

# **ACCELERATED APPEALS**

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## ACCELERATED APPEALS

### I. Defining an Accelerated Appeal

The term “accelerated appeal” is somewhat of a misnomer. An accelerated appeal is not usually accelerated, except to the extent that there are accelerated deadlines for perfecting the appeal, filing the record, and briefing the issues. The appellate courts do not often decide accelerated appeals on an expedited basis, so an accelerated appeal may take just as long as a regular appeal, even though Texas Rule of Appellate Procedure 40.1(b) gives precedence to accelerated appeals.

The term “accelerated appeal” denotes an interlocutory appeal, that is, an appeal from an order that does not dispose of all issues and parties in the case. Therefore, an accelerated appeal is in fact “accelerated” to the extent that the appeal can be taken earlier than usual, that is, before a final judgment is signed.

This paper will discuss various issues relevant to accelerated or interlocutory appeals, beginning with the types of non-final orders that can be appealed before a final adjudication, perfecting and briefing an accelerated appeal, stays pending accelerated appeals, and recent cases and developments in this area of appellate practice.

### II. Orders Subject to Accelerated Appeals

Statutory authorization must exist for an accelerated appeal. The main statute on accelerated or interlocutory appeals is section 51.014 of the Civil Practice & Remedies Code, but that is not the only source for accelerated appeals.

#### A. The Main Categories of Orders Subject to Accelerated Appeals

Section 51.014 of the Texas Civil Practice & Remedies Code lists nine categories of orders that can be appealed despite the absence of finality. That code section allows accelerated or interlocutory appeals from orders:

- appointing a receiver or trustee;
- overruling a motion to vacate an order appointing a receiver or trustee;
- certifying or refusing to certify a class in a suit brought under Texas Rule of Civil Procedure 42;
- granting or refusing a temporary injunction or granting or overruling a motion to dissolve a temporary injunction under chapter 65 of the Civil Practice & Remedies Code;
- denying a summary judgment based on an assertion of immunity by an individual who is an officer or employee of the state or one of its political subdivisions;
- denying a summary judgment based on free speech grounds filed by a media defendant or a person whose communication appears in a print media;
- granting or denying a special appearance under Texas Rule of Civil Procedure 120a, except in an action brought under the Family Code;
- granting or denying a plea to the jurisdiction by a governmental unit, as defined in section 101.001 of the Civil Practice & Remedies Code; and
- denying or granting relief under section 74.351 of the Civil Practice & Remedies Code, which requires an expert report in order to maintain a healthcare liability, and specifically orders denying all or part of any relief sought under section 74.351(b) or granting relief under subdivision (1) of that provision, which allows the prevailing defendant to recover fees and costs, except that no appeal may be taken from an order extending the time to file a report

TEX. CIV. PRAC. & REM. CODE ANN. § 51.04(a). The avenue of accelerated appeal for the last category of orders was added by the 2003 tort reform legislation, known as House Bill 4.

### **B. Accelerated Venue Appeals**

Another category of orders subject to an accelerated appeal is found in section 15.003 of the Civil Practice & Remedies Code, which was also amended by House Bill 4. Subdivision (b) of section 15.003 permits an accelerated or interlocutory appeal from certain venue orders. Specifically, a party affected by the determination may appeal a ruling as to whether:

- a plaintiff independently established venue; or
- a plaintiff that did not independently establish proper venue established the four elements set forth in section 15.003(a).

TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(b). The four elements set forth in section 15.003(a), which apply when a plaintiff did not independently establish venue, are: (1) joinder is proper under the Texas Rules of Civil Procedure, because of common issues of law or fact; (2) no unfair prejudice would result from the joinder; (3) there is an “essential need” to have the joining plaintiff’s claim tried in the county of suit – an element that arguably can never be met; and (4) the county of suit is fair and convenient. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a).

By authorizing an accelerated appeal from a ruling that the plaintiff did or did not establish independent venue, the legislature overruled *American Home Products Corp. v. Clark*, 38 S.W.3d 92, 96 (Tex. 2000). In that case, the supreme court held that under the prior version of section 15.003, an accelerated appeal was possible only from a ruling on joinder, not from a ruling on the independent establishment of venue. Through section 15.003(b), House Bill 4 eliminated the supreme court’s limitation.

House Bill 4 also expanded the availability of accelerated venue appeals, specifying that such appeals can be taken by any party affected by a determination under section 15.003(a). TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(c). Nevertheless, special procedures govern venue appeals. The appellate court conducts de novo review and must issue the opinion within 120 days. *Id.* However, the statute does not state what happens if the 120-day deadline is not met. Presumably, a mandamus action could be filed, unless the dilatory court is the Texas Supreme Court.

The legislative authorization of venue appeals represents a considerable expansion of accelerated appeals. An interlocutory appeal is now available whenever there are two or more plaintiffs. See Frank Gilstrap, *House Bill 4: Jury Charge and Appeals*, STATE BAR OF TEXAS, THE IMPACT OF HOUSE BILL 4 (2004).

### **C. Agreed Accelerated Appeals**

By virtue of the legislature’s adoption, in 2001, of a variation of 28 U.S.C. § 1292(b), a third category of orders is subject to accelerated appeals. Section 51.014(d) of the Civil Practice and Remedies Code permits “agreed interlocutory appeals” of any order that would not otherwise be unappealable:

A district court may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if:

- (1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for a difference of opinion;
- (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and
- (3) the parties agree to the order.

Furthermore, section 51.04(e) states:

An appeal under Subsection (d) does not stay proceedings in the district court unless the parties agree and the district court, the court of appeals, or a judge of the court of appeals orders a stay of the proceedings.

Section 51.04(f) states:

If application is made to the court of appeals that has appellate jurisdiction over the action not later than the 10th day after the date an interlocutory order under Subsection (d) is entered, the appellate court may permit an appeal to be taken from that order.

TEX.. CIV. PRAC. & REM. CODE ANN. § 51.014(d)-(f).

The requirement of consent by the parties has ensured a sparing use of this type of accelerated appeal.<sup>1</sup> The first case construing the agreed interlocutory appeal was *In re D.B.*, 80 S.W.3d 698 (Tex. App.–Dallas 2002, no pet.). The new procedure’s beginning was hardly auspicious. The court dismissed the appeal for two procedural reasons. First, the parties’ consent did not appear in the record. Second, no formal application was made to the court of appeals for the right to conduct the appeal. The docketing statement did not amount to an application, which must be filed within ten days after the order is signed – a deadline that the court held cannot be extended.

