BILL OF REVIEW

TED TERRY
JIMMY VAUGHT
KARL E. HAYS
Law Offices of Edwin J. (Ted) Terry, Jr.
805 W. 10th, Suite 300
Austin, Texas 78701
(512) 476-9597
Fax: (512) 476-6106

STATE BAR OF TEXAS
23rd ANNUAL MARRIAGE DISSOLUTION INSTITUTE
May 11-12, 2000
Chapter 10

TABLE OF CONTENTS

BILL OF REVIEW

I. INTRODUCTION

This article will discuss the use of bills of review in Texas including the elements of the "typical" and "atypical" bill of review, procedural issues, equitable defenses, use of summary judgments and post-judgment considerations.

II. GENERAL OVERVIEW

A bill of review is an independent equitable action to set aside a judgment that is no longer appealable or subject to a motion for new trial. *Transworld Fin. Serv. Corp. v. Briscoe*, 722 S.W.2d 407, 407 (Tex. 1987); *see also, Law v. Law*, 792 S.W.2d 150, 153 (Tex.App.–Houston [1st Dist.] 1990, writ denied) (a bill of review is a separate suit in equity, brought to set aside a judgment in the same court in an earlier suit, when the judgment in the earlier suit is final, not reviewable by appeal or by writ of error, and does not appear to be void on the face of the record). As an equitable proceeding, the bill of review is designed to prevent manifest injustice. *French v. Brown,* 424 S.W.2d 893, 895 (Tex. 1967). Nonetheless, the mere fact that an injustice has occurred is not sufficient to justify relief by bill of review. *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996, 998 (Tex. 1950) (the "injustice" was that a man was held liable for damages caused by a mule he didn't own); *cf., Rodriguez v. Holmstrom*, 627 S.W.2d 198, 200 (Tex.App.–Austin 1981, no writ) (it is not the purpose of a bill of review to relitigate issues decided in a former case, and the fact the court may have committed error in the trial of a cause or that an erroneous judgment has been entered is not grounds for granting the bill).

Under the doctrine that some degree of finality must attach to judgments, relief in equity is not easily obtained and the party seeking relief must overcome various procedural and substantive impediments to prevail; in other words, the grounds upon which petitions for bills of review are granted are narrow and restricted. *Montgomery v. Kennedy*, 669 S.W.2d 309, 312 (Tex. 1984); *see also, Alexander,* 226 S.W.2d at 998 (the grounds for a bill of review are narrow and strictly construed because the need for equitable relief must be counter balanced against the fundamental importance of achieving the finality of judgments and the elimination of endless litigation). Thus, Texas courts do not look on bills of review with favor, and the burden on the party filing the bill of review petitioner is heavy indeed. *Williamson v. Williamson*, 986 S.W.2d 379, 380 (Tex.App.-El Paso 1999, no pet.).

TEX.R.CIV.P. 329b(f) provides: "[o]n the expiration of the time within which the trial court had plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law." Although the Texas Rules of Civil Procedure do not define "sufficient cause," the Texas Supreme Court has enunciated in specific detail the steps necessary to be followed in a bill of review proceeding. *See State v. 1985 Chevrolet Pickup Truck*, 778 S.W.2d 463, 464-65 (Tex. 1989); *Beck v. Beck*, 771 S.W.2d 141, 141-42 (Tex.1989).

Generally, bill of review relief is available only if a party has exercised due diligence in pursuing all adequate legal remedies against a former judgment and, through no fault of its own, has been prevented from making a meritorious claim or defense by the fraud, accident, or wrongful act of the opposing party. *Wembley Investment Company v. Herrera*, 43 Tex. Sup. Ct. J. 140, 142 (Dec. 2, 1999). Ordinarily, a party seeking to invoke a bill of review must plead and prove (1) a meritorious defense to the cause of action alleged to support the judgment, (2) an excuse justifying the failure to make that defense which is based on the fraud, accident or wrongful act of

the opposing party, and (3) an excuse unmixed with the fault or negligence of the petitioner. *Beck v. Beck*, 771 S.W.2d at 141; *cf. Texas Property and Cas. Ins. Guar. Ass'n v. Johnson*, 4 S.W.3d 328, 332 n. 4 (Tex. App.–Austin 1999, pet. denied) ("[a] bill of review proceeding evidently may be founded on any recognized equitable basis for setting aside a previous judgment"). If legal remedies were available to the petitioner, but ignored, relief by equitable bill of review is unavailable. *Wembley Investment Company*, 43 Tex. Sup. Ct. J. at 142.

If a judgment is not challenged by a timely direct appeal or restricted appeal (formerly writ of error), a bill of review becomes the exclusive method of vacating the judgment. *In the Matter of the Marriage of Vogel*, 885 S.W.2d 648, 650 (Tex.App.–Amarillo 1994, writ denied) (judgment containing orders for future child support). A bill of review is a direct attack upon an existing judgment. *Min v. Avila,* 991 S.W. 2d 495, 499 (Tex.App.–Houston [1st Dist] 1999, no pet.). Consequently, a bill of review does not provide an opportunity to relitigate a judgment on the merits by *collateral* attack. *Baker v. Goldsmith*, 582 S.W.2d 404, 406-07 (Tex.1979); *see also, In Interest of Moragas,* 972 S.W.2d 86,89 (Tex.App.–Texarkana 1998, no pet.) (former husband's failure to attack divorce judgment through bill of review, as exclusive method to challenge judgment after time for filing motion for new trial had expired, precluded him from attacking divorce judgment as collateral matter to former wife's motion to confirm his child support arrearage). Likewise, a bill of review is not a proper attack on an appellate court's judgment and cannot be used as a substitute for a petition for review to the Texas Supreme Court. *Cherry v. Altman,* 872 S.W.2d 46, 47 (Tex.App.–Fort Worth 1994, writ dism'd w.o.j.) (the trial court had dismissed with prejudice the petitioner's original cause of action as groundless, brought in bad faith and for the purpose of harassment, whereupon the petitioner appealed to the Fort Worth Court of Appeals, which affirmed the trial court's judgment and sanctioned the petitioner for bringing the appeal for the purpose of delay and without sufficient cause; undeterred, the petitioner then filed a petition for a bill of review in the district court seeking to set aside the opinion of the *appellate* court, which, not surprisingly, proved unproductive).

III. ELEMENTS OF A "TYPICAL" BILL OF REVIEW

A. Meritorious Defense

In order to prevail on a bill of review, a party must first present a prima facie meritorious defense. A party establishes a meritorious defense when it proves that (1) its defense is not barred as a matter of law, and (2) it will be entitled to judgment on retrial if no evidence to the contrary is offered. *Ortmann v. Ortmann,* 999 S.W.2d 85, 88 (Tex.App.–Houston [14th Dist.] 1999, pet. denied). The threshold meritorious defense issue presents a question of law for the trial court. *Baker v. Goldsmith*, 582 S.W.2d 404, 408-09 (Tex. 1979); *Chandler v. Chandler*, 991 S.W.2d 367, 392 (Tex. App. - El Paso 1999, pet. denied).

Prima facie proof of a meritorious defense may consist of documents, answers to interrogatories, admissions, and affidavits. *Baker*, 582 S.W.2d at 409. Of course, live testimony is permissible as well. *See, e.g., State By and Through Mattox v. Buentello*, 800 S.W.2d 320, 325 (Tex. App. – Corpus Christi 1990, no writ) (father testified regarding his payment of child support). Likewise, the bill of review defendant may respond with similar proof showing the defense is barred as a matter of law. *Id.* The decision as to the existence of a meritorious defense must be made without considering any controverting evidence offered by the opponent on the issue; thus, the question of the fraud or wrongful act of the opponent on the issues of the fraud or wrongful act of the opponent, or of the negligence or fault of the petitioner; consequently, evidence bearing on these issues should not be considered. *Martin v. Martin*, 840 S.W.2d 586, 592 (Tex.App.–Tyler 1992, writ denied).

When the bill of review complainant attacks a judgment with which he was satisfied or agreed to at the time of entry, the burden is not, strictly speaking, to show a "defense" to the judgment; rather, it is to show that "he [or she] has grounds for different and greater relief than that previously given him [or her]," a burden equivalent to showing a meritorious defense, but which properly takes into account the petitioner's relationship to the judgment he [or she] is attacking. *Amanda v. Montgomery*, 877 S.W.2d 482, 485 n.3 (Tex.App.–Houston [1st Dist.] 1994, orig. proceeding), *quoting Fort Worth & Denver City Ry. Co. v. Reid*, 115 S.W.2d 1156, 1159 (Tex.Civ.App.–Fort Worth 1938, no writ).

1. Examples of a Meritorious Defense

A meritorious defense existed when the trial court improperly awarded the wife a life estate, rather than a homestead interest, in the parties' marital domicile, thereby divesting the husband of his fee interest in his separate property. *Lawrence v. Lawrence*, 911 S.W.2d 443, 447 (Tex.App.-Texarkana 1995, writ denied).

In a divorce, the wife established the meritorious defense that she would obtain a more favorable property division on retrial, when she showed that, far from being in precarious financial condition, a corporation (owned either as community property or as the husband's separate property) was entering into a period of prosperity, that its stock was worth at least three or four times the value shown on the husband's inventory, and that during the year before the divorce, the corporation retained six million dollars of community income (as well as the fact that distribution of this income to the husband commenced promptly after the divorce became final). *Martin,* 840 S.W.2d 592; *see also Rose v. Rose*, 598 S.W.2d 889, 895 (Tex.Civ.App.–Dallas 1980, writ dism'd w.o.j.) (when it is shown that a different property division will be obtained on a retrial, the petitioner establishes a meritorious defense).

The wife alleged a meritorious defense to the entry of the divorce decree because the written order did not comport with the agreement of the parties dictated into the record. *Bakali v. Bakali*, 830 S.W.2d 251, 255-256 (Tex.App.-Dallas 1992, no writ).

A biological mother established a prima facie meritorious defense to the termination of her parental rights, even though termination was requested and granted on the grounds that the mother was unfit and termination was in best interest of child, when the petition for termination failed to state any specific statutory ground for the termination, and the termination decree failed to describe any statutory basis for the termination. *In re T.R.R.*, 986 S.W.2d 31, 37 (Tex.App.-Corpus Christi 1998, no writ).

When the husband admitted that the wife had been prevented from asserting rights to a greater share of the parties' community estate and to greater child support, that he misrepresented and failed to disclose the nature, extent, and value of their community property, and that the wife's monetary settlement was much less than her share of the parties' marital estate, such factual admissions raised at least a fact issue as to whether the wife would have been able to present a meritorious defense to the property division made in the original divorce decree. *Hill v. Steinberger*, 827 S.W.2d 58, 61-62 (Tex.App.–Houston [1st Dist.] 1992, no writ).

In *Morris v. Morris*, 759 S.W.2d 707, 712 (Tex.App.–San Antonio 1988, writ denied), the San Antonio Court of Appeals stated that the record reflected the following evidence of a meritorious defense, which had been tried by consent, in spite of only general, and not particular, allegations of a meritorious defense in the pleadings: the husband testified, without objection, that the community property was purchased with earnings of both

parties, that he was gainfully employed and contributed to the community during the marriage, that he contributed to the community when he was away, that the tax records prepared by the wife verified his contributions to the community, that he did not abandon the family but left because of his father's heart condition and was driven to the airport by the wife, and that, had he known of the suit and been present, he would have received something more than nothing. The husband's affidavit in support of his petition for bill of review stated:

> ... I have a meritorious defense to the property division of the court in that the final decree of divorce entered in cause number 84-CI-04007 awarded one hundred percent of the community property to Sylvia Vale Morris. Upon a trial where I can present a defense, I would expect to receive and believe I am entitled to at least some portion of the community property and I am willing to pay my fair share of the community debts.

Id. at 713.

Justice Butts, in her dissent, argued that the husband's general allegations did not suffice to allege a meritorious defense. *Id.* She also argued that there was no proof of a meritorious defense in the record, noting instead (in a footnote) that the husband answered affirmatively to his attorney's question: "Do you feel like there would have been a different result?"; and that, when asked by the trial judge how the result would have been different (given that the wife had made the house payments, supported their two teenage daughters, and received no child support), the husband responded: "...anyone is entitled to some percentage of community property after a marriage of some 18 years." *Id.*

In *Hartsfield v. Wisdom*, 843 S.W.2d 221, 224 (Tex.App.–Amarillo 1992, writ denied), the former husband filed a petition for bill of review to set aside an agreed decree of divorce, alleging, as his meritorious defense, that he was mentally incompetent at the time he entered into the agreed judgment. However, the former husband did not seek to have the decree of divorce set aside, but rather, only the property settlement portion of the agreed judgment. *Id.* at 223-24. The Amarillo Court of Appeals determined that the former husband had failed to allege a meritorious defense, declaring:

> A mere allegation that the resisting party was incompetent during the pendency of the divorce proceeding is inadequate to show a meritorious defense to the contractual divorce agreement. This is because Hartsfield must also plead or show proof that he received an unfair settlement and would obtain a more favorable property division on retrial if his allegations were believed.

Id. at 224.

