that individuals can reasonably predict when mandamus is available—and a degree of flexibility so that rogue trial courts are kept in check.¹⁸³ An optimal balance will provide the judiciary with a workable standard, which is neither limited in scope nor consisting of conclusory language.¹⁸⁴

C. Adherence to Constitutional Values

The third factor that the court should consider is elementary: a judicially created rule of law must conform to the “entire scheme of constitutional jurisprudence.”¹⁸⁵ It must not “weaken constitutional protections.”¹⁸⁶

The court should consider these three factors when creating the “adequate remedy by appeal” standard. Significantly, consideration of these factors will increase the lower courts' confidence in the judicially created rule of law, increasing the likelihood the standard will be accepted.¹⁸⁷ Acceptance of the standard is imperative because if the lower courts reject it, the standard is “not good law, and may not even be accepted as law at all.”¹⁸⁸

Court should take a case).

181. See *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (expressing the need for antitrust laws to “be administratively workable” and “clear enough for lawyers to explain . . . to their clients”).

182. Cf. Denis M. Gravel, Case Note, *Department of Revenue v. Kurth Ranch: Double Jeopardy. A: Multiple Punishment Component. Q: What is Confusion? Continuing where Halper and Austin Left Off*, 15 N. ILL. U. L. REV. 433, 465, (1995) (criticizing the court for not providing a workable test for lower courts to follow).

183. See BARON, *supra* note 50, at 1 (noting the Texas Supreme Court's inability to establish a workable—meaning predictable, yet flexible—mandamus standard).

184. Cf. Ethan M. Posner, Note, *Clarifying a “Pattern” of Confusion: A Multi-Factor Approach to Civil RICO's Pattern Requirement*, 86 MICH. L. REV. 1745, 1780 (1988) (proposing a test that would present a “workable, flexible solution that does not consist of conclusory and imprecise terminology”).

185. See Grabow, *supra* note 179, at 609–10 (observing that a “judicially correct standard” adheres to the scheme of constitutional jurisprudence).

186. *Id.*; cf. U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States.”).

187. Cf. Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 812 (1961) (observing that the validity of the law depends on people's confidence in it).

188. *Id.*

V. ESTABLISHING A DESIRABLE “ADEQUATE REMEDY BY APPEAL”
STANDARD

Part II examined the development of the mandamus standard through the court’s decision in *Prudential*. Part III discussed the problems created by the *Prudential* court. The factors that the court should consider in defining an appropriate standard were identified in Part IV. This final Part proposes a new “adequate remedy by appeal” standard that resolves the problems created by *Prudential*. This proposed standard is predictable, workable, and adheres to constitutional values, such that if adopted, it will become an enduring rule of law.

A. *A Predictable, Workable, and Constitutional Standard*

When determining whether an individual has satisfied the no “adequate remedy by appeal” standard, the reviewing court should look at the underlying reason for the mandamus action. If mandamus is sought because the individual stands to lose his substantial rights, the no “adequate remedy by appeal” standard is satisfied. Conversely, if mandamus is sought for a reason other than the loss of an individual’s substantial rights, then the no “adequate remedy by appeal” standard is not satisfied and mandamus should not be granted. Significantly, the court should not consider expense or delay because this is not a loss of a substantial right.

1. *The Court Must not Consider Expense and Delay.* In 1992, the Texas Supreme Court, in *Walker v. Packer*, held that “an appellate remedy is not inadequate merely because it may involve more expense or delay.”¹⁸⁹ Twelve years later in *Prudential*, the court explained that “the word ‘merely’ carries heavy freight,” and accordingly the court should take expense and delay into account when the expense or delay becomes extreme.¹⁹⁰ However, the court should return to the *Walker* standard and not consider expense or delay—even if extreme—when determining whether there is no adequate remedy by appeal. Consideration of these factors creates an unpredictable standard,¹⁹¹ resulting in mandamus becoming far from

189. *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992).

190. *In re Prudential Co. of America*, 148 S.W.3d. 124, 136 (Tex. 2004).