The San Antonio Court of Appeals has disagreed with the Dallas Court on this

<sup>1</sup> One commentator has suggested that a rule, providing that “the parties” whose consent is required should be only the parties to the order being appealed, would best accomplish the legislative purpose. See Russell S. Post, *Interlocutory Appeals in the 21<sup>st</sup> Century*, STATE BAR OF TEXAS ADVANCED CIVIL APPELLATE COURSE (2002). The authors gratefully acknowledge using Russell Post’s excellent work as a source for this paper.

issue, holding that the extension of time provided in Texas Rule of Appellate Procedure 26.3(b) does apply to section 50.014(d) appeals. In *Stolte v. County of Guadalupe*, No. 04-04-00083-CV, 2004 WL 1159388 (Tex. App.–San Antonio May 26, 2004, no pet. h.), the court held that if a timely-filed application to appeal is jurisdictional, the jurisdictional requirement is subject to the motion for extension of time, *see id.* at \*1, \*4. Relying on *Verburgt v. Dorner*, 959 S.W.2d 615, 616 (Tex. 1997), the court reasoned that the notice of appeal is “an instrument” filed in a bona fide attempt to invoke the appellate court’s jurisdiction. Thus, the *Stolte* court did not dismiss the appeal for the appellant’s failure to also file an application for permission to appeal. Because the notice of appeal was filed within fifteen days of the date the application was due, and the appellant provided a “reasonable explanation” for his failure to file a timely application or notice of appeal, the court granted the extension of time to file the application. *See id.* at \*4.

Recently, the Fourteenth Court of Appeals elaborated on some of the requirements for agreed accelerated appeals. In *Diamond Products International, Inc. v. Handsel*, No. 14-03-00990-CV, 2004 WL 1607689 (Tex. App. [14th Dist.] July 20, 2004, no pet. h.), the appellant filed a summary judgment motion, and the trial court denied the motion and signed an order authorizing an appeal. The appellant did not file an application for permission to appeal in the Fourteenth Court. Instead, within ten days after the trial court’s order was signed, the appellant filed a notice of appeal. In the majority opinion, Justice Seymour explained that although the appellant had not filed an application pursuant to section 51.014(f), appellate jurisdiction was proper because the appellant had filed a timely notice of appeal. Because the parties had fully briefed the issues before the court, Justice Seymour found it unnecessary to require the appellant to file an application for permission to appeal. *See id.* at \*2.

Justice Seymour observed that while section 51.014(f) does not specify the contents of an application for permission to appeal, and the supreme court has not enacted rules to implement the procedure, an appellant must still include facts and argument addressing the general requirements found in section 51.014(d). Neither party presented facts or argument explaining why permission to appeal should be granted; however, the reasoning of the parties was apparent from the briefing: the parties sought to obtain an advance ruling on the summary judgment ground alleged in the motion before proceeding to trial. Justice Seymour reasoned that section 51.014(d) does not contemplate permissive appeals of summary judgments when the *facts* are in dispute; instead, permissive appeals are permitted only when determination of controlling *legal* issues is necessary for resolution of a given case. Because resolution of the issue on summary judgment did not rest on a controlling legal issue or materially advance termination of the litigation, the court denied the application for permission to appeal and dismissed the appeal.

Justice Frost's concurring opinion is also illuminating. She wrote separately to highlight the "procedural uncertainties that presently exist due to the failure of our current rules to provide a procedure for permissive interlocutory appeals." *Id.* at \*3 (Frost, J., concurring). For example, Justice Frost pointed out that section 51.014(d) does not specify who should file the application, nor does it specify how such an appeal should "be taken." *Id.* at \*3. Without a statute or rule specifying whether a notice of appeal should be filed in permissive interlocutory appeals, Justice Frost outlined two possibilities: (1) following a procedure, similar to the Federal Rule of Appellate Procedure 5, under which a notice of appeal is unnecessary because such a notice is deemed to have been filed when the appellate court grants permission to appeal; or (2) requiring the appellant to file a notice

of appeal in the manner proscribed by Texas Rules of Appellate Procedure 25-28. *See id.*

To eliminate the above-mentioned uncertainties, Justice Frost opined that an amendment to the Texas Rules of Appellate Procedure would probably provide the best option. Until such an amendment occurs, she reasoned that "it would be sensible and prudent for appealing parties to file an application for permission to appeal and a notice of appeal at the same time, and perhaps in the same instrument." *Id.* at \*4. This method could serve as a guide for appellate practitioners, even though Justice Frost cautioned that "parties should not read today's decision as indicating that there is no place for filing a notice of appeal in permissive interlocutory appeals." *Id.*

Although much ambiguity remains on the issue of agreed accelerated appeals, one thing is clear: that subsections 51.014(f) and (d) are to be read in tandem. In *Watson v. Moray*, 133 S.W.3d 877 (Tex. App.—Dallas 2003, no pet. h.), the appellant sought to appeal an order granting new trial, typically a non-appealable order. The appellant argued that, although this was not an agreed appeal of an otherwise interlocutory order under section 51.014(d), an appellate court's ability to permit an appeal under 51.014(f) is "purely discretionary" and is independent of any requirement under 51.014(d). *Id.* at 878. The court flatly disagreed. Under section 51.014(f), an appellate court "may permit" an appeal of an otherwise non-appealable order *only if* the appeal is ordered by the trial court pursuant to the terms of subsection (d). In other words, section 51.014(f) does not grant the authority of a court "to review any order desirable." *Id.* The *Watson* court dismissed the appeal for want of jurisdiction.

#### **D. Other Accelerated Appeals**

Any order (or portion of an order or judgment) relating to sealing or unsealing court records is deemed to be severed from the underlying case and is treated as a final judgment for purposes of appeal. *See* TEX. R. CIV. P. 76a(8); *Gen. Tire, Inc. v. Kepple*, 970 S.W.2d 520, 525 (Tex. 1998). Any

party or intervenor who participated in the hearing proceeding issuance of the order may appeal. *See Gen. Tire, Inc.*, 970 S.W.2d at 525.

The supreme court has referred to an appeal from a Rule 76a order as an “interlocutory appeal.” *CSR Ltd. v. Link*, 925 S.W.2d 591, 601 (Tex. 1996); *Chandler v. Hyundai Motor Co.*, 829 S.W.2d 774, 775 (Tex. 1992) (per curiam); *Eli Lilly & Co. v. Marshall*, 829 S.W.2d 157, 158 (Tex. 1992) (per curiam). But in *In re Dallas Morning News*, 10 S.W.3d 298 (Tex. 1999) (per curiam), the court was divided on whether a Rule 76a proceeding is quasi-independent or is part of the underlying proceeding, and a majority of the court expressed views in concurring opinions that only a final adjudication of a Rule 76a issue is subject to an appeal under Rule 76a(8). *See id.* at 300 n.1; *id.* at 305-08.

Moreover, Rule 76a(8) refers to an order regarding the sealing or unsealing of court records as a final judgment deemed to be severed from the remainder of the case. Thus, it could be argued that a final order under Rule 76a is akin to a final judgment and that a regular appeal can be taken. Given the earlier and jurisdictional deadline for an accelerated appeal, the wise course would be to treat it as an accelerated appeal.

Further, an accelerated appeal is available from a termination of parent rights under section 109.002 of the Family Code. *See In re B.G., E.H., and J.M.H.*, 104 S.W.3d 565 (Tex. App.–Waco 2002, no pet.). In that case, the court concluded that the parent made a bona fide attempt to appeal and declined to dismiss on the ground that the notice was seven days late. *Id.* at 566-67. *Cf. In re T.W.*, 89 S.W.3d 641, 642-43 (Tex. App.–Amarillo 2002, no pet.) (dismissing appeal because notice of appeal was not filed within the time for seeking an extension of the time to perfect appeal).