2. Meritorious Defense Barred as Matter of Law

A meritorious defense which is proved to be barred by law is no meritorious defense at all. *See Baker*, 582 S.W.2d at 409. *Ortmann v. Ortmann,* 999 S.W.2d 85 (Tex.App.–Houston [14th Dist.] 1999, pet. denied), illustrates this point. In *Ortmann,* in June, 1996, the trial court ordered that the husband pay the wife $30,000 for fraud on the estate and waste of community assets, unless the husband could properly account for $30,000 that he had presumably received as settlement funds from an unrelated lawsuit filed on his behalf in 1992. *Id.* at 86-87. In October, 1996, the trial court entered a

consent divorce decree granting judgment against the husband for $20,000 for fraud on the community estate and waste of community assets, and awarding $10,000 in attorney's fees to the wife. *Id.* at 87. More than five months later, the husband filed a bill of review seeking to have the money judgment against him set aside, alleging that he had a meritorious defense to the judgment, in that he had never received the settlement funds from the other lawsuit because a prior lawyer appropriated the money. *Id.*

In the bill of review action, the trial court granted summary judgment against the husband. *Id.* On appeal, the Houston Fourteenth Court of Appeals held that the husband's alleged meritorious defense was barred as a matter of law because the summary judgment evidence adduced by the wife proved that the husband knew of, and could account for, the settlement funds from the unrelated lawsuit as early as 1992, and that he also knew that he did not receive the funds. *Id.* at 88-89. Since the husband failed to raise the defense before the trial court rendered judgment against him, and then failed to adduce any evidence raising a fact issue as to unavailability of the defense to him after judgment was rendered against him, the Houston appellate court affirmed the trial court's summary judgment. *Id.* at 89; *see also Amanda,* 877 S.W.2d at 487 (the trial court addressed the issue of whether the former husband was entitled to bring a bill of review based on the allegation that his wife had fraudulently precluded him from denying paternity, and held he was not entitled to proceed for two reasons, one of which was because he had knowledge of circumstances [i.e., the husband had made counterclaim allegations of adultery], which should have caused him to contest paternity at the time of the divorce proceeding); *Spears v. Haas*, 718 S.W.2d 756, 758 (Tex.App.–Corpus Christi 1986, orig. proceeding) (since the former husband had a vasectomy two years prior to the birth of the twins, he knew then, or should have known then, of circumstances which should have caused him to contest paternity of the children at the time of the divorce proceeding; failure to timely raise the defense defeated his later bill of review).

3. Proof of a Meritorious Defense is Required

In *Billy B., Inc. v. Board of Trustees of Galveston Wharves,* 717 S.W.2d 156,159 (Tex.App.–Houston [1st Dist.] 1986, no writ), a complicated commercial lawsuit, the petitioner had to plead and prove a meritorious defense to an earlier dismissal of its suit, and to do so, had to show that it had standing to bring the earlier suit for an injunction and damages, which, ultimately, required proof of damages. The petitioner alleged in its bill of review that "Plaintiff herein has a good and meritorious cause of action as set forth in its original petition, a copy of which is attached ... and made a part hereof by reference." *Id.* The incorporated petition alleged that the petitioner was losing sales and income because the city of Galveston was "subsidizing" one of its competitors by allowing the competitor to lease wharf space when the competitor did not qualify to lease that space. *Id.*

As proof of the petitioner's injury or damages (necessary to show standing), the petitioner's attorney testified as follows at the hearing on the bill of review:

> I believe that the plaintiff has standing in this case because all of the cases cited by both sides hold that when a party alleges a damage peculiar to himself and not suffered by the public in general, he has standing to bring a lawsuit of this nature...this case is about....peculiar damage to the plaintiff...the plaintiff...is being deprived of income from what has been alleged as illegal competition...."

Id.

On appeal, the Houston First Court of Appeals stated that while such statements by the petitioner's attorney might suffice as an outline of the proof to be offered, it did not constitute actual proof, and noted that no other testimony concerning the petitioner's damages as an element of standing was presented either at the initial bill of review hearing or at a later rehearing (during which the petitioner's attorney protested: "[n]aturally, I didn't bring all my witnesses and put on my proof because I didn't have a chance to do any discovery..."). *Id*. Since Texas law requires both allegation and proof of a meritorious cause of action for a party to prevail upon a petition for bill of review, the Houston appellate court held that the petitioner failed to prove its meritorious defense. *Id.*

4. Notice Defects

A showing of a meritorious defense is not required to obtain bill of review relief from a default judgment entered without proper notice of the proceedings. *See, e.g, Morris*, 759 S.W.2d at 711 (in which defective citation by publication lead to a default divorce judgment).

B. Extrinsic Fraud

The second element that a bill of review plaintiff must prove is that he or she was prevented from asserting his or her meritorious defense because of the extrinsic fraud, accident, or wrongful conduct of an opposing party. *See, e.g, Beck*, 771 S.W.2d at 141.

1. Extrinsic v. Intrinsic Fraud

Fraud, in relation to attacks on final judgments, is classified as either extrinsic or intrinsic. *Montgomery*, 669 S.W.2d at 312. Only extrinsic fraud will entitle a petitioner to bill of review relief. *Id.*

a. Extrinsic Fraud

Extrinsic fraud denies a losing litigant the opportunity to fully litigate her rights or defenses upon trial. *Montgomery*, 669 S.W.2d at 312. It is conduct that prevents a real trial upon the issues involved. *Id*. at 313. An allegation of extrinsic fraud requires proof of some deception practiced by the adverse party, collateral to the issues in the case, that prevents the petitioner from fully presenting his or her claim or defense in the underlying action. *Bakali*, 830 S.W.2d at 255; *see also Montgomery*, 669 S.W.2d at 312. In other words, extrinsic fraud is fraud committed by the other party that: (1) prevents the losing party from either (a) knowing about a right or defense he or she is entitled to assert, or (b) having a fair opportunity to present such a right or defense at trial; (2) is committed outside of the trial; (3) is committed directly upon the losing party, his or her agent or attorney, or one of his or her witnesses; and (4) is collateral to the matter that was tried, *i.e*., it does not relate to a subject that was actually or even potentially an issue in the trial. *Amanda,* 877 S.W.2d at 488; *see also Alexander*, 226 S.W.2d at 1001 (extrinsic fraud is a wrongful act of the opposing party that prevents the losing party from either knowing about his rights or defenses or from having a fair opportunity of presenting them at trial).

b. Examples of Extrinsic Fraud

(1) Fiduciary's Concealment of Material Facts

The Texas Supreme Court has held that a fiduciary's concealment of material facts, used to induce an agreed or uncontested judgment, that prevents a party from presenting his legal right at trial, constitutes extrinsic fraud. *Montgomery*, 669 S.W.2d at 313 (as the trustees of a trust and executors of an estate with their sister as a beneficiary, the

brother and mother owed the sister a fiduciary duty of full disclosure of all material facts known to them that might affect the sister's rights).

(2) Fraudulent Inducement to Divorce?

The Texas Supreme Court denied the petition for review in *Vickery v. Vickery,* 999 S.W.2d 342 (Tex. 1999). In his dissent to the denial of the petition for review, Justice Hecht attached as an appendix the unpublished opinion of the Houston First Court of Appeals. In its opinion, the Houston appellate court recounted that the wife testified that her husband had duped her into getting a divorce by persuading her that it was necessary to protect the family's assets (from a malpractice lawsuit pending against him) and that the couple would reunite after the malpractice suit threat had passed. 999 S.W.2d at 367. On appeal, the husband asserted that his alleged misrepresentations–that the divorce was to protect assets and that they would reunite after the malpractice suit threat had passed–could not as a matter of law rise to the level of extrinsic fraud. *Id.* However, the First Court of Appeals noted that the essence of the wife's claim was that she was duped into not contesting the divorce because she believed it was to be a sham divorce; in other words, the husband's misrepresentations prevented the wife "from fully presenting her claim or defense in the underlying action." *Id.* Further, the appellate court stated that the wife asserted that the husband had concealed from her his real reason for wanting a divorce, as well as the fact that the plaintiff who was suing the husband had offered to settle the malpractice suit for policy limits before the wife signed the divorce decree; thus, the Houston appellate court concluded, the evidence was legally and factually sufficient to support a finding of extrinsic fraud. *Id.* at 367-68.

(3) Fraudulent Citation by Publication

In *Morris*, 759 S.W.2d at 709, the San Antonio Court of Appeals found extrinsic fraud when the wife caused citation by publication to issue, even though she knew the whereabouts of the husband (she also knew his whereabouts at the time when the divorce was granted). Since the record established that due diligence would have resulted in personal notification to the husband, the Fourth Court of Appeals held that the wife had procured the divorce judgment by extrinsic fraud. *Id.; cf., Burrows v. Miller*, 797 S.W.2d 358, 361 (Tex.App.–Tyler 1990, no writ) (a false affidavit to secure service by publication is a species of extrinsic fraud).

(4) Misrepresentation Coupled with Coercion

In *Rathmell v. Morrison,* 732 S.W.2d 6, 14 (Tex.App.–Houston [1st Dist] 1987, no writ), the husband not only misrepresented the market value of the various companies which he controlled, but also threatened that if the wife obtained an interest in the companies, or even if she merely insisted on having the companies appraised, the husband would dissolve the companies, close them down and walk across the street and start new companies. According to the Fourteenth Court of Appeals, the husband's wrongful act of threatening the value of the companies, *i.e.,* preventing his wife from having them appraised, coupled with his misrepresentation of the value of the companies, amounted to more than intrinsic fraud. *Id.* Further, since the wife was induced by the husband's threat to forego an appraisal and agreed to the property settlement agreement based on the husband's representations regarding the value of the companies, she was prevented from having a fair opportunity of presenting in the divorce trial evidence concerning the value of the companies, and thus there was sufficient evidence to support a jury finding of extrinsic fraud (in this manner the Houston appellate court distinguished the typical misrepresentation of value bill of review case, which is an instance of intrinsic fraud). *Id.*

(5) No Fraud When Attorney Involved

In *Bakali*, 830 S.W.2d at 256, the Dallas Court of Appeals held that the uncontroverted summary judgment evidence conclusively negated the wife's bill of review allegation that she had been precluded from asserting her meritorious defense by the fraud, accident or wrongful act of her husband, when the affidavit of the husband's attorney stated that he sent the wife's attorney two letters between the time the judgment was signed and filed with the court, had several conversations with the wife's attorney in which the decree was discussed openly, and that the wife knew the judge had signed the decree.

(6) Judicial Admissions of Fraud

In what must be considered a most innovative slant on litigation tactics, in his motion for summary judgment, the former husband accepted as true the following facts alleged in his wife's petition for bill of review: (1) he had made fraudulent misrepresentations concerning the wife's need for an attorney in the divorce proceedings; (2) his fraudulent misrepresentations were made in order to induce the wife to refrain from hiring a lawyer; (3) his acts and omissions prevented the wife from asserting rights to greater child support payments; and (4) he prevented the wife from asserting rights to a greater share of the community property estate. *Hill v. Steinberger*, 827 S.W.2d at 61. Consequently, the Houston appellate court determined that the husband judicially admitted such facts, which raised at least a genuine issue of material fact as to the existence of extrinsic fraud, and therefore the appellate court reversed the summary judgment granted in his favor by the trial court. *Id.* at 62. Some people just want to lose.

(7) Threats and Duress

In *Decluitt v. Decluitt*, 613 S.W.2d 777, 780 (Tex.Civ.App.–Waco 1981, writ dism'd w.o.j.), the former wife, who had suffered from both mental illness and alcoholism, alleged in her bill of review that she had been induced to sign a property settlement agreement by her former husband's promises to treat her justly; and by his threats to take their son away from her if she did not sign it. Further, she alleged that she was totally deceived as to the amount of community property the parties had owned until after the divorce. The trial court granted the husband's motion for summary judgment, but on appeal, the Waco Court of Appeals held that there were genuine issues of material fact as to whether the former wife had a meritorious defense to the trial court's judgment dividing the community property, which she was prevented from making by fraud or the wrongful acts of the appellee, unmixed with any fault or negligence on her part. *Id.* at 781.

(8) "I'll Take Care of Everything"

In several cases, the husband's assurances that he "would take care of everything," coupled with other circumstances, resulted in (at least) a finding that a genuine issue of material fact existed as to the existence of extrinsic fraud. In *Hill v. Steinberger*, 827 S.W.2d at 63, the wife alleged that she did not employ an attorney due to her husband's misrepresentations that he would "take care of everything," and that she received a smaller share of the community property than she would have received but for the husband's fraud. In *Decluitt*, 613 S.W.2d at 780, among other facts described immediately above, the former wife alleged that the former husband had assured her he "would treat her fairly," and the Waco appellate court appeared to take such allegation into consideration when it held that the husband's motion for summary judgment was improperly granted. *But cf. Gone v. Gone*, 993 S.W.2d 845, 847 (Tex.App.–Houston [14th Dist.] 1999, pet. denied) (the trial court disbelieved the husband's allegations that his wife had told

him he didn't need to worry about the divorce).

(9) False Promises of Settlement

When the petitioner is induced to refrain from pursuing his meritorious defense by false promises of compromise and settlement made by the opposite party, extrinsic fraud exists. *Griffith v. Conard*, 536 S.W.2d 658, 660 (Tex.Civ.App.–Corpus Christi 1976, no writ).

c. Intrinsic Fraud

In contrast to extrinsic fraud, intrinsic fraud exists when "the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were, or could have been, litigated therein." *Amanda*, 877 S.W.2d at 488, *quoting, Montgomery*, 669 S.W.2d at 313. Intrinsic fraud is inherent in the matter considered and determined in the trial, where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were or could have been litigated therein. *Montgomery,* 669 S.W.2d at 313.

d. Examples of Intrinsic Fraud

(1) False Testimony and Fraudulent Instruments

Intrinsic fraud includes false testimony, fraudulent instruments, and any matter actually presented to and considered by the court in rendering the judgment assailed. *Montgomery,* 669 S.W.2d at 313*; see also Law*, 792 S.W.2d at 153 n.2.

(2) Conspiracy to Suborn Perjury

An allegation of a conspiracy to suborn perjury constitutes an allegation of intrinsic fraud. *Tice v. City of Pasadena,* 767 S.W.2d 700, 702 (Tex. 1989).

(3) Misrepresentations About the Nature and Value of Marital Assets

Generally, misrepresentations about the nature and value of marital assets, even those which mislead a party into agreeing to an unjust property division, are considered to be intrinsic instead of extrinsic fraud because they obviously relate to matters at issue in the former trial. *Borgerding v. Griffin*, 716 S.W.2d 694, 699 (Tex.App.–Corpus Christi 1986, no writ) (evidence failed to establish that the former wife committed extrinsic fraud which would justify setting aside the divorce judgment, when the former wife failed to disclose a bank account in her mother's name and an account in a friend's name used for the former wife's benefit); *see also Lawrence*, 911 S.W.2d at 447-48 (allegations by the husband that the wife acknowledged at trial that she had community funds in a bank account and that she had not included the funds and the account in her inventory, and that the trial court had prevented the husband from proving those facts, alleged at best only intrinsic fraud and thus would not support a bill of review)*; Rathmell*, 732 S.W.2d at 13 (as a matter of law, misrepresentation with respect to the value of known community assets does not alone constitute extrinsic fraud); *Bankston v. Bankston*, 251 S.W.2d 768 (Tex.Civ.App.–Dallas 1952, mand. overr.) (husband provided inaccurate information about business concerns upon which the wife relied).