191. See *infra* text accompanying notes 215–18 (demonstrating the unpredictability the consideration of expense and delay can cause).

extraordinary.¹⁹² A comparison of *In re General Metal Fabricating Corp.*¹⁹³ and *In re Rowe*¹⁹⁴ demonstrates this unpredictability.

In *General Metal Fabricating*, John Sterigou and Arnold Curry entered into a Rule 11 settlement agreement.¹⁹⁵ The terms of this agreement were dependent upon the answer to the jury's first question.¹⁹⁶ If the jury answered "yes," Mr. Sterigou would assign all stock in the General Metal Fabricating (GMF) corporations to Mr. Curry.¹⁹⁷ If the jury answered "no," Mr. Sterigou would assign all stock in the GMF corporations to Mr. Curry for an initial payment of \$20,000 with an additional \$280,000 to be paid out over time with interest.¹⁹⁸

The jury answered "no" and returned a \$750,000 verdict for Mr. Sterigou.¹⁹⁹ Subsequently, Mr. Sterigou moved the court for a judgment on the verdict, arguing that the Rule 11 agreement was unenforceable because it had become unworkable.²⁰⁰ Mr. Curry filed a motion for summary judgment seeking to enforce the Rule 11 settlement agreement.²⁰¹ The trial court denied Mr. Curry's motion for summary judgment.²⁰² Less than two months later, Mr. Curry requested that the court abate or stay the enforcement of the judgment.²⁰³ Once again, the court denied the request and Mr. Curry sought mandamus relief.²⁰⁴

The court of appeals granted the writ of mandamus, holding that the trial court abused its discretion when it failed to abate the final judgment.²⁰⁵ However, there was no explanation of why Mr. Curry's appellate remedy was inadequate.²⁰⁶ The court only noted that "[i]t would be pointless for the appellate court and the

192. See *infra* notes 232–34 and accompanying text (examining the effects of mandamus becoming less than extraordinary).

193. *In re Gen. Metal Fabricating Corp.*, No. 01-06-00879-CV, 2006 WL 3316877 (Tex. App.—Houston [1st Dist.] Nov. 16, 2006, no pet.) (mem. op.).

194. *In re Rowe*, 182 S.W.3d 424 (Tex. App.—Eastland 2005, no pet.).

195. *Gen. Metal Fabricating Corp.*, 2006 WL 3316877, at *1.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* Sterigou claimed that the parties could no longer agree on the terms of the \$300,000 agreement and that Curry had misrepresented available assets. *Id.*

201. *Id.* at *2.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at *3.

206. See generally *id.* at *2 (noting "exceptions" to the adequate remedy by appeal requirement but failing to apply them to the facts of the case).

parties to expend resources on appeal until the trial court first determines the enforcement issue.”²⁰⁷

Compare *General Metal Fabricating* to *Rowe*. In *Rowe*, Hollie Wynette Rowe filed for divorce in Midland County.²⁰⁸ Two days later, Mrs. Rowe’s husband, Aaron Douglas Rowe, filed for divorce in Collin County.²⁰⁹ Mr. Rowe subsequently filed a motion to dismiss for lack of jurisdiction and plea in abatement, arguing that Mrs. Rowe had not been a resident of Midland County for the required ninety days before filing suit.²¹⁰ The trial court denied the motion and Mr. Rowe sought mandamus relief, requesting an order that the trial court abate divorce proceedings initiated by his wife.²¹¹ The court of appeals denied the writ of mandamus, holding that an appeal was an adequate remedy.²¹² Significantly, the court noted that its decision might result in a waste of the parties’ and trial court’s resources but emphasized that this was not sufficient to warrant the writ to be granted.²¹³

The courts in *General Metal* and *Rowe* are presented with the same issue: whether the waste of the parties’ and the court’s resources are sufficient to warrant mandamus.²¹⁴ In *General Metal*, the court said the waste of resources was sufficient to justify mandamus.²¹⁵ However, in *Rowe*, the court said that the waste of resources was not sufficient to justify mandamus.²¹⁶ This inconsistent standard makes it impossible for an individual to rely on the law because the individual does not know what the law prescribes.²¹⁷ Moreover, no evidence exists that courts will reconcile the problem as they become more familiar with the test.²¹⁸

207. *Id.*

208. *In re Rowe*, 182 S.W.3d 424, 425 (Tex. App.—Eastland 2005, no pet.).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 425, 427 (holding that venue decisions are “incidental trial rulings” that can be corrected by appeal).