Other orders are subject to accelerated appeals. Examples are: (1) orders regarding disclosure of an environmental, health, and safety audit under Texas Revised Civil

Statute article 4447cc; (2) an order setting a bond in a tax lawsuit or dismissing a party for failure to post a bond under Texas Revised Civil Statute article 717m-1; (3) various provisions in the Texas Health & Safety Code, including sections 81.191, 574.070, and 574.108; and (4) certain orders relating to juveniles under the Texas Family Code, including sections 54.03, 54.05, and 56.01. *See* Pamela Stanton Baron, *Interlocutory Appeals, Mandamus, and Other Extraordinary Remedies*, STATE BAR OF TEXAS, 26<sup>TH</sup> ANNUAL ADVANCED CIVIL TRIAL COURSE (2003).<sup>2</sup>

This paper is not intended to provide a comprehensive list of all orders that are subject to an accelerated appeal. The citation to other statutes and codes should instruct the appellate lawyer that, if the order to be appealed arises from a statute, that statute should be reviewed to determine if an interlocutory appeal has been legislatively authorized.

### III. Issues Concerning Orders Subject to Accelerated Appeals

As usual, the legislative draftsmanship has created some questions about the scope and availability of accelerated appeals. Those questions arise in part because courts strictly construe statutes that allow interlocutory or accelerated appeals. *See, e.g., Walker Sand v. Asphalt Materials*, 95 S.W.3d 511, 514-16 (Tex. App.–Houston [1st Dist.] 2002, no pet.); *City of Austin v. L.S. Ranch Ltd.*, 970 S.W.2d 750, 753 (Tex. App.–Austin 1998, no pet). Some of those

<sup>2</sup> Pamela Baron’s excellent paper is cited several times and is gratefully acknowledged by the authors as being a main source used in preparing this current paper. As noted in Pamela Baron’s paper, some statutes specify that a notice of appeal is to be filed in the court of appeals rather than the trial court clerk, as required by Texas Rule of Appellate Procedure 25.1; but filing in the manner directed by Rule 25.1 has been held sufficient. *See In re J.J.*, 900 S.W.2d 353, 354-55 (Tex. App.–Texarkana 1995, no writ). It is often the authors’ belt-and-suspenders practice to file a notice of appeal with the trial court clerk and to send a copy to the appellate clerk.

questions are listed below, together with some judicial clarifications of the statutory bases for accelerated appeals.

#### A. Receivers & Trustees

Given strict construction, the statutory grant needs to be read carefully. The first two subdivisions of section 51.014(a) allow appeals from orders that appoint a receiver or trustee or overrule a motion to vacate an order appointing a receiver or trustee. Therefore, an order denying appointment of a receiver is not appealable. *See, e.g., Balias v Balias*, 748 S.W.2d 253, 255 (Tex. App.–Houston [14th Dist.] 1998, writ denied); *see generally* Pamela Stanton Baron, *Interlocutory Appeals, Mandamus, and Other Extraordinary Remedies*, STATE BAR OF TEXAS, 26<sup>TH</sup> ANNUAL ADVANCED CIVIL TRIAL COURSE (2003) (listing orders involving receivers and trustees that are and are not appealable).

#### B. Class Actions

Recent legislative enactments have changed some of the rules for class action appeals. Prior to House Bill 4, an interlocutory order that certified or refused to certify a class could be appealed, but further review by the supreme court was available only in the case of dissent or conflict jurisdiction; House Bill 4 loosened those requirements, amending Government Code section 22.225(d) to permit supreme court review of such orders without a showing of either dissent or conflict jurisdiction. *See* Claudia Wilson Frost & J. Brett Busby, *HB4's New Appellate Rules: Interlocutory Appeals and Stays, Conflict Jurisdiction, Judgment Interest, and Stays of Foreign Judgments*, THE APPELLATE ADVOCATE 8 (Winter 2003).<sup>3</sup>

House Bill 4 also affected interlocutory class actions appeals by allowing early review of certain pleas to the jurisdiction. *See id.* The new section 26.051 of the Civil Practice and Remedies Codes provides that,

before a hearing on a motion for class certification, a trial court must conduct a hearing and provide a written ruling on all pending pleas to the jurisdiction over part or all of the action; if a plea to the jurisdiction is denied and the class is then certified, a party may obtain review of the order denying the plea to the jurisdiction. *See id.*

Despite these legislative efforts, there is some doubt whether an accelerated appeal can be taken from orders on motions to “decertify” a class. The supreme court recently held that an order *refusing* to decertify is not appealable. *See Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 358 (Tex. 2001). On the other hand, two lower courts have held that orders granting motions to decertify a class are appealable. *Wood v. Victoria Bank & Trust Co.*, 69 S.W.3d 235, 237-38 (Tex. App.–Corpus Christi 2001, no pet.); *Grant v. Austin Bridge Constr. Co.*, 725 S.W.2d 366, 368-69 (Tex. App.–Houston [14th Dist.] 1997, no writ).

Orders that simply enlarge the class or modify its definition are not appealable. *Bally Total Fitness Corp.*, 53 S.W.3d at 355 (citing cases). However, there is one exception that threatens to swallow the rule. In *De Los Santos v. Occidental Chem. Corp.*, 933 S.W.2d 493, 495 (Tex. 1996), the supreme court held that an order that changes the “fundamental nature” of the class is appealable.

#### C. Temporary Injunctions

The right to an accelerated appeal from temporary injunction orders may include an appeal from an anti-suit injunction. *See, e.g., Am. Int’l Specialty Lines Ins. Co. v. Triton Energy Ltd.*, 52 S.W.3d 337 (Tex. App.–Dallas 2001, pet. dismissed w.o.j.). An appeal of an order overruling a motion to dissolve a temporary injunction is intended to allow a litigant to show that the injunction should be dissolved as a result of “changed circumstances.” *Smith v. O’Neill*, 813 S.W.2d 501, 502 (Tex. 1991); *Henke v. Peoples State Bank*, 6 S.W.3d 717, 721 (Tex. App.–Corpus Christi 1999, pet. dismissed w.o.j.). A motion to dissolve will not allow

<sup>3</sup> The authors wish to thank J. Brett Busby for graciously supplying additional resource material for this paper.

the re-litigation of the original issue. *See Chase Manhattan Bank v. Bowles*, 52 S.W.3d 871, 878-879 (Tex. App.–Waco 2001, no pet.).

Classifying an order as one pertaining to a temporary injunction is not always easy. The character and function of an order determines its classification. *Qwest Comms. Corp. v. AT&T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000); *Walker Sand v. Asphalt Materials*, 95 S.W.3d 511, 514-16 (Tex. App.–Houston [1st Dist.] 2002, no pet.). The question is whether the order grants temporary injunctive relief; in all likelihood, it does if it compels a party to act or to refrain from acting during the pendency of a suit. *See Universal Health Serv.*, 24 S.W.3d at 576; *Swanson v. Comty. State Bank*, 12 S.W.3d 163, 165 (Tex. App.–Houston 2000, no pet.). As apparent from the split of opinions on this issue, there is some room for argument as to whether an order is a temporary injunction. *Compare Waite v. Waite*, 64 S.W.2d 217, 224 n.6 (Tex. App.–Houston [14th Dist.] 2001, pet. denied) (appeal proper), *with Kaplan v. Tiffany Dev. Corp.*, 69 S.W.3d 212, 217 (Tex. App.–Corpus Christi 2001, no pet.) (appeal dismissed).