(4) Misleading Party Into Unjust Settlement

Misleading the adverse party, or that party's attorney, into acquiescence and approval of an unjust settlement condition, may also constitute intrinsic fraud. *See, e.g. Amanda*, 877 S.W.2d at 448; *Bankston*, 251 S.W.2d at 772; ; *cf., Griffith,* 536 S.W.2d at

660 (false promises of settlement constitute extrinsic fraud).

(5) Matters "Considered and Determined" by the Trial Court

Assertions by the husband that the wife concealed her knowledge of the identity of child's real biological father (*i.e.,* not the husband) pertained to paternity, an issue involved in the original divorce, whether or not the issue was actually contested. *Amanda*, 877 S.W.2d at 448. According to the Houston First Court of Appeals, the fact that the divorce decree declared that the husband was the child's father meant that paternity was a matter that was "considered and determined" in the divorce proceeding. *Id.*

Recall that in *Ortmann v. Ortmann,* 999 S.W.2d 85, 88 (Tex.App.–Houston [14th Dist.] 1999, pet. denied), the husband attempted to ground his bill of review upon the fraudulent acts of one his prior attorneys. Specifically, the husband argued that it was his former attorney's deception in telling him that funds from one lawsuit were being used as a bond in a second lawsuit that prevented the husband from knowing of his defense (he never received the funds and so should not have been held accountable for them in the divorce). *Id.* at 89. The Fourteenth Court of Appeals, however, noted that the husband's former attorney's actions were such an integral part of the underlying divorce action that the former attorney had been joined and served as a party to the divorce action (in order to ascertain the whereabouts of the settlement funds). *Id.* Thus, according to the Houston appellate court, the alleged fraudulent acts became an actual issue in the underlying suit, and therefore, could hardly be said to be a collateral matter. *Id.* As an actual issue in the divorce, the former attorney's fraudulent acts could not constitute extrinsic fraud. *See, Id.*

(6) Incomplete Information, But No Coercion

In *Kennell v. Kennell*, 743 S.W.2d 299, 299-300 (Tex.App.–Houston [14th Dist.] 1987, no writ), the ex-wife filed a bill of review alleging that her ex-husband made several misrepresentations regarding the value of marital properties and the income and tax liability of the ex-husband's business. The ex-wife further claimed that she, her legal counsel, and her C.P.A. relied upon the ex-husband's representations because final accounting figures were not available for the period just prior to the entry of the agreed divorce decree; she also alleged that the ex-husband had concealed the true value of his business, by telling her that the business was "worth far less than either appraisal which had been obtained by both sides." *Id.* at 301. Ultimately, the ex-wife complained that she had trusted her husband and that she had been unable to ascertain his credibility. *Id.*

After the trial court rendered summary judgment against the ex-wife, she appealed. *Id.* On appeal, the Houston Fourteenth Court of Appeals stated that every relevant piece of information was available to the ex-wife during the original divorce proceeding through normal discovery procedures, and that her attorney and her certified public accountant conducted an independent investigation of the assets and their values. *Id.* at 301. Although the ex-wife complained that she could not get final sales figures for the months just prior to the divorce, the ex-husband presented summary judgment evidence that her attorney chose to complete settlement negotiations before such figures were available. *Id.*

Although the Fourteenth Court of Appeals acknowledged that extrinsic fraud can be based upon non-coercive actions of a fiduciary, the ex-wife did not present summary judgment evidence that she was unable to discover the underlying sales documentation at the time the parties negotiated the agreed judgment (after all, she had both an attorney and a C.P.A.), and she could have discovered the documentary

evidence necessary to ascertain the ex-husband's business income for any period during the marriage. *Id.* Thus, the Houston appellate court held that the ex-wife did not present evidence that her husband had coercively induced her to accept his representations (the lack of coercion distinguished the case from *Rathmell*). *Id.*

In conclusion, the Houston Fourteenth Court of Appeals stated:

> Divorce litigants commonly assert differing valuations and differing versions of the facts. If each party has access to the evidence that will prove or disprove an assertion, the party making the assertion has concealed nothing. One purpose of divorce proceedings is to resolve the differences in the parties' perceptions or assertions of fact. The purpose of a bill of review is not to reopen litigation every time a party, upon further reflection, decides that he is unsatisfied with the result in a case.

Id.

2. Fraud by Opposing Party

Extrinsic fraud requires that the fraud, accident, or wrongful act be committed by an "opposing party." *Ortmann,* 999 S.W.2d at 88. In *Ortmann,* the former husband made the literal (but misguided) argument that his prior attorney (in another lawsuit, who had appropriated the settlement proceeds from that other lawsuit) was an "opposing party" for purposes of bringing a bill of review, on the grounds that "[a] person who steals $30,000 from another person is by fundamental reasoning and definition an opponent of his victim." 999 S.W.2d at 89-90. However, as noted by the Houston Fourteenth Court of Appeals, the former husband cited no authority for his proposition, and, in fact, Texas law held otherwise. *Id.* at 90; *see also Transworld Fin. Servs. Corp.,* 722 S.W.2d at 408 (holding a bill of review plaintiff must have been prevented from making his defense by the fraud of the person against whom the bill of review is brought); *Martin*, 840 S.W.2d at 591 (defining extrinsic fraud as "wrongful conduct of the successful party practiced outside of an adversary trial, [and] practiced directly upon the defeated party, his agents, or witnesses"); *Rathmell,* 732 S.W.2d at 13 (concluding that extrinsic fraud must be committed by the other party to the suit).

3. Official Mistake

The Texas Supreme Court has held that a bill of review petitioner may be relieved of the necessity of proving extrinsic fraud on the part of his opponent when the petitioner can demonstrate that the judgment resulted from his reliance on a court officer who improperly executed his official duties. *See, e.g. Hanks v. Rosser*, 378 S.W.2d 31, 35 (Tex. 1964); *Alexander*, 226 S.W.2d at 998-99 (the rule that reliance upon the statements or promises of third persons, even though they may occupy some official position or seem to have better information than the party himself, does not ordinarily entitle one to relief for failing to make a defense; to be entitled to such relief, the reliance must be upon some official duty that the clerk had to act).

It should be immediately noted, however, that "officers of the court" in this context does not include the litigants' attorneys. *Transworld Financial Services Corp.*, 722 S.W.2d at 408 (a bill of review petitioner who alleges that he suffered an adverse judgment because of the fraudulent or wrongful acts of his attorney is not excused from the necessity of pleading and proving extrinsic fraud on the part of his opponent); *see also Lawrence*, 911 S.W.2d at 448 (a court officer in this context does not include the party's attorney, and an allegation that the

party's misplaced reliance on his attorney led in part to his failure to pursue his appeal does not constitute official mistake). For instance, a mistake by a party or his attorney in interpreting the authorized language of a citation (which leads to filing an improper answer and a default judgment) would not constitute an "official" mistake, since it is the rule that a mistake by the party seeking relief or his counsel does not entitle one to a bill of review. *See, e.g. K.B. Video and Electronics, Inc. v. Naylor*, 847 S.W.2d 401, 407 (Tex.App.–Amarillo 1993, writ denied); *cf., Rodriguez*, 627 S.W.2d at 200 n.1 (a justice of the peace is not an official court functionary of a county court at law and cannot, therefore, supply erroneous official information which could prevent a timely filing of a motion for new trial and thus provide a party to a former action a ground for the grant of a bill of review).

An official mistake may include the clerk's failure to send a notice of a dismissal. *Plains Growers, Inc. v. Jordan*, 519 S.W.2d 633, 637 (Tex. 1974). Official mistake may also include the misplacement of an original answer. *Baker*, 582 S.W.2d at 407. The failure of the clerk to send the notice of judgment as required by the Texas Rules of Civil Procedure may also constitute official mistake. *Pope v. Moore*, 729 S.W.2d 125, 127 (Tex.App.–Dallas 1987, writ ref'd n.r.e.).

In *Bakali*, 830 S.W.2d at 256-57, in order to defeat a claim of official mistake, the husband attached to his motion for summary judgment an affidavit from the judge's personal secretary that stated that the signed divorce decree was sent to wife's attorney. The husband also attached, as an exhibit to the affidavit, a copy of the transmittal letter to the attorneys for both parties. The Dallas Court of Appeals held that, since the husband's summary judgment evidence was uncontroverted, the affidavit and exhibits were sufficient to show compliance with the duties imposed on court clerks under the Texas Rules of Civil Procedure and to negate any allegation of official mistake. *Id.*

In *Remington Investments, Inc. v. Connell*, 971 S.W.2d 140, 142-43 (Tex.App.–Waco 1998, no writ) the petitioner alleged that the failure to have its request for findings of fact and conclusions of law timely filed with the trial court, so as to properly extend the appellate timetable, was not the result of its own negligence, but was the result of an official mistake by the United States Postal Service. According to the petitioner, it mailed its request for findings of fact and conclusions of law to the trial court clerk several days before the September 3, 1996 due date. *Id.* at 143. At the same time, it mailed a copy of the request, via certified mail, return receipt requested, to the opposing counsel; the returned receipt indicated that the opposing counsel received the copy on September 5. *Id.* Consequently, the petitioner contended that the United States Postal Service was responsible for the request not being filed until September 16, thirteen days too late to extend the appellate timetable, and that, because the late-filing was a result of an "official mistake," and not due to any negligence on the petitioner's part, its bill of review should have been granted and the prior judgment set aside. *Id.*

The Waco Court of Appeals noted that the Texas Supreme Court has had several occasions to discuss what constitutes "official mistake" for the purpose of reviewing a bill of review. The Waco appellate examined *Petro-Chemical Transp., Inc. v. Carroll*, 514 S.W.2d 240, 245 (Tex. 1974), the only case involving a bill of review proceeding after a trial on the merits, in which the trial court clerk's failure to send the required notice of the signing of the judgment was an official mistake. The Court also examined *Hanks v. Rosser*, 378 S.W.2d 31, 35 (Tex. 1964), in which, in a default judgment context, an official mistake included erroneous information given by a court official. The Court also examined *Baker v. Goldsmith*, 582

S.W.2d 404, 407 (Tex.1979), in which a court official's failure to perform required duties constituted official mistake. *See Remington Investments, Inc.,* 971 S.W.2d at 143. In all of those cases, stated the Waco Court of Appeals, the official mistake was determined to be some action or inaction of a court official or employee. *Id.* The Waco Court of Appeals also noted that the Texas Supreme Court, in *Transworld Fin. Servs. Corp*., 722 S.W.2d at 407-08, refused to extend the definition of an official mistake to include the actions of the attorney for the bill of review petitioner. *Remington Investments, Inc.,* 971 S.W.2d at 143.

Accordingly, the Waco appellate court similarly refused to extend the definition of "official mistake" to include actions of postal employees, since a postal employee is even less an "officer of the court" than an attorney for either of the litigants. *Id.* Therefore, because the petitioner did not allege and prove that the failure to timely file its request for findings of fact and conclusions of law was the result of an official mistake, the petitioner failed to satisfy the requirements for having its bill of review granted and the prior judgment set aside. *Id.*

The failure of the trial court to appoint an attorney for an indigent mother in termination proceedings has been held to be an "official mistake," since the Texas Family Code provides that such an appointment must be made for an indigent parent who responds in opposition to the termination. *In re T.R.R.*, 986 S.W.2d 31, 37 (Tex.App.-Corpus Christi 1998, no writ); *see also* TEX. FAM.CODE §107.013(a) (Vernon Supp. 2000).

4. Change of Law

A change in judicial interpretation or view after a final judgment does not furnish a basis for a bill of review and the bestowal of equitable relief. *Pollard v. Steffens*, 161 Tex. 594, 343 S.W.2d 234, 238 (1961); *see also, Walker v. Walker*, 691 S.W.2d 102, 105, (Tex.App.–San Antonio 1985, no writ) (fact that after judicial approval of the property settlement awarding the former husband his military pension benefits, Congress enacted a statute governing the rights of parties to a divorce with respect to military retirement pay, did not entitle the former wife to her petition for bill of review of the divorce judgment, when there was no fraud, deceit, accident, or mistake in the procurement of the divorce judgment, when both parties were represented by counsel, both parties agreed to the division of community property, and both parties requested the court to approve the agreement and make it part of the court's judgment).

C. Due Diligence

1. The General Rule

As a general rule, a bill of review is available only when a party has exercised due diligence to avail himself or herself of all adequate legal remedies against a former judgment. *See, e.g., Rizk v. Mayad,* 603 S.W.2d 773, 775 (Tex. 1980); *see also*, *French v. Brown*, 424 S.W.2d 893, 895 (Tex. 1967) (if a party permits a judgment to become final by neglecting to file a motion for new trial, appeal, or appeal by writ of error, then that party is precluded from proceeding on a bill of review unless the party shows a good excuse for the failure to exhaust adequate legal remedies). In other words, a petitioner must show an excuse justifying the failure to assert a meritorious defense which is "unmixed with the fault or negligence of the petitioner." *Beck*, 771 S.W.2d at 141. Put yet another way, Texas courts require that the party seeking relief under a bill of review should not have been responsible in any manner for permitting the judgment to be rendered. *Ortmann,* 999 S.W.2d at 90.

Since a bill of review is, as a practical matter, the "last bite" at the apple, invariably something has gone askew for somebody. And, of course, in litigation, when one thing goes askew, others tend to follow. For this reason, in every bill of review, the prudent practitioner, whether prosecuting or defending a bill of review, will

look hard at the due diligence issue. The following recent cases illustrate and highlight the significance of the "due diligence" issue in a bill of review.

2. The General Rule: Recent Cases

a. Texas Supreme Court

In an insurance case, *Wembley Investment Company v. Herrera*, 43 Tex. Sup. Ct. J. 140, 142 (Dec. 2, 1999), the Texas Supreme Court revisited the issue of "due diligence" in a bill of review. In *Wembley,* the plaintiff was injured in a building owned by Wembley and managed by Vantage Management Company; among others, the plaintiff sued Wembley and Vantage. Hartford, the workers' compensation carrier for the plaintiff's employer, intervened and asserted subrogation claims for benefits paid to the plaintiff.