213. *Id.* at 426.

214. *See id.* (considering the resources of the parties and court in its mandamus decision); *In re Gen. Metal Fabricating Corp.*, No. 01-06-00879-CV, 2006 WL 3316877, at *2 (Tex. App.—Houston [1st Dist.] Nov. 16, 2006, no pet.) (mem. op.) (same).

215. *See Gen. Metal Fabricating Corp.*, 2006 WL 3316877, at *2.

216. *See Rowe*, 182 S.W.3d. at 426.

217. *Cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (stating that the ability to predict what type of activities will subject a person to suit is a core value of a due process analysis); Scalia, *supra* note 137, at 1179 (opining that “[r]udimentary justice requires that those subject to the law must have the means of knowing what it prescribes”).

218. *Cf. BARON*, *supra* note 50, at 2 (commenting that the *Walker* standard has often proved unworkable, requiring the court to make numerous exceptions).

Expense and delay are matters of degree and purely subjective factors. What one court believes to be *extreme* expense and delay that warrants mandamus, another court may believe to be *incidental* expense and delay not worthy of consideration.²¹⁹ What a court believes to be *extreme* expense and delay one day, the same court may believe to be *incidental* expense and delay the next. How is an individual supposed to know what the law prescribes when he is subject to the whim of a judge?²²⁰

The elimination of expense and delay as a consideration in a mandamus analysis would increase the predictability of mandamus law. Courts would no longer grant mandamus simply because the individual will incur expense or delay. Consequently, individuals would no longer have to speculate as to whether their particular judge will find the expense and delay sufficient. Additionally, the court should not consider expense and delay in a mandamus analysis because consideration of these factors contradicts the intent of earlier courts.²²¹ Mandamus is intended to be an “extraordinary” remedy.²²² Consideration of expense and delay, however, turns mandamus into a remedy that is less than extraordinary.

Take, for example, *Texas Mutual Insurance Co. v. Sonic Systems International, Inc.*²²³ In this case, a former employee of Sonic Systems International, Inc. (“Sonic”) was injured on the job.²²⁴ After Texas Mutual Insurance Co. (“TMI”), Sonic’s workers’ compensation carrier, denied coverage of the injury, Sonic filed suit against TMI, alleging breach of contract.²²⁵ The trial court abated Sonic’s contract claims pending resolution of Sonic’s

219. See *supra* notes 215–16 and accompanying text. Compare *In re Foremost County Mut. Ins. Co.*, 172 S.W.3d 128, 136 (Tex. App.—Beaumont 2005, pet. denied) (granting mandamus to avoid wasting time and money), with *In re Christus Health*, No. 09-05-363-CV, 2005 WL 2450146, at *1 (Tex. App.—Beaumont Sept. 22, 2005, no pet.) (mem. op.) (denying mandamus even though the trial court’s ruling forces the petitioner to undergo a trial of the individual claims of three persons).

220. Moreover, the vagueness of the *Prudential* court’s “balance of jurisprudential considerations” standard increases the likelihood that judges will manipulate their opinions. See Staton & Vanberg, *supra* note 167, at 3 (opining that judges have a greater chance of manipulating vague opinions).

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

222. *Id.*

223. Tex. Mut. Ins. Co. v. Sonic Sys. Int’l, Inc., 214 S.W.3d 469 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

224. *Id.* at 471.