A list of cases that classify orders as injunctive or not appears in a paper presented by Pamela Baron. *See Pamela Stanton Baron, Interlocutory Appeals, Mandamus, and Other Extraordinary Remedies*, STATE BAR OF TEXAS, 26<sup>TH</sup> ANNUAL ADVANCED CIVIL TRIAL COURSE (2003). Samples from her list are:

- An order modifying a temporary injunction is appealable. *Toby Martin Oilfield Trucking, Inc. v. Martin*, 640 S.W.2d 352 (Tex. App.–Houston [1st Dist.] 1982, no writ).
- An order that makes no substantive change to a prior temporary injunction is not appealable. *Barrier v. Little*, No. 01-98-01361-CV, 1999 WL 439011 (Tex. App.–Houston [1st Dist.] June 17, 1999, no pet.) (not reported).

- An order that has the effect of a temporary injunction but lacks some of its requirements, such as a bond or a trial setting is appealable. *Qwest Comms. Corp. Am. Tel. & Tel. Corp.*, 24 S.W.3d 334 (Tex. 2000) (per curiam).
- A temporary restraining order is not appealable. *Lesikar v. Rappeport*, 899 S.W.2d 654 (Tex. 1995) (per curiam).

#### D. Special Appearance

If an order granting a special appearance dismisses all remaining defendants, it is a final judgment and may be appealed under the final judgment procedures. *E.g., TeleVentures, Inc. v. Int'l Gaming Tech.*, 12 S.W. 900, 904 n.1 (Tex. App.–Austin 2000, pet. denied). This may be more attractive because of the different procedures (and deadlines) that govern final judgment appeals.

#### E. Plea to Jurisdiction

The statute allows an accelerated appeal only from a ruling on a plea to the jurisdiction. Thus, no accelerated appeal is available from a ruling on a motion for summary judgment, even if it challenges jurisdiction. *See, e.g., Texas Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583, 586 n.2 (Tex. 2001); *Brazos Transit Dist. v. Lozano*, 72 S.W.3d 442, 444-45 (Tex. App.–Beaumont 2002, no pet.).

#### F. Official Immunity

There is a split of authority concerning whether individual officers may file pleas to the jurisdiction and take advantage of this interlocutory appeal. Some courts hold that government officials acting in their official capacity are “governmental units,” because an official capacity suit is effectively a suit against the government. *See, e.g., Perry v. Del Rio*, 53 S.W.3d 818, 821-23 (Tex. App.–Austin 2001), *pet. dismissed*, 66 S.W.3d 239, 256 (Tex. 2001); *Friona Indep. Sch. Dist. v. King*, 15 S.W.3d 653, 657 n.3 (Tex. App.–Amarillo 2000, no pet.). Others strictly construe the statute and hold that

individual officials are not “governmental units” under the statute. *E.g.*, *Castleberry Indep. Sch. Dist. v. Doe*, 35 S.W.3d 777, 780 (Tex. App.—Fort Worth 2001, pet. dismissed w.o.j.); *Univ. of Houston v. Elthon*, 9 S.W.3d 351, 354 (Tex. App.—Houston [14th Dist.] 1999), *pet. dismissed as improvidently granted*, 52 S.W.3d 689 (Tex. 2001); *Dallas County Comty. Coll. Dist. v. Bolton*, 990 S.W.2d 465, 467 (Tex. App.—Dallas 1999, no pet.).

#### IV. Procedural Aspects of an Accelerated Appeal

There are a number of procedural differences between a normal appeal and an accelerated appeal. It is important to identify that the appeal is accelerated, because the method and time for perfecting appeal is different. As can be guessed, all the deadlines are accelerated, as discussed below.

##### A. Perfecting Appeal

The notice of appeal must state that the appeal is accelerated. *See* TEX. R. APP. P. 25.1(c)(6). The docketing statement must state the appeal is accelerated. *See* TEX. R. APP. P. 32.1(g). In all but one category of interlocutory appeals, the notice of appeal must be filed within 20 days after the order is signed. TEX. R. APP. P. 26.1(b); *Iron Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc.*, 964 S.W.2d 762, 763 (Tex. App.—Amarillo 1998, no pet.). An “application” for permission to appeal must be filed within 10 days after the order at issue. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(f). Because interlocutory appeals are accelerated, TEX. R. APP. P. 28.1, they are placed on a fast track.

##### B. Post-Trial Motions and Extending the Time to Appeal

Filing a motion for new trial will not extend the time to perfect an interlocutory appeal. *See* TEX. R. APP. P. 28.1. A motion for reconsideration is equivalent to a motion for new trial. *See IPM Prod. Corp. v. Motor Parkway Realty*, 960 S.W.2d 879, 882 (Tex. App.—El Paso 1997, no pet.). Consequently, the filing of a motion for reconsideration

will not extend the time for perfecting an interlocutory appeal. *See Dayco Prod., Inc. v. Ebrahim*, 10 S.W.3d 80, 83 (Tex. App.—Tyler 1999, no pet.).

The deadline to file the notice of appeal may be extended if, within fifteen days after the deadline, the appellant files both the notice of appeal and a motion for extension of time. TEX. R. APP. P. 26.3; TEX. R. APP. P. 10.5(b); *see Ace Ins. Co. v. Zurich Am. Ins. Co.*, 59 S.W.3d 424, 426 (Tex. App.—Dallas 2002, no pet.). But according to one court, no such extension is possible in an agreed accelerated appeal. *In re D.B.*, 80 S.W.3d 698 (Tex. App.—Dallas 2002, no pet.).

The law is unclear whether a timely-filed request for findings of fact and conclusions of law extends the appellate deadlines on interlocutory appeals. One commentary suggests that a request for findings of fact and conclusions of law would extend the appellate deadline. *See* John Hill Cayce et al., *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 BAYLOR L. REV. 872, 880 (1997). Another appellate scholar adamantly disagrees. *See* Pamela Stanton Baron, *Interlocutory Appeals in Texas State Courts*, SOUTH TEXAS COLLEGE OF LAW, 10TH ANNUAL ADVANCED CIVIL TRIAL LAW CONFERENCE (2001).

Given that confusion, the Texas Supreme Court held that a litigant could “plausibly assume” that a request for findings of fact and conclusions of law could extend the time for perfecting an accelerated appeal. *Hone v. Hanfin*, 104 S.W.3d 884, 887-88 (Tex. 2003) (per curiam). The *Hone* court did not answer the question of whether it did extend the time. Thus, if the notice of appeal is filed within the 15-day period for seeking an extension of time to file a notice of appeal, reliance on an extension via a request for findings of fact and conclusions of law will save the appeal; but it may not do so after that time.

If no notice of an interlocutory order is received, then an extension of time is available under Rule 306a, which allows a

party under certain circumstances to obtain a later date for the signing of a judgment based on the party's first notice of the judgment. *Smith v. Adair*, 96 S.W.3d 700, 705 (Tex. App.—Texarkana 2003, pet. denied).