Wembley and Vantage were both insured by the same company, but because of some error on the insurance company's part, an answer was filed for Vantage, but not for Wembley. Vantage moved for summary judgment, which the trial court granted.

A little over a year later, on December 13, 1993, the trial court granted a default judgment against Wembley and others, including a judgment to Hartford to the extent of its subrogated interest. The judgment recited that the plaintiff's claims against three defendants, including Vantage, were previously resolved by dismissal or take-nothing judgments, but did not address Hartford's subrogation claims against the three defendants.

The clerk apparently failed to mail a notice of the default judgment to Wembley. Wembley first learned of the default judgment on August 18, 1994, when the plaintiff's counsel contacted Wembley's chairman (something about payment, presumably). Uncertain about the default judgment's finality absent an express disposition of Hartford's subrogation claims, Wembley's counsel filed both a motion for new trial and a petition for bill of review.

In mid-January 1995, the plaintiff's counsel informed Hartford that some of its subrogation claims had not been dismissed and requested that Hartford file a motion for nonsuit and proposed judgment on such claims, which it did. The trial court granted Hartford's motion and signed the "Judgment of Nonsuit" as to all nondefaulting defendants on January 20, 1995. Although Wembley had entered an appearance, it did not receive a copy of the nonsuit motion or judgment and first learned of the nonsuit on September 20, 1995, at the hearing on its motion for new trial. By that time, the trial court lacked jurisdiction to grant a motion for new trial, and Wembley could not seek relief by appeal or writ of error. The trial court denied Wembley's motion for new trial, and Wembley moved for summary judgment in the bill of review proceeding The trial court granted Wembley's motion for summary judgment, determining that Wembly had a meritorious defense to the plaintiff's suit and that Wembly had established the necessary bill of review elements as a matter of law. Thus, the trial court rendered a take-nothing judgment against the plaintiff in the underlying lawsuit.

On appeal, the court of appeals held that the default judgment was interlocutory when Wembley learned of its existence in August, 1994, and further held that, even though Wembley did not know that the default judgment had become final, Wembley could have obtained relief by obtaining a ruling on its motion for new trial while the default judgment remained interlocutory. 43 Tex. Sup. Ct. J. at 142. The court of appeals concluded that Wembley's inaction constituted some evidence that Wembley did not exercise due diligence in pursuing available legal remedies, and that Wembley was therefore not entitled to summary

judgment. *Id.* The court of appeals reversed the summary judgment, holding that Wembley had not proved as a matter of law that it diligently pursued relief on its motion for new trial before seeking a bill of review. *Id.*

The Texas Supreme Court, however, disagreed that Wembley's failure to obtain a ruling on its motion for new trial constituted evidence that it had not proceeded with due diligence. *Id.* It was undisputed that Wembley timely availed itself of a legal remedy by filing a motion for new trial in October, 1994, and did so even though the time in which Wembley was required to file the motion did not begin to run until the judgment was final on January 20, 1995. Further, Wembley's summary judgment proof established that it was never served with a copy of the nonsuit motion or order. *Id.* Thus, Wembley was unaware that the default judgment had become final as a result of the nonsuit and that the appellate timetable was running against it. *Id.* at 143. According to the Texas Supreme Court, the Texas Rules of Civil Procedure impose no obligation upon a litigant to obtain a ruling on a motion for new trial before the judgment becomes final. *Id.* Moreover, according to the Texas Supreme Court, the plaintiff asserted neither estoppel nor any other extenuating circumstances that might otherwise render relief by bill of review inequitable. Therefore, under such circumstances, Wembley's failure to obtain a ruling on its motion for new trial resulted from the accidents or wrongful acts of others and not from a lack of due diligence. *Id.* Accordingly, without hearing oral argument, the Texas Supreme Court reversed the court of appeals' judgment, and remanded the case to that court to allow it to consider the plaintiff's remaining points. *Id.*

b. Courts of Appeals

In *Ortmann,* the trial court rendered a judgment against the husband for fraud on the community and waste of community assets. The judgments against the husband in the divorce resulted from the alleged receipt, by the husband, of settlement funds from an unrelated lawsuit, for which he did not properly account in the divorce. On appeal, the husband contended that he was not negligent in permitting the judgment for fraud on the estate and waste of community assets to be rendered against him, and that genuine fact issues existed as to whether he was diligent in making his defense. 999 S.W.2d at 90.

The summary judgment proof before the Fourteenth Court of Appeals, however, painted a different picture – that the husband knew about the receipt of funds by his lawyer more than four years before the divorce judgment was entered. *Id.* Thus, the Houston appellate court concluded that the husband had ample opportunity to develop his defense to the judgment in the underlying divorce. Further, in the absence of controverting proof, the Houston Court of Appeals concluded the trial court properly found that no fact issue existed as to whether the husband exercised diligence in preventing the judgment from being entered against him. *Id.* In other words, the appellate court's opinion can be read to say that the husband failed to exercise due diligence in the trial court, **before** the judgment was entered against him.

The husband also contended that he exhausted all legal remedies in order to bring his bill of review because he first learned of his attorney's fraud upon him only after the divorce judgment had become final, and thereafter filed a criminal complaint against the attorney, thereby diligently pursuing his legal options. *Id.* The husband's arguments availed him naught, as the Houston appellate court reiterated that he had knowledge of the circumstances which would have permitted him to account for the funds prior to the entry of judgment. *Id.* Furthermore, the husband could have filed a motion for new trial or a direct appeal. To make matters worse, the judgment attacked was entered with the husband's consent. *Id.* at 90-91. Thus, the

husband did not exercise due diligence. *Id.* at 91.

In *Gone v. Gone*, 993 S.W.2d 845, 846 (Tex.App.–Houston [14th Dist.] 1999, pet. denied), the parties were divorced in a no-answer default divorce decree dated December 20, 1994. On November 17, 1997, the husband filed a petition for bill of review, alleging fraud on the part of the wife in procuring the divorce decree (which awarded a disproportionate share of the marital estate to her). *Id.* The husband alleged that although he was aware of the divorce petition filed by the wife, he was not aware that she had proceeded with the divorce, and also was not aware that the divorce decree had been entered. *Id.* At the time the divorce decree was signed, the husband alleged, he and the wife were living together as husband and wife, and, four months after the divorce decree was signed, purchased a house together as husband and wife. *Id.* The husband claimed that the reason he did not answer the divorce citation was that he had trusted his wife's statements that he didn't need to worry about the divorce. *Id.* at 847. He also alleged he did not become aware of the divorce decree until he was served with eviction papers demanding that he vacate the former marital homestead of the parties. *Id.* at 846-47.

The trial court admitted evidence on whether the husband was properly served with citation in the divorce case and his reasons for not answering. *Id.* at 847. The wife disputed the husband's story and added that he drank a lot. *Id.* The trial court believed the wife, and found that the husband's negligence resulted in the default judgment against him. *Id.*

On appeal, the Houston appellate court found that the trial court correctly concluded that the husband's own negligence in failing to file an answer resulted in the default judgment against him – the failure to prove his lack of negligence in appearing to contest the matter defeated his right to a bill of review. *Id.* at 848.

The Fourteenth Court of Appeals then stated that due diligence was "an essential element to making a prima facie case for a bill of review." *Id., citing Baker*, 582 S.W.2d at 408. The Houston Court of Appeals continued: "[b]ecause [the husband] failed to make a prima facie case showing there was no negligence on his part in not filing an answer and contesting the divorce, there [was] no need to address [his other] points of error." 993 S.W.2d at 848.

It should be noted that the language used by the Fourteenth Court of Appeals is a bit loose. As already discussed, a bill of review plaintiff need only show a prima facie case of a *meritorious defense* to be permitted to proceed to prove the other elements of the bill of review. *See Baker*, 582 S.W.2d at 408-09 (the complainant in a bill of review is not required to prove his meritorious defense by a preponderance of the evidence, but, once a meritorious defense is shown and the trial proceeds, the complainant must open and assume the burden of proving that the judgment was rendered as the result of the fraud, accident or wrongful act of the opposite party or official mistake unmixed with any negligence of his own).

In *Williamson*, 986 S.W.2d at 380, the wife alleged that her husband threatened that, if she did not sign the divorce judgment approving a settlement worked out between the parties, he would turn all of the community property over to her because he knew she could not handle the management responsibilities. She also alleged that the husband misrepresented the health of the community estate. *Id.* However, these threats occurred prior to the signing of the divorce decree, and throughout the entire process leading up to the divorce settlement, the wife was represented by counsel, as well as by two accountants. *Id.*

The husband moved for summary judgment based in part on the theory that the wife failed to exhaust her available remedies

without sufficient excuse, and, therefore, had no right to an equitable bill of review. *Id.* at 381. Upon reviewing the motion for summary judgment, the trial court agreed with the husband. *Id.*

On appeal, the El Paso Court of Appeals immediately disposed of the wife's arguments, noting that the alleged threats of the husband occurred prior to the signing of the divorce decree. *Id.* at 380. Consequently, the wife had sufficient time to file a motion for new trial or a regular appeal, and her failure to do so was fatal to his appeal. *Id.* at 381. In the words of the El Paso appellate court, "[r]elief by bill of review is available *only if a party has exercised due diligence to pursue all adequate legal remedies against a former judgment, and through no fault of its own, no adequate legal remedy was available*." *Id.* (emphasis in original).

3. Is the General Rule a Rule, or a Guideline?

It has been argued that the often-quoted "general rule" is but a narrow statement of the due diligence "rule" as it applies to certain types of fact situations, and is not intended to be an all inclusive categorization of the cases when equitable relief by bill of review may be obtained from a final judgment. *Pierce v. Terra Mar Consultants, Inc.*, 566 S.W.2d 49, 51 (Tex.Civ.App.-Texarkana 1978, writ dism'd). As stated by Justice Walker in *Petro-Chemical Transport, Inc.*, 514 S.W.2d at 244:

> This [general] rule is entirely sound as applied to a defendant who suffered a default judgment after proper personal service of citation, but it does not govern the disposition of all bill of review cases.

Thus, there are several situations which do not come strictly within the accepted definitions of "fraud, accident or the wrongful act of the opposite party," which nevertheless permit the exercise of the equitable powers of the court to grant relief from a previous judgment. *Pierce,* 566 S.W.2d at 51. In some situations, relief is given even though the bill of review complainant does not bring himself or herself strictly within the rules as to fraud, accident or mistake. The court may properly give consideration to any circumstance which, being wholly beyond the control of the petitioner, presents a compelling factual reason for re-examining the judgment. *Id.* at 51-52.

Consequently, a bill of review is precluded only when the complaining party has failed to present an "adequate explanation" for his or her failure to invoke the right to appeal. *Steward v. Steward,* 734 S.W.2d 432, 435 (Tex.App.–Fort Worth 1987, no writ), *citing French,* 424 S.W.2d at 895 ("[n]o reason is advanced in his petition for bill of review for the fact that he did not seek correction of the asserted error of the trial court by the appeal remedy"); *see also Hesser v. Hesser,* 842 S.W.2d 759, 765 (Tex.App.–Houston [1st Dist.] 1992, writ denied) ("[t]hus, to be entitled to a bill of review, [the litigant] must show a good excuse for failure to exhaust adequate legal remedies"); *Griffith,* 536 S.W.2d at 661 (to be entitled to a bill of review, a litigant must show a good excuse for failure to exhaust adequate legal remedies).

In the context of a bill of review, could an "adequate explanation," or a "good excuse," be more forgiving than the traditional "no negligence–end of game" standard? The gist of *Petro-Chemical Transport* and its progeny may provide, in certain circumstances, an opportunity for creative lawyering. A party who suffers a default judgment after proper service will be held (in all likelihood and justifiably) to the highest standard of due diligence. However, there

may be situations that provide an "adequate explanation" for what otherwise appears as a lack of due diligence. The point is – the prudent practitioner should not fold up shop on a bill of review when his or her client has acted less than diligently in pursuing his or her rights. *Petro-Chemical Transport* may yield sufficient footing around an apparently intractable obstacle.

4. Magic Numbers

The common magic numbers in the due diligence analysis of an ordinary bill of review are: (1) a motion for new trial must be filed within thirty days of the judgment (TEX.R.CIV.P. 329b); (2) a notice of appeal (in the absence of a motion for new trial or other motion extending the plenary power of the trial court) must be filed within thirty days of the judgment (TEX.R.APP.P. 26.1) or within 90 days if the trial court's plenary power has been extended (TEX.R.APP.P. 26.1(a)) ; and (3) a restricted appeal (formerly the appeal by writ of error) must be filed within six months of the judgment (TEX.R.APP.P 30; TEX.R.APP.P 26.1(c)).

5. What (or When) Isn't Due Diligence

When is diligence due? What does it entail? These are important questions for the practitioner. The safe answers are, respectively, always and everything.

You'll note that certain reported cases focus on the failure of the petitioner to use due diligence in protecting himself or herself from the entry of judgment at the trial court level. Other cases emphasize the failure of the petitioner to utilize available post-judgment remedies to assail a judgment already rendered against him. Regardless, it's all due diligence.

a. Negligence or Fault at Trial

As already mentioned, Texas courts require that the party seeking relief under a bill of review should not have been responsible in any manner for permitting the judgment to be rendered. *Ortmann,* 999 S.W.2d at 90; *cf., Gone,* 993 S.W.2d at 848 (the husband's negligence in failing to file an answer resulted in the default judgment against him; the failure to prove his lack of negligence in appearing to contest the matter defeated his right to a bill of review); *Axelrod R & D, Inc. v. Ivy*, 839 S.W.2d 126, 128 (Tex.App.–Austin 1992, writ denied) (the due diligence requirement encompassed whether a petitioner was negligent in allowing the trial court to render a default judgment in the first place).