225. *Id.*

reimbursement claim.²²⁶ Sonic sought mandamus relief from the trial court's order of abatement.²²⁷

Applying the *Prudential* balancing test, the court of appeals granted mandamus.²²⁸ The court concluded that the financial burdens suffered by Sonic because of the abatement order resulted in the benefits of mandamus outweighing its detriments.²²⁹ Accordingly, Sonic lacked an adequate remedy by appeal.²³⁰

Like *General Metal Fabricating*, *Sonic* is an example of a court granting mandamus based on expense and delay.²³¹ Disturbingly, the *Sonic* holding effectively turns a mandamus action into an ordinary appeal by justifying mandamus whenever an appeal involves additional cost or delay.²³² This interpretation of the mandamus standard turns mandamus into a remedy that is far from extraordinary. Moreover, this interpretation is unworkable for the system as a whole.²³³ The judicial system cannot afford immediate review of every order.²³⁴

Eliminating the considerations of expense and delay from a mandamus analysis will bring additional predictability to mandamus law. Furthermore, it will help preserve mandamus's status as an extraordinary writ. Accordingly, when the court is determining whether an individual has an adequate remedy by appeal, it should not consider expense or delay.

226. *Id.* Sonic also sought reimbursement for voluntary payments made to the employee under the Texas Workers' Compensation Act. *Id.*

227. *Id.*

228. *Id.* at 482.

229. *Id.*

230. *Id.*

231. *See supra* notes 205–07 and accompanying text (finding a waste of resources sufficient to grant mandamus in *General Metal Fabricating*); *see also In re Foremost County Mut. Ins. Co.*, 172 S.W.3d 128, 136 (Tex. App.—Beaumont 2005, pet. denied) (finding the additional time and expense involved with litigation sufficient to justify mandamus); *In re El Paso Healthcare Sys., Ltd.*, No. 08-05-00098-CV, 2005 WL 2241024, at *8 (Tex. App.—El Paso Sept. 15, 2005, no pet.) (finding that the court's order requiring petitioner to retain local counsel was a significant economic burden sufficient to justify mandamus); *In re Landmark Org., L.P.*, No. 13-04-00527-CV, 2004 WL 2471809, at *1–2 (Tex. App.—Corpus Christi Nov. 1, 2004, no pet.) (finding the trial court's delay in ruling on the motion to compel arbitration sufficient to justify mandamus).

232. *See Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992) (commenting that if the “equally convenient, beneficial, and effective” remedy by appeal standard is literally applied, mandamus would become an ordinary appeal (quoting *Jampole v. Touchy*, 673 S.W.2d 569, 576 (Tex. 1984))).

233. *See id.* (discussing the policy implications of relaxing the mandamus standard).

234. *See id.* (“[T]he system cannot afford immediate review of every discovery order.”).

2. *The Court Should not Consider the Complete Lack of Authority for a Trial Court's Order.* In addition to not considering expense or delay as a basis for granting mandamus, the court also should not consider the lack of authority for a trial court's order when determining whether an adequate remedy by appeal exists. By considering the lack of authority, the court can manipulate the mandamus standard.²³⁵

In *In re Brunin*, Mrs. Brunin sought "mandamus relief from a trial court's order declaring an earlier order continuing spousal maintenance to be void."²³⁶ The court found that the order was voidable rather than void and, therefore, the trial court had abused its discretion.²³⁷ The court also found that the complete lack of authority for the trial court's order satisfied the no adequate remedy by appeal requirement and granted mandamus relief.²³⁸

However, Mrs. Brunin had an adequate remedy by appeal. She could have appealed the trial court's partial summary judgment order voiding the maintenance order. Even though this would have resulted in more expense and delay for Mrs. Brunin, the court should not have taken this into account in a mandamus analysis.²³⁹ Moreover, the court did not base its decision on expense and delay.²⁴⁰ Instead, the court wrongly based its decision on the complete lack of authority for the trial court's order—a factor relevant only to the abuse of discretion requirement.²⁴¹ Therefore, the complete lack of authority for the trial court's order had nothing to do with determining whether Mrs. Brunin had an adequate remedy by appeal.²⁴² *In re Brunin* appears to be a case where the court manipulated the mandamus standard.²⁴³ The Court believed it could justify granting

235. See *infra* note 243 and accompanying text.

236. *In re Brunin*, No. 04-04-00893-CV, 2005 WL 839531, at *1 (Tex. App.—San Antonio Apr. 13, 2005, no pet.).

237. *Id.* at *2.