### C. Findings of Fact and Conclusions of Law

Generally, it is a good idea to request findings of fact and conclusions of law in special appearance appeals. See, e.g., *Daimler-Benz Aktiengesellschaft v. Olsen*, 21 S.W.3d 707, 715 (Tex. App.—Austin 2000, pet. dismissed w.o.j.); *In re Estate of Judd*, 8 S.W.3d 436, 440 (Tex. App.—El Paso 1999, no pet.). Nevertheless, in accelerated appeals, findings of fact and conclusions of law are not required, so that the trial court's failure to make them is not error. See, e.g., *Hoffman-La Roche, Inc. v. Kwasnik*, 109 S.W.3d 21, 26 (Tex. App.—El Paso 2003, no pet.). As Texas Rule of Appellate Procedure 28.1 provides, the trial court is not required to, but may, file findings of fact and conclusions of law but may do so within 30 days after signing the order. See TEX. R. APP. P. 28.1.

Further, findings and conclusions filed in an accelerated appeal are "helpful" but not required, and they do not carry the same weight on appeal as findings made under rule 296, and are not binding if unchallenged. See, e.g., *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 884 (Tex. App.—Dallas 2003, no pet.); *Mueller v. Beamalloy, Inc.*, 994 S.W.2d 855, 858-59 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *Entex v. City of Pearland*, 990 S.W.2d 904, 910 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

### D. Appellate Record

The record, which consists of a clerk's record, together with the court reporter's record, if any. See TEX. R. APP. P. 34.1. The record is due within 10 days after the notice of appeal is filed. TEX. R. APP. P. 35.1(b). The appellate court must allow the record to be filed late when the delay is not the appellant's fault, and may file the record

late when the delay is the appellant's fault. See TEX. R. APP. P. 35.3(c).

In lieu of a clerk's record, the appellate court may hear an accelerated appeal on the original papers forwarded by the trial court, or on sworn or uncontroverted copies of the relevant papers. See TEX. R. APP. P. 28.3. A party who prepares its own clerk's record can often save both time and money.

The appellate court may allow an accelerated appeal to be submitted without briefing. See TEX. R. APP. P. 28.3. The choice of whether to file a brief, however, does not lie with the appellant; but is solely in the court of appeals' discretion. See *Lagrone v. John Robert Powers Schs., Inc.*, 841 S.W.2d 34, 37 (Tex. App.—Dallas 1992, no writ). If no briefs are filed, the court reviews the evidence to determine if it is sufficient to support the trial court's ruling. See, e.g., *Dawson v. First Nat'l Bank of Troup*, 920 S.W.2d 249, 253 (Tex. Civ. App.—Tyler 1967, no writ); *Taylor v. Latham*, 249 S.W. 542, 542 (Tex. Civ. App.—Austin 1923, no writ).

### E. Briefing

The appellant's brief is due 20 days after the record is filed. See TEX. R. APP. P. 38.6(a). An appellant may file a brief within 20 days after appellant's brief is filed or within 20 days of the due date of appellant's brief if appellant files no brief. See TEX. R. APP. P. 38.6(b). A reply brief, if any, may be filed within 20 after the appellee's brief was filed. See TEX. R. APP. P. 38.6(c).

The rule for extension of time to file briefs likely applies to interlocutory appeals because the rule does not exclude briefs in accelerated appeals. See TEX. R. APP. P. 38.6(d). The same rule authorizes courts to shorten the time for filing of briefs. See TEX. R. APP. P. 38.6(d). Shortening the briefing process is often appropriate in an accelerated appeal.

### F. Suspending Execution

Perfecting an interlocutory appeal does not suspend the order appealed from unless the order is superseded or the appellant is

entitled to suspend the order without security by filing a notice of appeal. TEX. R. APP. P. 29.1. The trial court may permit an order granting interlocutory relief to be superseded pending an accelerated appeal, in which case the appellant may supersede as in a normal appeal from a final judgment. TEX. R. APP. P. 29.2.

#### V. Stay of Other Proceedings During the Accelerated Appeal

Section 51.014(b) of the Texas Civil Practice & Remedies Code specifies whether an accelerated appeal stays other proceedings in the trial court. This provision was amended by House Bill 4 to expand the scope of the automatic stay. The amended, and complicated, provision appears below:

(b) An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4) [relating to orders granting or denying temporary injunctions], stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3), (5), or (8) [relating to class certification, denial of a summary judgment based on immunity by a government employee, and a plea to the jurisdiction by a governmental unit] also stays all other proceedings in the trial court pending resolution of that appeal.

(c) A denial of a motion for summary judgment, special appearance, or plea to the jurisdiction described by Subsection (a)(5), (7), or (8) is not subject to the automatic stay under Subsection (b) unless the jurisdiction is filed and requested for submission or hearing before the trial court not later than the later of:

(1) a date set by the trial court in a scheduling order entered

under the Texas Rules of Civil Procedure; or

(2) the 180th day after the date the defendant files: (A) the original answer; (B) the first other responsive pleading to the plaintiff's petition; or (C) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a)(5), (7), or (8), the responsive pleading that raises the defense.

TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b)-(c).

As stated above, an accelerated appeal automatically stays the commencement of trial pending resolution of the appeal under section 51.014(a), **except** when the appeal is taken from an order granting or refusing a request for a temporary injunction. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b).

The automatic stay has been expanded to stop all proceedings in the trial court pending resolution of the appeal, **but only as to** interlocutory appeals of: (1) class certification orders; (2) orders granting or denying summary judgment motions based on a plea of immunity; or (3) orders granting or denying a plea to the jurisdiction. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b).

Nevertheless, no stay occurs from an accelerated appeal from a denial of a motion for summary judgment based on governmental or official immunity, or the grant or denial of a special appearance, or the grant or denial of a pleas to the jurisdiction of a governmental unit, unless the operative pleading (*i.e.*, the motion for summary judgment, the special appearance, or the plea to the jurisdiction) is filed and requested for submission or hearing within specified time periods.

Before House Bill 4, an automatic stay did not result from an interlocutory appeal of a venue determination under section

15.003 of the Civil Practices and Remedies Code, but it does now. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(d).

The stay is mandatory when the statutory conditions are met. *See Waite v. Waite*, 76 S.W.3d 222, 223 (Tex. App.–Houston [14th Dist.] 2002, no pet.). But at least one court held that the stay is waivable. *See Siebenmorgen v. Hertz Corp.*, No. 14-97-01012-CV, 1999 WL 21299, at \*3 (Tex. App.–Houston [14th Dist.] Jan. 21, 1999, no pet.) (unreported) (finding waiver because party seeking to rely on stay failed to object at the beginning of trial).

There is scant case law concerning the scope of the automatic stay. At least one court has suggested that the stay provision extends only to any claim that might be affected by the pending appeal. *See Tarrant Reg'l Water Dist. v. Gragg*, 962 S.W.2d 717, 718-19 (Tex. App.–Waco 1998, no pet.). In *Gragg*, the defendant raised a sovereign immunity defense against some causes of action but not others. After the trial court set the case for trial, the defendant requested emergency relief from the court of appeals. The court of appeals allowed the trial to proceed on claims that were not affected by the sovereign immunity defense. *Id.* at 719.

In most cases, the grounds for an accelerated appeal apply to all claims and parties. Parties may not defeat the automatic stay provision by “severing” an interlocutory order from the rest of the case and proceeding to trial on claims that would otherwise be affected by the order. *See, e.g., Sheinfeld, Maley & Kay, P.C. v. Bellush*, 61 S.W.3d 437 (Tex. App.–San Antonio 2001, no pet.) (holding that the trial court improperly severed temporary injunction and set the rest of the case for trial).