Diligence, then, must occur prior to judgment, and a failure to exercise diligence before judgment may well bar bill of review relief. For example, a bill of review was improper when the party admitted that he had instructed his attorney to represent to the trial court that he agreed to the terms of the divorce settlement, but then, on appeal of the agreed judgment, attempted to claim that that was not his intent.The trial court properly concluded that the party was negligent in failing to assert his rights in the original divorce suit. *Borgerding v. Griffin*, 716 S.W.2d 694, 699 (Tex.App.–Corpus Christi 1986, no writ). Likewise, the failure to exercise reasonable care in the underlying divorce proceedings will not be excused by claims of intoxication. *See Bristow v. Bristow*, 834 S.W.2d 497, 502 (Tex.App.-Eastland 1992, no writ) (the husband testified that he could not recall any of the events connected with the property settlement agreement or the divorce).

Reliance on the statements of an opposing party at times may also be negligence. In *Brooks*, 892 S.W.2d at 93, the trial court denied a bill of review "after reviewing the pleadings" and "hearing the argument of counsel." In his pleadings, the petitioner admitted that he timely filed a motion for new trial that was subsequently overruled by operation of law. *Id.* However, to explain why he did not file an appeal or writ of error, he asserted only that he did not

file an answer or seek a hearing on his motion for new trial because of certain assurances made by the opposing attorneys during ongoing negotiations between the parties. *Id.* Thus, his allegations were legally insufficient and he was not entitled to relief by bill of review because he failed to make the requisite showing that he exhausted all available legal remedies. *Id.*

Brooks should be compared to *Griffith*, 536 S.W.2d 658. In *Griffith,* the petitioner alleged that he failed to answer and file a motion for new trial because he relied on the representations made by the defendants to "not worry about the lawsuit in that everything would be worked out through a settlement." *Id.* at 660. The petitioner also alleged that after he received notice of the judgment, he was told by the defendants that they would "call the dogs off" and "don't worry about the judgment, everybody would get together and settle this matter." *Id.* at 660-61. Further, the petitioner alleged that he diligently pursued the invitations to settle, that at no time was he negligent, and that after he received notice of the default judgment, he repeatedly attempted to contact the defendants, but was unsuccessful. *Id.* at 661.

On appeal, the Corpus Christi Court of Appeals concluded that the evidence did not show, as a matter of law, that the petitioner was not diligent in the pursuit of his defense. *Id.* The Corpus Christi appellate court distinguished *Griffith* from *Lindsey v. Dougherty*, 60 S.W.2d 300 (Tex.Civ.App.–Amarillo 1933, writ ref'd), in which there were no further representations alleged to have been made after the petitioner received notice of the judgment, and she was thus charged with a lack of diligence in not filing a motion for new trial since in *Griffith* the petitioner alleged that representations were made both before and after the default judgment was entered. *Id.* As a result, the Corpus Christi Court of Appeals in *Griffith* reversed the summary judgment rendered by the trial court against the petitioner. *Id.* at 662; *cf., Gone,* 993 S.W.2d 846 (the husband was negligent even though he claimed to rely on his wife's statements that he didn't need to worry about the divorce).

In *Kennell,* 743 S.W.2d at 300, the husband's summary judgment evidence proved that the wife was negligent with respect to the divorce decree entered in their divorce, in (1) failing to rely upon the evidence and expert opinions that she had in her possession rather than the husband's alleged representations as to value of the community estate, and (2) failing to discover existing objective evidence that would have conclusively established the truth or falsity of the husband's alleged misrepresentations. Accordingly, the wife was not entitled to the relief sought. *Id.*

In *In re National Unity Ins. Co.,* 963 S.W.2d 876, 879 (Tex.App.–San Antonio 1998, no pet.), the record on appeal showed that the petitioner's attorney, or those acting on his behalf, twice reviewed the erroneous judgment–once for approval before it was sent to the court, and again after the court entered it. *Id.* The San Antonio Court of Appeals stated that careful review of the judgment on either of those occasions would have revealed the drafting error that resulted in the eventual dismissal of the petitioner. *Id.* That the error was not timely discovered, the San Antonio appellate court held, was negligence attributable to the petitioner, thereby thwarting his success in his later bill of review. *Id.*

b. Failure to File Motion for New Trial

The failure to file a motion for new trial within 30 days when one has notice of a judgment is negligence that precludes relief by bill of review. *Hesser*, 842 S.W.2d at 765. Note that under *Wembley,* the litigant apparently need not necessarily obtain a ruling on the motion for new trial - simply filing it suffices to satisfy the requirements of due diligence. *Wembley,* 43 Tex. Sup. Ct. J. at 142-43.

c. Failure to Appeal

The failure to pursue an available appeal is also fatal to a bill of review. *French* , 424 S.W.2d at 895. In *Lawrence*, 911 S.W.2d at 448, for instance, the husband contended that he could not have pursued his complaints through an appeal or writ of error because (1) he could not afford the necessary $10,000.00 supersedeas bond and (2) he had hired another lawyer after the original trial who kept the files for five years before telling the husband that he could not help him. According to the Texarkana Court of Appeals, the husband's failure to prosecute an appeal resulted from his own negligence or mistake, or from his attorney's negligence or mistake, and lack of money is not a sufficient excuse for failure to appeal. *Id.*

In contrast to a motion for new trial, simply filing an appeal isn't enough to satisfy the requirements of due diligence. In an unpublished, per curiam opinion, the San Antonio Court of Appeals held that, when a litigant filed a notice of appeal, but later abandoned the appeal, the trial court did not abuse its discretion in denying her bill of review. *See Muecke v. McClung,* No. 04-98-00465-CV, 1999 WL 239043 (Tex.App.-San Antonio, April 21 1999, no pet.) (unpublished).

In *Nichols v. Jack Eckerd Corp*., 908 S.W.2d 5, 9 (Tex.App.–Houston [1st Dist.] 1995, no writ), the bill of review petitioner's attorney learned that the petitioner's lawsuit had been mistakenly dismissed. The attorney filed a timely motion to reinstate, alleging that a prior motion for non-suit presented to the trial court was a clerical error committed by his secretary, and that he learned that the judgment was signed on September 21, 1992. *Id.* The dismissal order was signed on August 4th. *Id.* The trial court denied the motion to reinstate. *Id.*

Instead of appealing the denial of the motion to reinstate, the petitioner waited several months and then filed a petition for bill of review that alleged different facts than the earlier motion to reinstate. *Id.* However, the Houston First Court of Appeals held that when the petitioner's attorney acquired actual knowledge of the dismissal order on September 21, 1992, such notice was imputed to the petitioner and since the attorney filed a timely motion to reinstate, the petitioner was bound by such acts. *Id.* The Houston appellate court concluded that the petitioner's proper remedy was to appeal from the denial of the motion to reinstate. *Id.* Since the petitioner had an available legal remedy, but failed to pursue it, the petitioner was not entitled to seek bill of review relief. *Id.*

d. Willful Failure to Appeal

Somebody once said "desperate times call for desperate measures," and they obviously talked to the lawyers in *Wadkins v. Diversified Contractors, Inc*., 734 S.W.2d 142, 144 (Tex.App.–Houston [1st Dist.] 1987, no writ), in which the First Court of Appeals noted that the record affirmatively showed that the appellants' failure to effect appellate review of the original action was not only negligence, but was a willful decision to not timely file an appeal bond, and a willful, conscious decision to not request an extension of time to file the appeal bond. Contrary to the appellants' arguments, continued the Houston appellate court, the requirement that a bill of review plaintiff show that a failure to appeal was unmixed with any fault or negligence on his part may *not* be satisfied by showing that the failure to appeal was *willful*. *Id.* Thus, the First Court of Appeals held that, by their conduct, the appellants had waived their points of error since they could not raise points of error in a bill of review that had been, or could have been, raised by appeal in the original proceeding. *Id.*

e. Failure to File Restricted Appeal (formerly Writ of Error)

The old appeal by writ of error procedure is now called a "restricted appeal." *See L.P.D. v. R.C.*, 959 S.W.2d 728, 729, n. 2 (Tex.App.–Austin 1998, writ denied); *see also* TEX.R.APP.P. 30 (replacing former TEX.R.APP.P 45). Recall that a restricted appeal requires that (1) the appellant was a party to the suit, (2) the appeal is filed within six months of the judgment attacked; (3) the appellant did not participate at trial; and (4) error is apparent on the face of the record. *L.P.D.*, 959 S.W.2d at 729-30.

In *Hesser*, 842 S.W.2d at 765, the wife conceded on appeal that she had notice, at the latest, by February 2, 1989, of a default judgment taken against her. Because the judgment was signed on November 8, 1990, the Houston appellate court commented, the wife, on February 2, still had 95 days to file a restricted appeal. *Id.*

Undaunted, the wife further conceded that she could have filed a writ of error, but argued that a writ of error was not an adequate remedy because there was no error apparent on the face of the judgment, and further asserted that no error was apparent until evidence was later gathered in the subsequent bill of review proceeding. *Id.* The First Court of Appeals disagreed, first pointing out that in a restricted appeal, courts look for error apparent on the face of the record, not simply the judgment. *Id.* Since the wife claimed that she had been served improperly, the Houston Court of Appeals next discussed the issue of defective service in the context of restricted appeals. Defective service, the appellate court began, constitutes error apparent on the face of the record. *Id.* Further, there are no presumptions of proper service when a default judgment is attacked by a restricted appeal, and a failure to show strict compliance with the applicable rules will render any attempted service ineffective, thus causing a default judgment to be set aside. *Id.* Additionally, in a direct attack by restricted appeal against a default judgment, no presumption of proper service exists simply because the judgment recites that proper service was issued. *Id.*

Unfortunately for the wife, she asserted that the notice she had refused was not a citation from the court, but was rather a notice prepared and delivered by private persons even though no court order authorized her to be served by private process. *Id.* The Houston appellate court noted that, if the wife's allegation was true, error was apparent on the face of the record, and she could, and should, have filed a restricted appeal. *Id.* at 765-66. But, said the First Court of Appeals, she did nothing, and because a legal remedy was available, but ignored, the trial judge correctly granted summary judgment against her bill of review. *Id.*

f. Ignorance of the Law

Ignorance of the law does not constitute an excuse for a lack of due diligence. *See, e.g. Weaver v. E-Z Mart Stores, Inc.,* 942 S.W.2d 167, 169 (Tex.App.–Texarkana 1997, no writ) (failure to use due diligence in obtaining service).

g. Failure to Do Anything

In *Innmon v. Mouser*, 493 S.W.2d 290, 293 (Tex.App.–Austin 1973, no writ), the plaintiff was precluded from bringing her bill of review because, although she had notice of the entry of the divorce judgment, she did not file a motion for new trial, did not perfect an appeal, did not file a writ of error, and waited until both she and her former-husband remarried before filing the bill of review.

6. <u>Examples of Due Diligence in Action</u>

In *Petro-Chemical Transport Inc.,* 514 S.W.2d at 246, the court of appeals had held that the counsel for the petitioner was guilty of negligence as a matter of law in failing to file a timely motion for new trial in, or an appeal from, the underlying lawsuit. In discussing

the holding of the appellate court on the due diligence issue, the Texas Supreme Court noted that, on May 12, the petitioner's attorney sent the trial judge his objections to the form of judgment that had been submitted previously by the opposing party's counsel. *Id.* The letter was sent well within the period for filing a motion for new trial, and no reply to the letter was made by either the judge or the opposing party's counsel. *Id.* Further, stated the Texas Supreme Court, on May 26, only seven days after expiration of the period for filing a motion for new trial, the petitioner's counsel telephoned the trial judge and was assured that he would have an opportunity to present his objections to the judgment when it was presented to the judge. *Id.* Under such circumstances, the Texas Supreme Court was unable to say that, as a matter of law, the petitioner's loss of the right to file a motion for new trial or appeal was due to the negligence of its counsel. *Id.*

In *In re T.R.R.,* 986 S.W.2d at 37, the mother filed a bill of review to set aside an earlier termination of her parental rights. The Corpus Christi Court of Appeals examined the due diligence issue as the final element necessary for her to prevail on her bill of review. *Id.* The appellate court recounted that the mother was served with the termination papers while she was a patient in a psychiatric center, and that, just prior to the termination proceeding, she had been hospitalized for gall bladder surgery. *Id.* The mother had also testified at the bill of review hearing that she had been on medication and felt dizzy at the termination hearing, as well as that she believed the hearing was for the purpose of establishing custody, and not to terminate her parental rights. *Id.* Significant to the Corpus Christi Court of Appeals was that, after the hearing, the mother attempted to procure counsel, but was not able to do so; in fact, she had been denied assistance both before and after the termination by Texas Rural Legal Aid. *Id.* Accordingly, the Corpus Christi appellate court could not say that the mother did not exercise due diligence in asserting her rights to her child. Id.

7. Potential Problem: Error on the Face of the Record?

A failure to file an available restricted appeal may well be fatal to a bill of review, and the availability of a restricted appeal depends on the existence of "error on the face of the record." At least one appellate court has stated that "[a] judgment will not be set aside by bill of review because of defects in citation or service *when the defect is apparent on the face of the record*." *See, Rundle v. Commission for Lawyer Discipline,* 1 S.W.3d 209, 216 (Tex.App.–Amarillo 1999, no pet.) (emphasis added). The Texas practitioner who has a copy of *Rundle* tossed onto the table before him or her, in support of an argument made to the trial court that bill of review relief is not available because error is apparent on the face of the record, should be aware that *Rundle* is not exactly the whole story on the issue. For example, the statement quoted above from *Rundle* should be compared to the following statement taken from *Min,* 991 S.W.2d at 499-500: "[t]he bill-of-review petitioner may therefore demonstrate that the judgment is invalid for lack of proper service of process, *whether or not the face of the record discloses the invalidity* and despite recitals of proper service in the judgment under attack." (Emphasis added.) The apparent conflict between *Rundle* and *Min*, however, can be resolved within the traditional framework of the Texas bill of review.