238. *Id.* at *1 (citing *In re Prudential Co. of Am.*, 148 S.W.3d 124, 137 (Tex. 2004)).

239. See Walker, 827 S.W.2d at 842 (stressing that "an appellate remedy is not inadequate merely because it may involve more expense or delay").

240. See generally *Brunin*, 2005 WL 839531, at *1–2 (basing its holding on the complete lack of authority for the trial court's order).

241. *Id.*

242. See *supra* note 64 and accompanying text (emphasizing that the clear abuse of discretion and inadequate remedy by appeal analyses be distinct inquiries that are independent from one another).

243. See *Brunin*, 2005 WL 839531, at *1–2 (granting mandamus based on the complete lack of authority of the trial court's order); see also *In re Edwards Aquifer Auth.*, 217 S.W.3d 581, 590 (Tex. App.—San Antonio 2006, no pet.) (granting mandamus based partly on the complete lack of authority of the trial court's orders).

mandamus by extensively citing *Prudential's* vague opinion.²⁴⁴ Ultimately, however, the court should not have granted mandamus. Mrs. Brunin had an adequate remedy by appeal.

As the foregoing analysis demonstrates, courts should not consider the complete lack of authority for a trial court's order when determining whether no adequate remedy by appeal exists. Such a restriction would reduce the court's ability to manipulate the mandamus standard and will help preserve mandamus as an extraordinary remedy.

3. *The Court Should Look to the Underlying Reason for the Mandamus Appeal.* When determining whether no adequate remedy by appeal exists, the court should ask itself one fundamental question: What is the underlying reason for the mandamus action? If the answer is that the individual stands to lose their substantial rights, the court should grant mandamus.²⁴⁵ If the answer is for any other reason than that the individual stands to lose their substantial rights, the court should not grant mandamus.

Determining the underlying reason for the mandamus action is a more workable standard for the courts than *Prudential's* standard, which requires the "balancing of jurisprudential considerations."²⁴⁶ A reviewing court would no longer be charged with identifying the benefits and detriments and weighing them against each other.²⁴⁷ The court would simply determine whether an individual stands to lose their substantial rights. Moreover, a more workable standard for the courts will result in greater predictability for the individual before the court.²⁴⁸

In re Allan is a good example of the court identifying the underlying reason for the mandamus action.²⁴⁹ In that case, Dr. Allan filed a petition for depositions to investigate a potential claim arising out of his mother's medical care.²⁵⁰ The trial court denied Dr. Allan's petition commenting that section 74.002 of the

244. See *Brunin*, 2005 WL 839531, at *1 (citing *Prudential's* balance of jurisprudential considerations test).

245. See *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004) (holding that appeal is inadequate when a party is in danger of losing its substantial rights). This is assuming that there has been a clear abuse of discretion. See *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (holding that mandamus will only issued when there is a clear abuse of discretion and no other adequate remedy by law).

246. *In re Prudential Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004).

247. See *id.* (requiring the benefits of mandamus to be balanced against its detriments).

248. See *supra* Part IV.B (identifying the need for a workable standard).

249. *In re Allan*, 191 S.W.3d 483 (Tex. App.—Tyler 2006, pet. filed).

250. *Id.* at 484.

Civil Practices and Remedies Code mandates that the court deny the requested depositions.²⁵¹ Dr. Allan sought mandamus relief, representing that he had “insufficient information to file suit . . . without violating Texas Rule of Civil Procedure 13 and section 9.011 of the Texas Civil Practice and Remedies Code.”²⁵²

The court of appeals granted mandamus, holding that the trial court abused its discretion because the Texas Civil Practices and Remedies Code did not require the court to deny the requested depositions.²⁵³ In analyzing the adequate remedy by appeal requirement, the court discussed the effects of denying mandamus.²⁵⁴ If Dr. Allan had not filed suit, any claim he had would have been lost.²⁵⁵ If Dr. Allan filed suit without investigating the claim, his suit may have been dismissed with prejudice.²⁵⁶ In both situations, Dr. Allan’s right to investigate the facts prior to filing suit could not be restored.²⁵⁷ Accordingly, Dr. Allan had no adequate remedy by appeal and mandamus was justified.²⁵⁸ The underlying reason for Dr. Allan’s mandamus action was the loss of a substantial right: “his right to investigate the facts of his mother’s care prior to filing suit.”²⁵⁹ This is a substantial right worthy of protection and intended to be protected by mandamus law.²⁶⁰