A summary judgment proceeding is considered a “trial.” *See Goswami v. Metro. Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988). Extending that logic, one court has held that summary judgment hearings may be stayed, just like a trial, under section 51.014(b). *See Lincoln Prop. Co. v. Kondos*, 110 S.W.3d 712, 714 (Tex. App.–Dallas

2003, no pet.). The *Lincoln Property* court concluded that “conducting a summary judgment hearing, and/or entering a final judgment based in whole or part on an order granting a motion for summary judgment, is a ‘trial’ within the meaning of section 51.014(b) and is thus subject to the automatic stay that arises from filing a notice of appeal of an order certifying or refusing to certify a class of litigants.” It explained that “the principles underpinning the legislative intent expressed in connection with sections 51.04(a)(3) and 51.014(b) apply equally to traditional trials and summary judgments alike.” *Id.*

However, no court has decided whether the stay created by section 51.014(b) expires once the appeal is decided by the court of appeals or continues in effect while a petition for review is pending in the Texas Supreme Court. In *Perry v. Del Rio*, 66 S.W.3d 239, 256-57 (Tex. 2001), the court noted the question, but did not reach it.

## VI. Orders Issued During the Accelerated Appeal

### A. Appellate Court Orders

When an interlocutory appeal is perfected, the court of appeals may make any temporary orders necessary to preserve the parties’ rights until the appeal is decided, and may require proper security. TEX. R. APP. P. 29.3. But the appellate court cannot suspend the trial court’s order if the appellant’s rights would be adequately protected by supersedeas or other relief authorized by Rule 24. *Id.*

Appellate courts should grant temporary relief when necessary to prevent the appeal or a portion of it from becoming moot. *See H & R Block, Inc. v. Haese*, 992 S.W.2d 437, 439 (Tex. 1999). If the court of appeals refuses to grant temporary relief necessary to protect its own jurisdiction, a party may ask the supreme court for relief. *See id.* The supreme court may grant temporary relief to protect the jurisdiction of the court of appeals without taking jurisdiction over the merits itself. *See id.* As an example of this power of the court of

appeals, the court may order a document sealed pending resolution of the trial court's denial of a motion for protection. *See Monsanto Co. v. Davis*, 110 S.W.3d 28, 29 (Tex. App.—Waco 2002, no pet.).

An appellate court may also find it necessary to issue temporary orders staying orders issued by the trial court while the appeal is pending until it can determine whether those orders interfere with its jurisdiction over the interlocutory appeal. *See, e.g., McAllen Med. Ctr. v. Cortez*, 66 S.W.3d 227, 238 (Tex. 2001). If they do, the court may then suspend the orders under Rule 29.6. *Id.*

Temporary relief may take a variety of forms. Because an interlocutory appeal is often available to protect a defendant from the burdens of litigation (*e.g.*, arbitration, immunity, special appearance, class actions, libel suits against media defendants), some appellate courts may be willing to stay all proceedings in the trial court pending disposition of the appeal. *See Lacefield v. Elec. Fin. Group*, 21 S.W.3d 799, 800 (Tex. App.—Waco 2000, no pet.) (staying proceedings pending disposition of special appearance appeal). But other courts may be less inclined to suspend proceedings in a trial court. *See Compaq Computer Corp. v. Lepray*, 52 S.W.3d 908 (Tex. App.—Beaumont 2001, no pet.) (denying motion to stay merits discovery and class notice while appeal of class certification was pending). Given the amendments to the stay provision under House Bill 4, courts may now be reticent to expand stays beyond those legislatively mandated.

At least one court has held that the power to issue temporary orders under Rule 29.3 expires once the appeal has been decided; appellate courts cannot fashion their own temporary injunctions to maintain the status quo after they remand the case for further proceedings. *See Gibson v. Waco Indep. Sch. Dist.*, 971 S.W.2d 179, 204 (Tex. App.—Waco 1998), *vacated on other grounds*, 22 S.W.3d 849 (2000).

While an interlocutory appeal is pending, only the appellate court in which

the appeal is pending may enforce the order. TEX. R. APP. P. 29.4. The appellate court may refer any enforcement proceeding to the trial court with instructions to hear evidence and grant relief, or to make findings and forward its recommendations to the appellate court. *See id.*; *Ex parte Boniface*, 650 S.W.2d 776, 778 (Tex 1983).

## **B. Trial Court Orders**

### **1. Orders granting substantially the same relief**

Rule 27.3 assumes that a trial court may modify an order that already has been appealed, in which case the appellate court “must” treat the appeal as from the new order. TEX. R. APP. P. 27.3. Thus, trial courts may apparently be prohibited from entering further orders granting substantially the same relief as the order being appealed. That issue arises when a trial court amends its order while the order is on appeal. *See, e.g., Peters v. Blockbuster, Inc.*, 65 S.W.3d 295, 304 (Tex. App.—Beaumont 2001, no pet.) (holding that the trial court had jurisdiction to amend the order during accelerated appeal).

In *Reeves v. City of Dallas*, 68 S.W.3d 58 (Tex. App.—Dallas 2001, pet. denied), the trial court granted a temporary injunction, which was appealed. The trial court then issued an order dissolving the original injunction and granting a new one, and then later modified the injunction. The court of appeals dismissed the appeal from the original order on the ground that it had been dissolved, but then vacated the later order as void. *Id.* at 60-61. *Reeves* seems at odds with Rule 27.3. The better view is reflected in *Ahmed v. Shimi Ventures, L.P.*, 99 S.W.3d 682, 689-91 (Tex. App.—Houston [1st Dist.] 2003, no pet.). In that case, the appellate court held that it had jurisdiction to review a modified temporary injunction and further stated that, in light of the excision of the prohibition against substantially similar orders, the former case law interpreting that prohibition is not binding.

## 2. Orders clarifying the basis for decision

When a court of appeals remands a case to the trial court for “clarification” of the grounds for its decision, the trial court’s clarification order does not violate Rule 29.5 – even if it negates the basis for the appeal. *Am. Home Prods. Corp. v. Clark*, 38 S.W.3d 92, 96-97 (Tex. 2000).

Rule 29.5 states that trial may proceed during an interlocutory appeal. *See* TEX. R. APP. P. 29.5. But that rule conflicts with the stay provisions of the interlocutory appeal statute, which preempt the rule. *Johnstone v. State*, 22 S.W.3d 408, 409 (Tex. 2000).

On a party’s motion or on the appellate court’s own initiative, an appellate court with jurisdiction over an interlocutory appeal may also review a further appealable interlocutory order concerning the same subject matter and any interlocutory order that would interfere with or impair the effectiveness of appellate relief. TEX. R. APP. P. 29.6.

As noted above, this rule permits the court of appeals to take jurisdiction over an amended order in the appeal from the original order. *See, e.g., Peters v. Blockbuster, Inc.*, 65 S.W.3d 295, 301-02 (Tex. App.–Beaumont 2001, no pet.) (holding amended class certification order was proper and reviewing original and amended orders together); *Brittingham v. Ayala*, 995 S.W.2d 199, 201 (Tex. App.–San Antonio 1999, pet. denied) (granting motion to challenge order modifying temporary injunction).