In support of its statement that a judgment will not be set aside by bill of review because of defects in citation or service when the defect is apparent on the face of the record, the Amarillo Court of Appeals in *Rundle* cited the Texas Supreme Court case of *Duncan v. Smith Bros. Grain Co.*, 113 Tex. 555, 260 S.W. 1027 (1924). In *Duncan,* the Texas Supreme Court stated:

> The judgment which [the petitioner] here seeks to vacate recites due and legal service on him and is on its face apparently valid, and hence not subject to collateral attack. In order to enjoin execution of this judgment and have same set aside, it was necessary for him to show that judgment was rendered against him without any fault on his part. To do this he must show that he is not liable for the debt for which judgment was rendered; that he was not served with citation as required by law, or, if served, that he was not at fault in failing to answer the suit of [the plaintiffs]; that he did not know of the judgment against him in time to have moved for a new trial in the court in which same was rendered, or, if he did know of such judgment, that he had some good and valid reason for not pursuing his legal remedy. This is a proceeding in equity. If he had a full and complete remedy at law, of which he failed to avail himself, he could not seek equitable relief, without showing some good reason for such failure.

260 S.W. at 1029. The statement "...that he did not know of the judgment against him in time to have moved for a new trial..." indicates that the Texas Supreme Court's emphasis in *Duncan* is upon whether and to what degree the bill of review petitioner knew of the judgment against him. In other words, a judgment may be set aside by bill of review because of defects in citation or service, even when the defect is apparent on the face of the record, if the petitioner did not have notice of the judgment in time to perfect a restricted appeal (6 months of the date the judgment is signed).

Interestingly, the Houston First Court of Appeals in *Min* made an overstatement similar to that in *Rundle* when it declared that, regardless of whether the defect is apparent on the face of the record, a petitioner may have a judgment set aside by bill of review. If the defect is apparent on the face of the record, and if the litigant has notice of the judgment within six months after the judgment is signed, but does not pursue a restricted appeal, then a bill of review will not normally be available.

The Houston appellate court in *Min* cited for its statement of the law the Texas Supreme Court case of *McEwen v. Harrison*,, 162 Tex. 125, 345 S.W.2d 706, 711 (Tex. 1961), and indeed, *McEwen* does state that "[i]f the judgment is one which the court had jurisdictional power to render but it is invalid, he may obtain relief by bill of review as provided in Rule 329-b whether the invalidity is or is not disclosed by the papers on file in the case." However, and again, the language employed by the Texas Supreme Court does not impart the complete story – in the lines immediately preceding the above quotation, the Texas Supreme Court had written:

> If he [the petitioner] is not served with citation and learns of the judgment within 30 days after its rendition, he may file a motion for new trial, which the court is at liberty to grant, and if his motion is overruled he may obtain relief by appeal. If he does not learn of the judgment within 30 days after its rendition but does learn of it within six months, and the invalidity of the judgment is disclosed by the papers on file in the case, he may obtain relief by prosecuting writ of

> error to a Court of Civil Appeals.

345 S.W.2d at 710-11. Again, the emphasis is on when the petitioner has notice of the judgment he or she wishes to assail. The Texas Supreme Court's statement that, if the judgment is one which the court had jurisdiction to render but it is invalid, a petitioner may obtain relief by bill of review, whether the invalidity is or is not disclosed by the papers on file in the case, is correct, provided that the petitioner did not have knowledge of the judgment within the period allowed for the filing of a restricted appeal.

Comm'n of Contracts v. Arriba, Ltd., 882 S.W.2d 576 (Tex.App.–Houston [1st Dist.] 1994, no writ), illustrates the interplay between a writ of error and a bill of review. In *Comm'n of Contracts*, a Mexican petroleum workers union and a Mexican construction company filed a petition for bill of review to set aside a default judgment against them entered in favor of a Bahamian corporation in the corporation's action for breach of a joint venture agreement. The evidence showed that the petitioners, at the earliest, received notice of the 1989 lawsuit and subsequent default judgment on September 29, 1989. *Id.* at 583. By that date, it was too late for the petitioners to file a motion for new trial or to perfect an appeal. *Id.* There was some evidence that an employee of one of the petitioners, who happened to be in Texas and who practiced law in Mexico, discovered the 1989 judgment five days (only three business days) before the expiration of the six month time period in which to file a writ of error. *Id.*

The bill of review defendants argued that the petitioner's failure to challenge the judgment by writ of error was negligence as a matter of law. *Id.* at 582. The trial court agreed and denied the bill of review. *See, Id.* at 583.

On appeal, the Houston First Court of Appeals held that "special circumstances" militated against finding the petitioners were not diligent, *i.e.,* the default judgment was taken against two unincorporated entities in Mexico, the principals and their representatives spoke primarily Spanish, and confusion existed over several different lawsuits between the parties. *Id.* Consequently, the Houston appellate court disagreed with the trial court that the petitioners' failure to file a writ of error within five days, under such circumstances, was negligence as a matter of law and precluded them from bringing their bill of review. *Id.*

IV. ELEMENTS OF THE "ATYPICAL" BILL OF REVIEW

"In the usual bill of review case, the [petitioner] seeks to set aside a default judgment rendered against him [or her] in order that he [or she] may have an opportunity to show that he [or she] has a meritorious defense to the cause of action alleged by the successful plaintiff." *Petro-Chemical Transp., Inc.*, 514 S.W.2d at 243. However, there are cases that do not fit the "usual" bill of review case. For example, there are cases in which a party seeks to set aside a judgment rendered *after a trial on the merits*. Such a case might be termed an "atypical" bill of review case.

According to one Texas court of appeals, although the Texas Supreme Court has not often been presented with such a situation, it has held that a different set of requirements must be satisfied before a judgment rendered after a trial will be set aside. *Remington Investments, Inc.*, 971 S.W.2d at 142; *see also, Petro-Chemical Transp.*, 514 S.W.2d at 244-46; *McDaniel v. Hale*, 893 S.W.2d 652, 660, 663 (Tex.App.–Amarillo 1994, writ denied.) (on rehearing) (plurality opinion) (*McDaniel* contains an extensive history of the development of the bill of review in Texas). After a trial on the merits, the bill of review

petitioner must allege and prove: (1) a failure to file a motion for new trial or a failure to advance an appeal, (2) caused by the fraud, accident, or wrongful act of the opposing party or by an official mistake, (3) unmixed with any fault or negligence of the petitioner. *See Petro-Chemical Transp.,* 514 S.W.2d at 244-46. Additionally, the petitioner must allege prima facie proof of a meritorious ground of appeal, which is one, had it been presented to the appellate court as designed, might, and probably would have resulted in the judgment's reversal. *Id*. at 245.

In the "atypical" bill of review, the petitioner should set out in the petition with some particularity the errors he or she claims were committed against him or her in the trial as well as the disposition of the original suit. *Id.* at 246. The petitioner should also introduce the transcript, and the statement of facts, when needed in the consideration of the alleged errors in the original suit. *Id.* If the trial court concludes that the petitioner is entitled to relief, it will be in position to enter a proper judgment disposing of the controversy involved in the original suit. *Id.* If, on the other hand, the trial court denies the petition for bill of review, the petitioner may appeal from that judgment and the appellate court will be in position to: (1) affirm, or (2) reverse the judgment of the trial court in the bill of review proceeding and either (a) render judgment for the petitioner, or (b) direct the trial court to retry the original suit on the merits so as to avoid errors committed during the first trial and then modify the judgment rendered therein accordingly. *Id.*

V. DEFECTS IN SERVICE

A. Failure of Service

In *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998), the Texas Supreme Court stated that if a defendant is not properly served, constitutional due process relieves him of showing, in a subsequent bill of review, both (1) a meritorious defense, and (2) that the fraud, accident or wrongful act of the opposing party prevented him from presenting such a defense as well as establishing his or her own "want of fault or negligence." The Texas Supreme Court, in *Caldwell,* cited for this proposition first, *Peralta v. Heights Medical Ctr., Inc*., 485 U.S. 80 (1988) (if the defendant was not served, constitutional due process relieves him of showing a meritorious defense), and second, *Texas Industries, Inc. v. Sanchez*, 525 S.W.2d 870, 871 (Tex. 1975) (proof of the defendant not having been served with citation obviates the necessity of pleading and proving that the defendant was prevented from making his meritorious defense by the fraud, accident, or wrongful act of the opposite party). The Texas Supreme Court cited no case for the proposition that, if the defendant was not served, then his or her want of negligence is "established." *See Caldwell,* 975 S.W.2d at 537.

The bill of review defendant in *Caldwell* argued that even if the petitioner had not been served in the underlying lawsuit, he could not obtain relief by bill of review because he had not availed himself of all remedies provided by Colorado law against the Texas judgment (which had been domesticated in Colorado). *Id.* According to the Texas Supreme Court, whether or not Colorado law actually afforded the defendant available legal remedies was a "difficult issue" which the Court did not have to address, "because we think that a judgment debtor in Texas need only pursue with diligence his legal remedies under Texas law." *Id.* at 538. It was undisputed that the defendant did not receive notice of the judgment until a time when no legal remedies remained available to him in Texas. *Id.* at 537-38.

Since *Caldwell* holds that, if a party is not served, it is relieved from showing a meritorious defense, and that the fraud, accident or wrongful act of the opposing party prevented him from presenting such a defense, as well as establishes his or her own want of fault or negligence, one might read the case to mean that, in such circumstances, the defendant is entitled to a bill of review as a matter of law. Yet, in *Caldwell,* the Texas Supreme Court nevertheless discussed at length whether the defendant availed himself of all legal remedies in Texas before pursuing his bill of review. For this reason, it could also be argued that *Caldwell* holds that, when service is defective, only the defendant's lack of negligence in allowing the judgment to be taken against him

in the first place is established. Under this reading, *Caldwell* would still require that a defendant avail himself or herself of all legal remedies against the judgment once the defendant receives notice of the judgment.

This ambiguity in *Caldwell* has had repercussions in the courts of appeal. For example, in *Edison v. Beta Financial Corp.*, 994 S.W.2d 827, 828 (Tex.App.–Eastland 1999, pet. denied), the Eastland Court of Appeals held that if service is defective, a petitioner is entitled to a bill of review as a matter of law. Citing *Caldwell,* the appellate court stated that the plaintiff's failure to properly serve the defendant established the defendant's own want of fault or negligence. In its opinion, the Eastland Court of Appeals specifically disagreed with the Austin Court of Appeals' holding in an earlier, pre-*Caldwell* case, *Axelrod R & D, Inc.*, 839 S.W.2d at 128.

In *Axlerod,* the plaintiff conceded that he did not properly serve process on the defendants. *Id.* The Austin Court of Appeals recognized that Texas courts have relaxed the requirements for a bill of review in instances when the party petitioning for the bill of review seeks to set aside a default judgment on the basis that he was not served with process. *Id.* Under such circumstances, stated the Third Court of Appeals, a petitioner need not prove the requirement of fraud, accident or wrongful act of the opposite party. *Id.* Accordingly, the Austin Court of Appeals held that the defendants in *Axlerod* were entitled to a bill of review if they could demonstrate that they were free from fault or negligence in letting the judgment be taken. *Id.* The Austin appellate court held that such requirement not only encompassed whether a petitioner was negligent in allowing the trial court to render default judgment against him or her, but also whether the petitioner availed himself or herself of all legal remedies against the former judgment, since one who has neglected to pursue an alternative legal remedy such as a motion for new trial, an appeal, or a writ of error is not entitled to seek equitable relief by way of bill of review. *Id.*

Ultimately, the Austin Third Court of Appeals found that the record presented an obvious fact issue regarding when the petitioners [defendants in the trial court] learned of the default judgment against them, an issue that went directly to whether the petitioners met the essential bill of review element that they were "free from fault or negligence." *Id.* at 129. For this reason, the Third Court of Appeals held that the trial court erred when it rendered summary judgment against the petitioners on their bill of review. *Id.*

As already mentioned, the Eastland Court of Appeals in *Edison* disagreed with the Austin Court of Appeals in *Axlerod* that the timing of the defendants' actual notice of the suit was material to the issue of their fault or negligence in failing to act. *Edison,* 994 S.W.2d at 830. To the Eastland Court of Appeals, *Caldwell* meant that a defendant is entitled to a bill of review as a matter of law if service was defective.

The majority position–pre *Caldwell*–on the issue among Texas courts of appeal appears to be in line with *Axlerod, i.e.*, even with defective service, a bill of review petitioner must still prove due diligence. *See, e.g. Subsequent Injury Fund, State of Texas v. Service Lloyds Ins. Co.*, 961 S.W.2d 673, 678 (Tex.App.–Houston [1st Dist.] 1998, pet. denied) (the Houston First Court of Appeals specifically agreed with the holding in *Axlerod* that a party must avail itself of all legal remedies before pursuing a bill of review); *see also Winrock Houston Assoc. v. Bergstrom,* 879 S.W.2d 678 144, 149 (Tex.App.–Houston [14th Dist.] 1994, no writ); *Hesser v. Hesser*, 842 S.W.2d 759, 765 (Tex.App.–Houston [1st Dist.] 1992, writ denied). However, it appears that *Edision* is the only current reported case addressing the issue post-*Caldwell.*

B. Defective Service, But Timely Notice

In *Dispensa v. University State Bank*, 987 S.W.2d 923, 925 (Tex.App.–Houston [14th Dist.] 1999, no pet.), the plaintiff bank sued the defendant who had defaulted on a loan. At the time of the suit, the defendant lived in Connecticut; accordingly, the plaintiff attempted to serve the defendant through the Texas Secretary of State, but, although the defendant's address was correct when the Bank sent the citation and petition to the Secretary of State, by the time the Secretary of State sent the citation to the defendant, he had

moved and did not receive the citation and petition. *Id.*

On December 26, 1990, the trial court entered a default judgment against the defendant. *Id.* Only days after the judgment was entered, the defendant received notice of the entry of the default judgment and contacted a lawyer to take care of the problem, but never followed up to make sure that it was resolved. *Id.* Six years later, when the Bank instituted foreclosure proceedings against the property which was the subject of the original loan, the defendant began his first real attempts to have the judgment set aside. *Id.* He filed a collateral attack on the default judgment, which was in effect denied, and then filed a bill of review seeking to have the judgment set aside. *Id.* After a hearing, the trial court entered an order denying the bill of review on the grounds that it was barred by the four-year statute of limitations and that the defendant had not exhausted all of his legal remedies before filing the bill of review. *Id.*

On appeal, the defendant claimed that upon a showing of "improper service," a party filing a bill of review is absolutely entitled to have a judgment set aside, citing *Peralta* in support of his argument. *Id.* at 926. The Houston Fourteenth Court of Appeals noted that in *Peralta* the defendant received no actual or constructive notice whatsoever of the suit or the judgment against him. *Id.* at 927, citing, *Peralta,* 485 U.S. at 81-84. The Houston appellate court distinguished *Peralta* on the basis that in the case before it, the defendant had received notice of the judgment, and therefore his due process rights were not violated because he received "notice at a meaningful time and in a meaningful manner that would have given him an opportunity to be heard." 987 S.W.2d at 928, *citing, Peralta*, 485 U.S. at 86.