Like the *In re Allan* court, several other courts have also granted mandamus, identifying a substantial right as the underlying reason.²⁶¹ However, many courts have also granted mandamus without identifying a substantial right as the underlying reason.²⁶² Unfortunately, this results in mandamus

251. *Id.* Where a conflict between the Medical Liability Act and another law exists, including a rule of procedure or evidence, the Medical Liability Act controls to the extent of the conflict. TEX. CIV. PRAC. & REM. CODE ANN. § 74.002(a) (Vernon 2005).

252. *Allan*, 191 S.W.3d at 484, 489.

253. *Id.* at 488–89.

254. *Id.* at 489.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (emphasizing the intent behind a writ of mandamus).

261. *See In re Ford Motor Co.*, 165 S.W.3d 315, 321–22 (Tex. 2005) (granting mandamus relief after trial court’s denial of legislative continuance, based on potential conflict between lawyer–legislators’ duties to clients and constituents); *see also In re Oliver*, No. 10-05-00213-CV, 2005 WL 1531712, at *3 (Tex. App.—Waco June 29, 2005, no pet.) (granting mandamus relief because a mother had a substantial right to expert testimony in a suit to obtain increased child support, and that right may be lost due to the child reaching the age of majority prior to resolution of the case).

262. *See, e.g., In re Gen. Metal Fabricating Corp.*, No. 01-06-00879-CV, 2006 WL

becoming a less than extraordinary remedy.²⁶³ Moreover, when the court does not identify a substantial right, the certainty and predictability behind mandamus law is reduced because courts can award mandamus based on their own personal philosophies.²⁶⁴ Accordingly, before granting mandamus, a court should be required to identify the specific substantial right that it seeks to protect by granting such relief.

In determining whether a loss of a substantial right will occur, a court should undertake a comprehensive analysis of the facts. A mandamus action that appears to be based only on expense and delay, might, after a more thorough analysis, be based on the loss of a substantial right.²⁶⁵ *In re Gray Law*²⁶⁶ is an example of such a case.

In *In re Gray Law*, a trial court ordered proceeds from the sale of Gray Law's real property to be deposited into the court's registry.²⁶⁷ The proceeds were deposited as a result of a Rule 11 divorce agreement between Jay Gray, one of the two partners of Gray Law, L.L.P. ("Gray Law"), and his wife, Katheryn Ann Gray.²⁶⁸ In granting the order, the trial court ignored Mr. Gray's claim that Gray Law needed the proceeds from the sale of the property "to continue to operate and to pay its debt" and "[w]ithout those funds, it [could] no longer operate."²⁶⁹ Gray Law sought mandamus relief.²⁷⁰

At first glance, it appears that Gray Law sought mandamus relief because of the expense and delay incurred with having its real property tied up in the divorce proceedings.²⁷¹ However, after a thorough analysis, the reviewing court determined that further expense and delay were not the underlying reasons for Gray

3316877, at *2-3 (Tex. App.—Houston [1st Dist.] Nov. 16, 2006, no pet.) (granting mandamus because of the costs that would be incurred on appeal); *In re Foremost County Mut. Ins. Co.*, 172 S.W.3d 128, 136 (Tex. App.—Beaumont 2005, pet. denied) (granting mandamus because this may avoid the expense and time-loss involved with litigation).

263. Cf. Allen L. Price, Note, *Mandamus May Issue to Compel a District Judge to Order Discovery*, 9 TEX. TECH. L. REV. 782, 784 (1978) (commenting that mandamus should not be a substitute for appeal).

264. Cf. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting) (criticizing judicial analyses that favor the personal philosophical dispositions of justices).

265. See *infra* notes 271-76 and accompanying text.

266. *In re Gray Law, L.L.P.*, No. 2-05-379-CV, 2006 WL 1030206 (Tex. App.—Fort Worth Apr. 20, 2006, no pet.).