This rule also provides the jurisdictional basis for an appellate court’s power to vacate a trial court order that interferes with its jurisdiction or impairs the relief that might be granted on appeal. *E.g., McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227, 238 (Tex. 2001); *H & R Block, Inc. v. Haese*, 992 S.W.2d 437, 439 (Tex. 1999).

Despite this rule, a court may also review any subsidiary issues that are necessary to a decision on the merits of the

applicable order. *Letson v. Barnes*, 979 S.W.2d 414, 417 (Tex. App.–Amarillo 1998, pet. denied) (holding “to the extent that the subject matter of the non-appealable interlocutory order may affect the validity of the appealable order, the non-appealable order may be considered”).

## 3. Jurisdiction to dissolve order on appeal

While an interlocutory appeal is pending, the trial court retains jurisdiction of the case and may make additional orders, including one dissolving the order appealed. TEX. R. APP. P. 29.5. When the order being appealed is dissolved, the interlocutory appeal is moot and should be dismissed. *E.g., Waite v. Waite*, 76 S.W.3d 222, 223 (Tex. App.–Houston [14th Dist.] 2002, no pet.) (dismissing appeal after order appointing receiver was dissolved).

## 4. Orders interfering with the appeal

There is one limit on the trial court’s continuing jurisdiction over the case while an appeal is pending: the trial court may not make any order that is inconsistent with any temporary order of the appellate court or that would interfere with the jurisdiction of the appellate court or the effectiveness of any appellate relief. TEX. R. APP. P. 29.5.

A good illustration of this rule is found in *McAllen Medical Ctr., Inc. v. Cortez*, 66 S.W.3d 227 (Tex. 2001), which is also discussed, *supra*, Section II.B.2. For these purposes, it is enough to know that when McAllen Medical Center filed its petition for review in this interlocutory appeal from a class certification, the trial court certified a new class action against it and severed the new class action allegations from the claims that were subject to the pending appeal (thereby eliminating McAllen Medical Center from the case in which the petition for review was filed). The supreme court vacated the severance order on the ground that the severance would interfere with its jurisdiction to grant appellate relief. *Id.* at 238.

## VII. Supreme Court Review of Accelerated Appeals

The Texas Supreme Court has several specific grants of review over accelerated appeals. By virtue of House Bill 4's amendment to section 22.225 of the Texas Government Code, the supreme court has jurisdiction over interlocutory appeals of certification orders. *See* TEX. GOV'T. CODE ANN. § 22.225(d). Likewise, the supreme court can review denials of motions for summary judgment filed by media defendants on free speech grounds. *Id.* Further, the supreme court has direct jurisdiction over an appeal from an order that either grants or denies an injunction based on the constitutionality of a state statute. *See* TEX. GOV'T CODE ANN. § 22.001(c); TEX. R. APP. P. 57.1; *Perry v. Del Rio*, 67 S.W.3d 85, 89 (Tex. 2001); *Owens Corning v. Carter*, 997 S.W.2d 560, 567-68 (Tex. 1999).

There are also judicially-created rights to supreme court review involving accelerated appeals. The supreme court can always determine a lower appellate court's jurisdiction over an accelerated appeal. *E.g.*, *Qwest Comms. Corp. v. AT & T Corp.*, 24 S.W.3d 334, 335-36 (Tex. 2000); *Univ. of Tex. Southwestern Med. Ctr. of Dallas v. Margulis*, 11 S.W.3d 186, 187 (Tex. 2000) (per curiam). Further, the supreme court can address action by a court of appeals that defeats supreme court review. *See, e.g.*, *Banales v. Jackson*, 610 S.W.2d 732, 733 (Tex. 1980) (per curiam) (refusing to decide motion for rehearing when a motion for rehearing was a predicate to supreme court review). Finally, in extraordinary situations, the supreme court can review matters affecting interlocutory appeals by mandamus jurisdiction. *See, e.g.*, *Deloitte & Touche LLP v. Fourteenth Ct. of Appeals*, 951 S.W.2d 394, 398 (Tex. 1997) (orig. proceeding).

Absent those circumstances, interlocutory appeals have generally been final in the court of appeals. TEX. GOV'T CODE ANN. § 22.225(b)(3). Section 22.225(c) of the Government Code grants

supreme court review in accelerated appeals only when: (1) the court of appeals' opinion conflicts with a prior decision of the supreme court or another court of appeals (often referred to as "conflicts jurisdiction"); or (2) if one member of the court of appeals disagrees on a material question. TEX. GOV'T CODE ANN. §§ 22.001(a)(1), 22.225(c).

The second basis for review is sometimes called "disagreement" jurisdiction, but more often "dissent" jurisdiction. The second shorthand name is a misnomer. The statute requires a "disagreement," not a "dissent" per se – although disagreements are often expressed as dissents. *See Travis County v. Pelzel & Assocs.*, 77 S.W.3d 246, 248 n.2 (Tex. 2002) (holding that supreme court jurisdiction existed because one court of appeals justice disagreed with one ground for the court's decision in a concurrence.)

The scope of "disagreement" jurisdiction is obviously narrow. The scope of "conflicts" jurisdiction is even narrower; the supreme court interprets the statutory grant for conflicting decisions to require not merely an implicit conflict, but a decision based practically upon the same state of facts and announcing antagonistic conclusions. *See Christy v. Williams*, 298 S.W.2d 565, 567 (Tex. 1957).

House Bill 4 significantly expanded the scope of the Texas Supreme Court's conflict jurisdiction in all cases by re-defining "holds differently" as follows:

For purposes of Subsection (c) one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to the litigants."

TEX. GOV'T CODE ANN. § 22.225(e) (as amended); Frank Gilstrap, *Recent Changes in Supreme Court Jurisdiction*, STATE BAR OF TEX., PRACTICE BEFORE THE

TEXAS SUPREME COURT (2004).<sup>4</sup> Some commentators believe that the new standard “seems likely to replace the technical jurisprudence that previously defined the battle over conflict jurisdiction with a more flexible and prudential inquiry into whether hearing a particular interlocutory appeal would be a good use of the court’s scarce resources.” See Claudia Wilson Frost & J. Brett Busby, *HB4’s New Appellate Rules: Interlocutory Appeals and Stays, Conflict Jurisdiction, Judgment Interest, and Stays of Foreign Judgments*, THE APPELLATE ADVOCATE 9 (Winter 2003).

### VIII. Arbitration Appeals

With the increasing prevalence of binding arbitration as a mechanism for dispute resolution, concerns have arisen as to appropriate means to challenge an arbitration-related court order. The Texas Arbitration Act (the “TAA”), TEX. CIV. PRAC. & REM. CODE § 171.001 *et seq.*, recognizes certain arbitration-related orders as interlocutory and expressly allows for accelerated appeals of such orders. While the TAA, as well as the case law interpreting that statute, help to clarify issues surrounding interlocutory appeals of arbitration-related orders, some peripheral haziness remains.