The Fourteenth Court of Appeals also held that it was the defendant's own negligence that resulted in his failure to file a motion for new trial or a restricted appeal. 987 S.W.2d at 928. Further, according to the Houston appellate court, because the defendant received notice at a meaningful time and in a meaningful manner, the application of the four year statute of limitations was not unconstitutional. *Id.* Ultimately, the defendant had a timely opportunity to legally challenge the judgment against him but failed to do so until five years and eight months had passed; thus, his bill of review failed. *Id.*

Dispensa should be compared to *Edison,* introduced above. In *Edison.,* a company controlled by the plaintiff borrowed five million dollars from a financial institution, and the plaintiff guaranteeed the loan. 994 S.W.2d at 827. After difficulties arouse between the parties, the plaintiff sued the financial institution, alleging lender liability. *Id.* As in *Dispensa,* there were problems with the service of process, and a default judgment was taken against the foreign defendant corporation at a time when it appeared that service had been successful on the defendant. *Id.* at 827-28. On April 18, 1991, the trial court signed a default judgment in favor of the plaintiff against defendant financial institution, relieving the plaintiff of his personal guarantee of the five million dollar loan and awarding him damages. *Id.* at 828.

The defendant filed a bill of review in May 1994, and on June 28, 1996, the trial court held its first hearing on the bill of review and ruled that the service of process against the defendant was defective. *Id.* The plaintiff never contested the ruling. *Id.* Because there had been defective service underlying the default judgment, the trial court further ruled that the defendant was not required to demonstrate either (1) a meritorious defense to the cause of action alleged to support the default judgment or (2) an excuse justifying the failure to make the defense which was based on the fraud, accident, or wrongful act of the plaintiff. *Id.* After finding that the defendant had not been negligent, the trial

court granted the bill of review and vacated the default judgment against the defendant. *Id.*

The plaintiff appealed the granting of the bill of review, but the Eastland Court of Appeals held that since there was defective service on the defendant, the defendant was entitled to the bill of review as a matter of law. *Id.*

Again, in *Edison,* the existence of "defective" service resulted, as a matter of law, in the absolute right to a bill of review, at least as far as the Eastland Court of Appeals was concerned (note that the trial court still held the defendant to the "no negligence" standard). The issue of notice does not appear to have figured in the Eastland appellate court's analysis. However, in *Dispensa,* the fact that the defendant received notice in a meaningful time and in a meaningful manner overrode the effects of defective service, and thus the defendant was held by the Houston appellate court to the "no negligence" standard.

Add to this mix a footnote in *McDaniel,* stating that "[i]f service is merely defective, as opposed to non-existent, the bill of review plaintiff must still allege a meritorious defense. 893 S.W.2d at 663, n.24, *citing,* William R. Trail & Julia A. Beck, *Peralta v. Heights Medical Center, Inc.: A Void Judgment Is a Void Judgment Is a Void Judgment–Bill of Review and Procedural Due Process in Texas*, 40 BAYLOR L.REV. 367, 380 (1988).

Where does this leave the Texas practitioner? *Caldwell* speaks of a defendant who is "not properly served," but in *Caldwell*, there was no service at all. 975 S.W.2d at 537. Does *Edison* read *Caldwell* correctly, when it reads the Texas Supreme Court's opinion so broadly? Or is *Dispensa* the better statement of the law, as it turns toward the notice issue, even when service has been "defective"? Currently, the issue seems unclear.

VI. BILL OF REVIEW PROCEDURE

A. Standing

In order for a party to have standing to file a bill of review, usually he or she must be a party to the prior judgment, or one who had a then existing interest or right which was prejudiced thereby. *Lerma v. Bustillos*, 720 S.W.2d 204, 205 (Tex.App.–San Antonio 1986, no writ). Issues of standing are a bit more complicated than the straightforward language in *Lerma* may imply, particularly in a Suit Affecting the Parent-Child Relationship, as is illustrated by *Barrow v. Durham*, 574 S.W.2d 857 (Tex.Civ.App.–Corpus Christi 1978), *aff'd*, 600 S.W.2d 756 (Tex. 1980).

In *Barrow,* the natural mother of two children, whose parental rights to those children had been terminated in 1974, and the guardian ad litem, who had represented the children in the prior termination proceeding, filed a bill of review seeking to overturn the subsequent 1976 adoption of the children. 574 S.W.2d at 859. The trial court dismissed the bill of review on the grounds that neither the mother nor the guardian ad litem had standing to pursue a bill of review. *Id.* The mother and the guardian appealed.

On appeal, the Corpus Christi Court of Appeals held that, since the mother's rights in and to the children were terminated in the prior termination order, she had no interest in the later adoption, and therefore, in her individual capacity, had no standing to file a bill of review. *Id.* at 860. The Corpus Christi appellate court also held that the appointment of the guardian ad litem in the termination suit ended when the judgment rendered in that suit became final, and therefore he was not entitled to be a party to the later adoption proceeding merely because he had been appointed in the prior termination suit; thus, he too lacked standing–as the children's guardian ad litem–to prosecute the bill of review. *Id.*

However, the Corpus Christi Court of Appeals then held that the arguments of the mother and the guardian ad litem were "those which would be asserted by someone acting in the capacity of next friend to the minor children." *Id.* at 861. In the capacity of next friends, according to the appellate court, the mother or the guardian ad litem would have standing to present the interests of the children in a bill of review since in any action involving their custody, the children are the real parties in interest. *Id.* Consequently, the Corpus Christi Court of Appeals reversed the trial court's dismissal of the action. *Id.*

The adoptive parents then appealed to the Texas Supreme Court, which affirmed the judgment of the court of appeals, but disagreed with its rationale. *Durham*, 600 S.W.2d at 758.

Initially, the Texas Supreme Court noted that, as a general rule, a party to a prior judgment has standing to bring a bill of review, and therefore held that both the natural mother and the guardian ad litem, since they were parties to the termination proceedings, had standing in a bill of review to attack the termination decree (the Texas Supreme Court also determined that the petition attacking the adoption decree could be construed as attacking the termination decree as well). *Id.* at 760.

Next, if the termination judgment was valid, the natural mother had no standing to bring a bill of review as a party to the adoption because an individual who has been divested of parental rights by a termination decree loses all legal rights and interest in the children who were the subject of the termination proceeding. *Id.* However, according to the Texas Supreme Court, if the termination decree was invalid, then the natural mother was a necessary party to any adoption, she was entitled to notice of the adoption suit, and she would then have had standing to attack the adoption by bill of review. *Id.* Additionally, the Texas Supreme Court held that the guardian ad litem's representation was limited to matters related to the suit for which he was appointed–the termination–and that he did not have standing to attack the adoption as a necessary party to that suit nor was he entitled to notice of those proceedings. *Id.* at 760-761.

The Texas Supreme Court disagreed with the court of appeals that the mother and the ad litem had "next friend" status. *Id.* at 761. Although the children were the subject of the adoption suit, they were not participants in the suit, and were not necessary parties to the adoption. Since the children themselves were not necessary parties to the adoption, a next friend would not have standing to attack the adoption by bill of review. *Id.* Ultimately, the Texas Supreme Court affirmed the judgment of the lower court of appeals, and thus the case was remanded to the trial court for further proceedings. *Id.*

B. Parties

Generally, in a proceeding which is instituted to vacate and set aside a judgment, such as a bill of review, all parties to the judgment, or all parties whose interests are such that they would be, or might be, directly and materially affected, must be made parties to such proceedings. *Morrison v. Rathmell*, 650 S.W.2d 145, 149 (Tex.App.–Tyler 1983, writ dism'd). Thus, only parties who would or might be affected by the result of the attack on the former judgment must be joined, and others not so situated need not be joined. For example, in a bill of review which seeks to overturn a prior decree of divorce, but that does attack provisions of the decree relating to the children of the marriage, the children need not be joined as parties. *Id.*

The rule in *Morrison* derives–at least in part–from *Hunt v. Ramsey*, 162 Tex. 133, 345 S.W.2d 260 (Tex. 1961). In *Hunt*, two plaintiffs brought suit against over 1,000 defendants and obtained a judgment for several thousand acres of land. *Id.* at 261. The plaintiffs served most of the defendants

with citation by publication and obtained default judgments against most of the defendants. *Id*. The heirs of one of the defendants brought a bill of review seeking to set aside the judgment as to that portion of the acreage to which their ancestor had a claim, disclaiming any interest in any other acreage awarded to the plaintiffs. *Id*. at 261-62.

The Texas Supreme Court noted that the first issue was whether a part of a judgment may be set aside as to some parties and left intact as to others. *Id.* at 262. According to the Texas Supreme Court, in suits for recovery of lands, in which the defendants claim separate parcels and in which they are entitled to demand a separate trial, a voluntary severance can be deemed to have occurred if the plaintiff proceeds to trial against one or more defendants without having properly served the other defendants, who do not appear. *Id*. at 263. Thus, the Texas Supreme Court concluded that a portion of such a judgment, in a proper case, could be set aside. *Id.* at 264.

The Texas Supreme Court then addressed whether the judgment could be set aside without the joinder of all the parties to it being made parties to the action, and noted that the general rule in Texas was that all parties whose interests are such that they would be, or might be, directly or materially affected are necessary parties, and, if joined, the attack is direct; otherwise, the attack is a collateral one. *Id*. But, parties who will not, or cannot, be affected by the action need not be made parties. *Id*. Therefore, the Texas Supreme Court held, if a bill of review attacks the interests of but one party whose interests are severable, others named in the former litigation need not be joined, since only those persons who have a real, present interest in the judgment attacked are necessary for the attack to be direct. *Id*. at 264-65; *see also Lowe v. Farm Credit Bank of Texas*, 2 S.W.3d 293, 297 (Tex.App.-San Antonio 1999, pet. filed) (when one co-maker of a note filed a bill of review seeking to set aside a deficiency judgment, another co-maker of the note was a necessary party, whose absence made the petition for bill of review an improper collateral attack on the deficiency judgment).

With the increasing number of the third party actions in divorce litigation, particularly those targeting lawyers, the issue of who is a necessary party to a bill of review may receive increased attention.

C. Pleadings

A bill of review petitioner must allege, with particularity, sworn facts sufficient to constitute a defense or claim. *Martin*, 840 S.W.2d at 591. Bill of review pleadings must be verified. *Wright v. Wright*, 710 S.W.2d 162, 166 (Tex.App.–San Antonio 1986, writ ref'd n.r.e.). However, the failure to except, or otherwise direct the attention of the trial court, to a lack of verification, results in waiver of the objection. *Billy B., Inc. v. Board of Trustees of Galveston Wharves*, 717 S.W.2d 156, 158 (Tex.App.–Houston [1st Dist.] 1986, no writ).

Defects in bill of review petitions normally must be challenged by special exceptions before dismissal or summary judgment for failure to state a claim is proper. A trial court errs by denying a petitioner the opportunity to amend his of her pleadings to cure defects. *Harris v. Moore*, 912 S.W.2d 860, 862 (Tex.App.–Austin 1995, no writ); *Clemons v. State*, 737 S.W.2d 431, 432 (Tex.App.–Eastland 1987, no writ). In *Harris,* the Austin Court of Appeals commented that "[p]resumably, bills of review utterly failing to plead a viable cause of action would be susceptible to summary judgment on that basis just like similarly deficient petitions." 912 S.W.2d at 862 n.1, *citing, Chambers v. Huggins*, 709 S.W.2d 219, 224 (Tex.App.–Houston [14th Dist.] 1986, no writ) (the trial court's refusal to lodge a special exception was not error although the motion for summary judgment was based on the nonmovant's alleged failure to state a cause of action, when the nonmovant's pleadings did

not suffer from a mere technical defect, but consisted of nothing more than conclusory allegations of fraud and mutual mistake).

In *Farrell v. Crossland*, 706 S.W.2d 158, 159 (Tex.App.–El Paso 1986, writ dism'd), the defendant filed a motion for summary judgment asserting that the plaintiff's bill of review failed to contain the essential elements of a bill of review, i.e., the bill of review failed to plead that the plaintiff was prevented from filing an appeal or from making her defense therein by the fraud, accident, or wrongful act of the defendant, and further failed to allege that the failure to appeal or plead a defense was unmixed with any fault or negligence on the part of the plaintiff or her attorney. The plaintiff, for reasons known only to God and her attorney, filed no response or reply to the motion for summary judgment. *Id.* The trial court granted summary judgment after finding "the Plaintiff's pleadings for a Bill of Review are deficient...." *Id.*

On appeal, the El Paso appellate court noted that when a nonmovant has filed no response to a motion for summary judgment, only two issues may be raised on appeal: (1) the nonmovant may attack the legal sufficiency of the grounds raised in the motion for summary judgment; and (2) the nonmovant may also urge that the movant's proof was insufficient to establish as a matter of law the specific grounds relied upon by the movant. *Id.* at 159-60. The El Paso Court of Appeals next acknowledged the established rule that a motion for summary judgment may not be used as a substitute for a special exception when there is a pleading defect, but noted as well that, on appeal from a summary judgment, only the issues raised in the trial court may be raised on appeal. *Id.* at 160.