267. *Id.* at *1.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

Law's mandamus action.²⁷² The court found that Gray Law needed the funds to pay its debts to stay in business.²⁷³ Moreover, Jay Gray, a partner of Gray Law, needed to earn money to support his child.²⁷⁴ Consequently, the underlying reason for the mandamus action was Gray Law's right to operate its business and Jay Gray's right to support his child.²⁷⁵ These are substantial rights that deserve the protection of mandamus law. Accordingly, the court found that no adequate remedy by appeal existed and granted mandamus.²⁷⁶

In re Gray Law is an example of a case where the court undertakes a thorough analysis of the facts to establish the underlying reason for the mandamus action.²⁷⁷ Having established that Gray Law would lose its substantial rights, the court correctly granted mandamus. Without a thorough analysis the court may have denied mandamus after determining that expense and delay was the reason for the mandamus action. As a result, Gray Law would have lost its substantial rights.²⁷⁸

Accordingly, when determining whether no adequate remedy by appeal exists, courts must undertake a comprehensive analysis to identify the underlying reason for the mandamus action—if the underlying reason is the loss of a substantial right, the court should grant mandamus;²⁷⁹ if not, the court should not

272. See *id.* at *2–3.

273. *Id.*

274. *Id.*

275. See *id.*

276. *Id.* The court held that there had been an abuse of discretion by the trial court. *Id.* at *3.

277. See also *In re Tex. Am. Express*, 190 S.W.3d 720, 728 (Tex. App.—Dallas 2005, no pet.) (holding that petitioner had a substantive right to use his own money); *In re State of Texas*, 175 S.W.3d 532, 536 (Tex. App.—Tyler 2005, pet. dismissed) (holding that petitioner had a substantive right to the cash because it was guaranteed by statute); *In re Arthur Andersen*, 121 S.W.3d 471, 483–84 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (finding that petitioner had a substantive right to present the complete set of intertwined facts to one factfinder in one proceeding).

278. For an example of such a denial, see *In re Wal-Mart Stores, Inc.*, No. 14-05-00137-CV, 2005 WL 2076644 (Tex. App.—Houston [14 Dist.] Aug. 30, 2005, no pet.). In this case, the court misconstrues Wal-Mart's argument. Wal-Mart sought mandamus to set aside the trial court's order granting a joint trial for three plaintiffs against Wal-Mart. *Id.* at *1. Wal-Mart's argument was not that it would be overly burdened by having to endure a joint trial before challenging the consolidation order on appeal, but that its substantive rights would not be protected by a joint trial. See *id.* at *3 (observing that in a joint trial, the jury may return a verdict for one plaintiff based on evidence introduced by another plaintiff on a separate claim). Thus expense and delay were not the primary reason that Wal-Mart sought mandamus relief, although it may have appeared so at first blush.

279. This is assuming that there has been a "clear abuse of discretion." See *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (holding that mandamus relief is only available where there is a clear abuse of discretion and no adequate remedy by appeal).

grant mandamus. This approach to a mandamus analysis produces a more predictable and workable standard for the courts than the *Prudential* balancing test.

B. A Parting Request: A Mandamus Analysis Must Address Both the “Clear Abuse of Discretion” and the “Adequate Remedy by Appeal” Requirement

Walker v. Packer reaffirmed the requirement that mandamus will issue only when no adequate remedy by appeal exists.²⁸⁰ In recent years, however, courts have once again started to ignore this requirement, granting mandamus without discussing whether no adequate remedy by appeal exists.²⁸¹

In her concurrence in *In re Smith Barney*, Judge Hankinson aptly commented:

When the Court makes relief available in the absence of a trial court’s abuse of discretion and a showing that an ordinary appeal would be inadequate, litigants are unable to predict what they must show to obtain relief. In lieu of standards, and without guidance, litigants are simply put to guessing what issue will catch the attention of five justices at any given time.²⁸²

Accordingly, when a court makes mandamus relief available, it must discuss both the clear abuse of discretion requirement and the no adequate remedy by appeal requirement. Leaving the discussion of either requirement out of the opinion, whether the court actually considered them or not, further confuses mandamus law.