#### A. Overview: the TAA v. the FAA

Typically, the answer to the question of which act governs the arbitration, the state or federal, will determine the availability of an interlocutory appeal in state court.<sup>5</sup> If the Federal Arbitration Act (the “FAA”) applies, 9 U.S.C. § 1 *et seq.*, mandamus is typically the only available route to challenge an order denying or compelling arbitration. See, e.g., *In re Am. Homestar, Inc.*, 50 S.W.3d 480, 483 (Tex. 2001); *Freis v. Canales*, 877 S.W.2d 283, 283 (Tex. 1994);

<sup>4</sup> The authors gratefully acknowledge using Frank Gilstrap’s excellent work as a source for this paper.

<sup>5</sup> If in federal court, the availability of interlocutory appeal will be governed by the FAA’s appellate provision, 9 U.S.C. § 16.

*Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272-73 (Tex. 1993).

On the other hand, if the TAA applies, interlocutory appeals are generally available. The Texas Arbitration Act permits interlocutory appeals from certain arbitration orders, including those denying arbitration. TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1); see also *Materials Evolution Dev. USA, Inc. v. Jablonowski*, 949 S.W.2d 31, 33 (Tex. App.—San Antonio 1997, no pet.) (finding appellate jurisdiction for interlocutory orders that are expressly made appealable by section 171.098(a) of the TAA).

If a party feels that it is entitled to arbitration under either act and is denied the right to arbitrate, that party must pursue “parallel proceedings,” meaning that both a mandamus action and an interlocutory appeal should be filed. See, e.g., *Jack B. Anglin Co.*, 842 S.W.2d at 272. Once the appellate court makes the factual determination as to which act governs, it will then dismiss the appropriate proceeding. See, e.g., *Trico Marine Serv., Inc. v. Stewart & Stevenson Tech. Serv., Inc.*, 73 S.W.3d 545, 548 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding).

#### B. Texas Arbitration Act

Under the appellate provision of the TAA, an order that (1) denies an application to compel arbitration, (2) grants an application to stay arbitration, (3) confirms or refuses to confirm an arbitration award, (4) modifies or corrects an arbitration award, or (5) vacates an arbitration award without directing a hearing, is appealable. TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a).

Appeals under the TAA may be taken “in the manner and to the same extent as an appeal from an order or judgment in a civil action.” TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(b). Because appeals under this section are interlocutory, they are governed by the ordinary rules that government interlocutory appeals. See *Certain Underwriters at Lloyd’s of London*

*v. Celebrity, Inc.*, 988 S.W.2d 731, 732-33 (Tex. 1998) (holding that the statute limiting supreme court jurisdiction in interlocutory appeals applies to appeals under this statute).

The TAA does not technically permit an interlocutory appeal from an order compelling or refusing to stay arbitration. Nonetheless, the Texas Supreme Court has stated in dictum that an interlocutory appeal may be available from an order compelling arbitration under the TAA. See *Jack B. Anglin Co.*, 842 S.W.2d at 272 (stating in dictum that the Texas Arbitration Act “permit[s] a party to appeal from an interlocutory order granting or denying a request to compel arbitration”). Thus, there is an open question about the scope of the right to an interlocutory appeal.

However, most courts decline to follow the *Jack B. Anglin Co.* dictum and hold that orders compelling arbitration under the TAA are not appealable. See, e.g., *Trico Marine Servs.*, 73 S.W.3d at 548 n.3 (citing cases); see also *Lipshy Motorcars, Inc. v. Sovereign Assocs., Inc.*, 944 S.W.2d 68 (Tex. App.—Dallas 1997, no writ); but see *Teal Constr. Co. v. Darren Casey Interests, Inc.*, 46 S.W.2d 417, 418-20 (Tex. App.—Austin 2001, pet. denied) (entertaining cross-appeal of interlocutory order compelling arbitration without addressing jurisdiction over that portion of the case).

Until the Texas Supreme Court finally resolves this issue, practitioners who wish to appeal an order compelling arbitration must seek the parallel remedies of an interlocutory appeal and a petition for writ of mandamus.

### C. Federal Arbitration Act

By contrast, this ambiguity does not exist for arbitration cases under the Federal Arbitration Act. In that context, it is well-settled there is no right to an interlocutory appeal. *Jack B. Anglin Co.*, 842 S.W.2d at 272. The appropriate course is a petition for mandamus. See *In re Am. Homestar of Lancaster*, 50 S.W.3d at 483; see also *Freis*, 877 S.W.2d at 283 (mandamus available to

attack order compelling arbitration under FAA); *Jack B. Anglin Co.*, 842 S.W.2d at 272 (mandamus available to attack order denying arbitration under FAA).

If it is not clear whether the agreement will be governed by the Texas statute or the Federal statute, parties seeking to compel arbitration must pursue the parallel proceedings outlined above. E.g., *Jack B. Anglin Co.*, 842 S.W.2d at 272; *J. M. Davidson, Inc. v. Webster*, 49 S.W.3d 507, 510-11 (Tex. App.—Corpus Christi 2001, pet. filed). The parallel proceedings should be decided simultaneously. *In re Valero Energy Corp.*, 968 S.W.2d 916, 916-17 (Tex. 1998).

Typically, courts have held that only mandamus relief is available when the FAA applies. See, e.g., *Hou-Scape, Inc. v. Lloyd*, 945 S.W.2d 202, 205 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (per curiam). There are two outliers, however. Both the Fort Worth and the Corpus Christi courts have held that, in some situations, an interlocutory appeal is available even with respect to an FAA award. See *J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 S.W.3d 836, 839 (Tex. App.—Fort Worth 2002, pet. denied); *Smith Barney, Inc. v. Settle*, No. 13-97-554-CV, 2000 WL 1146516, at \*2 (Tex. App.—Corpus Christi May 21, 1998, no pet.) (not designated for publication).

Both courts held that a party can challenge, by interlocutory appeal, an order that vacates an FAA-governed award without directing a rehearing. In so holding, the courts relied on *Jack B. Anglin Co.*, which explains that in state court, state procedural rules trump federal procedural rules, even when the FAA governs the arbitration. Although the arbitration agreements at issue clearly implicated the FAA, the Fort Worth and Corpus Christi courts interpreted the TAA’s arbitration provision, section 171.098, to be the applicable “procedural rule.” Under section 171.098(a)(5), an interlocutory appeal was available. Although these cases appear to be in the vast minority, they do lend some

support to the notion that interlocutory appeals are available even for FAA-governed arbitrations.

Ultimately, most modern arbitration agreements will have some involvement with interstate commerce, which is the threshold standard for FAA applicability. The “involving commerce” standard is the functional equivalent to the U.S. Supreme Court’s seemingly all-encompassing “affecting commerce” standard. Applying that standard, Texas Supreme Court has held that an arbitration agreement may involve interstate commerce when, among other factors, the contracting parties reside in different states. *See In re L & L Kempwood Assocs., L.P.*, 9 S.W.3d 125, 127 (Tex. 1999) (per curiam). Other courts have found that the mere fact that parties to the arbitration agreement reside in different states is sufficient to satisfy the “involving commerce” standard. *See Trico Marine Servs.*, 73 S.W.3d at 547.

Given that precedent, the FAA will apply more often than not. For that reason, appellate lawyers dealing with arbitration-related orders would be well advised to familiarize themselves with the parallel proceedings and the possible consolidation of their interlocutory appeal with a mandamus action.

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