As discussed above, the Texas Supreme Court should not consider expense, delay, or the complete lack of authority for the trial court’s order when determining whether to grant mandamus. Instead, the court should look to the underlying reason for the mandamus appeal, granting mandamus only when the individual stands to lose his substantial rights. Determining the underlying reason for the mandamus action is a more workable standard for the courts than *Prudential’s* balancing of

280. See *id.* at 842 (“The requirement that mandamus issue only where there is no adequate remedy by appeal is sound, and we reaffirm it today.”).

281. See *In re Siemens Corp.*, 153 S.W.3d 694, 698–99 (Tex. App.—Dallas 2005, no pet.) (describing *Prudential’s* “adequate remedy by appeal” balancing test and then failing to apply it); see also *In re Landmark Org.*, No. 13-04-00527-CV, 2004 WL 2471809, at *1 (Tex. App.—Corpus Christi Nov. 1, 2004, no pet.) (granting mandamus without discussing whether petitioner had an “adequate remedy by appeal”).

282. *In re Smith Barney*, 975 S.W.2d 593, 600 (Tex. 1998) (Hankinson, J., concurring).

jurisprudential considerations. Furthermore, when a court makes mandamus relief available, it must discuss both the clear abuse of discretion requirement and the no adequate remedy by appeal requirement.

VI. CONCLUSION

The Texas Supreme Court has been unable to establish a workable mandamus standard.²⁸³ In *Walker v. Packer*, the court set a strict standard holding that “expense and delay” will not justify mandamus relief.²⁸⁴ In 2004, the court in *Prudential*, however, effectively overruled *Walker*.²⁸⁵ *Prudential* held that in determining whether an adequate remedy by appeal exists, the word “adequate” is “simply a proxy for the careful balance of jurisprudential considerations.”²⁸⁶ The court stated that a remedy may be “adequate” when the benefits of granting mandamus outweigh its detriments.²⁸⁷

Courts applying *Prudential’s* balancing test have been unable to apply the test with consistency.²⁸⁸ Moreover, the balancing test has relaxed mandamus law, relegating it to a remedy that is less than extraordinary.²⁸⁹ As a result, the Texas Supreme Court should overrule *Prudential* and articulate a new mandamus standard.²⁹⁰ This new standard should require the reviewing court to undertake a comprehensive analysis of the case to identify the underlying reason for the mandamus action. When there is a clear abuse of discretion, and the underlying reason for the party seeking mandamus is the loss of a substantial right, the court should grant mandamus. If the

283. See BARON, *supra* note 50, at 1 (discussing mandamus history in Texas); Cooperman & Ray, *supra* note 77, at 1177 (commenting that the Texas Supreme Court has failed to establish a workable and predictable mandamus standard).

284. *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992).

285. See BARON, *supra* note 50, at 6–7 (comparing *Walker v. Packer* with *In re Prudential* and concluding that *In re Prudential* effectively overruled *Walker v. Packer*).

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

287. *Id.*

288. See *supra* note 219 (comparing cases that have differing outcomes from similar facts).

289. See *supra* notes 232–34 and accompanying text (examining the effects of mandamus becoming less than extraordinary).

290. Cf. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (observing that “when governing decisions are unworkable or are badly reasoned,” the U.S. Supreme Court “has never felt constrained to follow precedent” (quoting *Smith v. Allwright*, 321 U.S. 649, 655 (1944))). Moreover, if the legislature wants to enlarge mandamus, it can do so by statute; this is not the job of the judiciary. See *In re Rowe*, 182 S.W.3d 424, 426–27 (Tex. App.—Eastland 2005, no pet.) (observing that the legislature has enlarged mandamus in the past by enacting section 15.0642 of the Texas Civil Practices and Remedies Code).

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underlying reason is not the loss of a substantial right, the court should not grant mandamus. Expense and delay, and the complete lack of authority for a trial court's order, are not sufficient reasons to justify mandamus relief. This new mandamus approach will produce a workable standard for the courts and will improve the predictability of mandamus law for litigants.

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