Turning to the plaintiff's pleadings, the Eighth Court of Appeals found that the first amended petition for bill of review did allege a meritorious defense, although it did not allege any facts to substantiate such a conclusion. Further, there was no allegation that the plaintiff was prevented from making her defense in the original suit by the fraud, accident or wrongful act of the defendant, and there was no allegation that the failure to assert the alleged defense was not the fault or result of the negligence of the plaintiff. *Id.* Thus, the pleading did not meet all the requirements of a bill of review, and, there being no complaint in the trial court that the attack upon the pleading defect came in the form of a motion for summary judgment rather than a special exception, the summary judgment against the plaintiff was affirmed. *Id.*

In *Nichols v. Jack Eckerd Corp*., 908 S.W.2d at 9, the plaintiff filed a bill of review with multiple pleading deficiencies. The trial court determined that the petition failed to establish the necessary elements for bill of review relief, and granted the defendant's special exceptions to the pleading. *Id.* When the plaintiff refused to amend her pleadings, the trial court dismissed her cause of action, and the Houston First Court of Appeals upheld the dismissal on appeal. *Id.* at 9-10.

Alternative pleadings are permissible in bill of review actions. In *Martin*, 840 S.W.2d at 592, the trial court granted summary judgment against the wife "on the pleadings"of her bill of review on the narrow ground that the wife, by alternatively seeking a division of undivided assets under former Texas Family Code §3.91 [now TEX.FAM.CODE §9.205 (Vernon 1998)], had asserted an adequate remedy at law, thereby barring her from pursuing the bill of review, an equitable remedy. *Id.*

On appeal, the Tyler Court of Appeals noted that the trial court did not find, nor did the husband concede, that the wife actually had an adequate remedy at law, but only that she had asserted a legal remedy. *Id.* However, according to the Tyler appellate court, to demonstrate the absence of an adequate legal remedy, the petitioner need only show the absence of any adequate legal remedy against the judgment under attack, such as a motion for new trial, or appeal, and

a sufficient excuse for not asserting those legal remedies. *Id.* The wife stated that she did not discover the husband's fraud, nor did the husband cease threatening her, until after the time had passed for a motion for new trial or an appeal. *Id.* at 593. Since alternative pleadings of equitable and legal remedies are permitted by the Texas Rules of Civil Procedure, the Tyler Court of Appeals held that the trial court erred in granting the husband's motion for summary judgment "on the pleadings." *Id.*

D. Filing the Petition

A bill of review is a direct attack on a prior judgment. Consequently, the petition must be filed in the same court that rendered the prior judgment. *National Unity Ins. Co.,* 963 S.W.2d at 878; *see also Pursley v. Ussery*, 937 S.W.2d 566, 568 (Tex.App.–San Antonio 1996, no writ). A direct attack is instituted for the purpose of correcting a presumably incorrect former judgment and may only be brought in the court rendering the judgment or in a higher court. *National Unity Ins. Co.*, 963 S.W.2d at 878, n.1. The requirement that a bill of review be filed in the the same court that rendered the prior judgment is jurisdictional, and applies even if the judgment was rendered in a county containing multiple courts of concurrent jurisdiction. *Pursley*, 937 S.W.2d at 568.

As a separate suit, a bill of review should be given a new docket number. *Lawrence*, 911 S.W.2d at 446, n.2; *see also, Amanda,* 877 S.W.2d at 485 (Texas procedure has always mandated that a petition for bill of review be a new lawsuit filed under a different cause number than the case whose judgment the bill of review complainant is attacking); *McKellar Development Group, Inc. v. Fairbank*, 827 S.W.2d 579, 581 (Tex.App.–San Antonio 1992, no writ) (it is clear that a bill of review suit occupies an independent position on the trial docket; it is not a part of the original suit even though its purpose is to review the merits of that case); *Langford v. Douglas*, 359 S.W.2d 951, 953 (Tex.Civ.App.–Beaumont 1962, no writ) (a motion to reinstate, which could be considered a bill of review, did not belong in the original suit).

Nevertheless, an improperly filed bill of review will not be dismissed, assuming its allegations are otherwise sufficient, if it is given the number of the action in which the judgment was rendered and is mistakenly called a "motion for new trial," or given some other improper label. *Lawrence,* 911 S.W.2d at 446, n.2. In *Lawrence,* for example, the ex-husband filed a bill of review styled "In the Matter of the Marriage of Irene Lawrence and John Thomas Lawrence, Sr.," and used the original divorce cause number; the trial court simply, and properly, assigned a new cause number and styled the case *"*John Thomas Lawrence, Sr. v. Irene Lawrence.*" Id.; see also Malone v. Emmert Indus. Corp*., 858 S.W.2d 547, 549 (Tex.App.–Houston [14th Dist.] 1993, writ denied) (the appellate court could consider the appellants' pleading, entitled "Motion to Vacate," and filed under the number of the case in which the judgment had been entered, as a bill of review, if the basic elements of the action were alleged under oath).

Lehtonen v. Clarke, 784 S.W.2d 945 (Tex.App.–Houston [14th Dist.] 1990, writ denied), illustrates the difficulties sometimes encountered–or endured–because of a failure to observe the "independent" status of a bill of review. In *Lehtonen,* the trial court, as punishment for the defendant's failure to furnish post-judgment interrogatory answers, ordered both the defendant's motion for new trial, and its bill of review, dismissed with prejudice *Id.* at 946-47 (in the words of the Houston Fourteenth Court of Appeals: "...dismissed not just from consideration–in other words, denied–but also from existence."). On appeal, the Houston appellate court recounted that the defendent had brought the bill of review, in addition to its motion for

new trial, "out of an abundance of caution." *Id.* at 947 n.1. However, according the Fourteenth Court of Appeals, the defendant made the unfortunate mistake of filing the bill of review under the original cause number, and, "...needless to say, the [trial] court struck it completely from existence for good measure." *Id.* Had the bill of review been properly docketed under a new and separate cause number, the trial court probably would not have "struck it completely from existence for good measure," and the defendant, to some significant degree, probably would have experienced less trauma (and the attorney for the defendant probably would have made one less phone call to his or her malpractice carrier).

Note that the style of a bill of review case may be important. On the one hand, for example, a petitioner may well desire that the trial court always have before it a constant reminder of the existence of a number of children who may have been affected by the challenged judgment, a result arguably encouraged if every pleading filed in the case recites the litany of children born to the parties. On the other, the party resisting a bill of review may prefer to have the case styled a simple "plaintiff" against a "defendant," thereby de-emphasizing the existence of the children. As already discussed, the defendant ought to have the upper hand in this battle of words.

It should also be noted that the mere filing of a bill of review affects neither the finality nor the enforceability of the judgment it challenges. *City of Houston v. Hill*, 792 S.W.2d 176, 179 (Tex.App.–Houston [1st Dist.] 1990, writ dism'd by agr.); *see also Kantor v. Herald Publishing Co.*, 632 S.W.2d 656, 658 (Tex.App.–Tyler 1982, no writ) (supersedeas bond filed in a bill of review action did not suspend the final judgment in the original action). In order to protect the status quo in the original proceeding while a bill of review is pending, trial courts have often stayed execution of the original judgment by granting a temporary injunction in the bill of review action. *See, e.g. Petro-Chemical Transp., Inc.*, 514 S.W.2d at 242; *American Fidelity Fire Ins. Co. v. Pixley*, 687 S.W.2d 50 (Tex.App.–Houston [14th Dist.] 1985, no writ) (the trial court did not abuse its discretion by granting such a temporary injunction).

E. Statute of Limitations

Absent a showing of extrinsic fraud, a bill of review must be filed within the general four-year statute of limitations. *Law*, 792 S.W.2d at 153; *see also,* TEX.CIV.PRAC.& REM.CODE §16.051 (Vernon 1997). Since the vast majority of bill of review cases involve allegations of extrinsic fraud, the four-year limitations period may apply, strictly speaking, only to the relatively fewer cases involving accident or official mistake.

As for the tolling of the statute due to fraud, a cause of action generally accrues when facts come into existence that authorize a claimant to seek a judicial remedy. *Lawrence*, 911 S.W.2d at 448. Therefore, in an action for fraud, limitations begins to run when the fraud is perpetrated or, if the fraud is concealed, from the time it is discovered or could have been discovered by the exercise of reasonable diligence. *Id.*

In *Lawrence,* the ex-husband filed a bill of review more than four years after the trial court entered a decree of divorce. He argued that the statute of limitations should have been tolled because of the discovery rule and the actions of his former attorney. *Id.* at 448-49. However, his primary complaints were that the trial testimony revealed that his former wife had concealed marital assets, and that the trial court had prevented him from developing the testimony; accordingly, on appeal, the Texarkana Court of Appeals noted that if the former husband discovered, or should have discovered, the concealment at the trial itself, the statute of limitations began running then and was not tolled. *Id.* at 449.

Further, the Texarkana appellate court rejected the argument that the actions of the husband's attorney tolled the statute, since, normally, the actions of a party's attorney are attributed to the party. *Id.*

Recently, the Texas Family Code was amended to add TEX.FAM.CODE §161.211(a) (Vernon Supp. 2000), which provides that, notwithstanding TEX.R.CIV.P. 329, the validity of an order terminating the parental rights of a person who has been personally served is not subject to collateral or direct attack after the sixth month after the date the order was rendered. *See also In re T.R.R.* 986 S.W.2d at 35 (the general four-year statute of limitations, and not §161.211(a), proscribing a direct or collateral attack on an order terminating parental rights more than six months after such order was rendered, applied to a bill of review brought by the biological mother whose rights had been involuntarily terminated, when the statute took effect after the mother filed her bill of review and was not made applicable to pending suits). Apparently, no reported appellate case yet addresses the validity or contours of the new statute.

F. Discovery

1. Timing and Scope of Discovery

Discovery issues in a bill of review can be troublesome. If your client wants to file a bill of review to reopen a divorce, which was final two years ago and involved substantial property, at what point are you entitled to discovery of the original underlying divorce issues – before, or after, you make your prima facia meritorious defense? And recall that, the trial court, in its discretion, might be inclined to move forward immediately into the merits of the underlying cause once it determines that a meritorious defense exits. Recall further the frustration voiced by the lawyer in *Billy B. Inc*., 717 S.W.2d at 159, as his opponent hammered him with failing to prove his meritorious defense: "I didn't bring all my witnesses and put on my proof because I didn't have a chance to do any discovery...."

In *Spears*, 718 S.W.2d at 757, the divorce decree recited that the parties were the parents of three children, for whom the husband was ordered to pay child support. Roughly eighteen months later, the former husband filed a petition for bill of review in which he sought to overturn that portion of the divorce decree which found him to be the parent of two of the three children (twins). *Id.*

Pursuant to his bill of review, the husband took the deposition of his former wife, at which she reiterated her position that the former husband was the father of the twins. *Id.* The former husband then sought to have his former wife and the twins voluntarily submit to serology testing, which the former wife refused. *Id.* 757-58. The former husband filed a "motion for testing to determine paternity," which the trial court denied leading to the husband's request to the Corpus Christi Court of Appeals to order such testing by mandamus. *Id.* at 758.

Initially, stated the Corpus Christi appellate court, "we are faced with the unique question of whether a petitioner in a bill of review proceeding must establish his prima facie case for the granting of a bill of review before he may proceed with discovery in the portion of the suit to set aside the former judgment which has become final." *Id.* The Corpus Christi Court of Appeals then declared that, while it believed, as a general rule, discovery was appropriate prior to the pretrial hearing at which the petitioner must prove his prima facie case for bill of review, it did not believe that the general rule encompassed serology testing to determine paternity until after the prima facie case has been established since the testing would not in any manner aid the former husband in establishing the elements necessary to show the prima facie grounds of fraud, accident, wrongful act of opposing party, or official mistake, in his bill

of review action. *Id.* [Since when does a litigant have to show prima facie grounds for anything but a meritorious defense?]

In *Amanda*, 877 S.W.2d at 487, a case factually similar to *Spears*, the Houston First Court of Appeals quoted the "general rule" of *Spears* discussed above. According to the Houston appellate court, the bill of review plaintiff in *Amanda* was not entitled to a bill of review for two reasons: (1) he did not sufficiently plead for bill of review relief, and thus did not satisfy the first requirement from *Baker v. Goldsmith* for going forward with his action (additionally, his meritorious defense was barred by law); and, (2) the face of the record (his counterclaim allegations of adultery) disclosed that the plaintiff knew of circumstances at the time of the divorce which should have caused him to contest paternity at that time. *Id.* As a result, the trial court erred by ordered paternity testing. *Id.*

Amanda probably simply stands for the proposition that, in a bill of review, discovery aimed at the underlying judgment is inappropriate when–in essence–the plaintiff's pleadings and the defendant's response demonstrate that bill of review relief is precluded by law. *Amanda,* however, is not clear as to the precise timing of discovery (paternity testing) allowable in a bill of review.

Another case also raises the timing issue, but provides little guidance. In *Billy B., Inc.,* 717 S.W.2d at 159, the trial court ruled that the plaintiff failed to prove its prima facie meritorious defense and was not entitled to bill of review relief. The Houston First Court of Appeals noted that proof of the plaintiff's damages was required to show its standing to bring the initial suit as an essential element of its cause of action (a complicated "loss of business" claim), and stated that "[d]iscovery *may* have been required to obtain needed proof *either in [the plaintiff's] initial suit or in its petition for bill of review*. *Id.* (Emphasis added.) However, the plaintiff did not complain on appeal that it was thwarted or precluded from obtaining discovery in either action, and so the Houston appellate court had nothing more to say one way or the other on the discovery issue.

Whether discovery should be aimed at the underlying judgment, or at the elements of the bill of review attacking that judgment, can be an important issue. For example, in *Markham v. Diversified Land & Exploration Co.*, 973 S.W.2d 437, 438 (Tex.App.–Austin 1998, pet. denied), the plaintiff obtained a default judgment in California against a married couple and their closely-held corporation. Some six years later, the plaintiff registered its default judgment under the Uniform Enforcement of Foreign Judgments Act, in Comal County, Texas, where the wife, since divorced from the husband, was living. *Id.* In 1997, when the plaintiff garnished her bank accounts, the wife filed a bill of review and motion to stay; ultimately, after granting the [trial] plaintiff protection from the discovery request of the [trial] defendant ex-wife, on the grounds that such discovery was irrelevant to the matters at issue in the bill of review, the trial court denied her bill of review. *Id.* at 438-39.

On appeal, the Austin Court of Appeals held that the ex-wife carried the burden of presenting a meritorious defense, not to the validity of the underlying California judgment, but to the validity of the judgment's claim to full faith and credit. *Id.* at 439. However, in complaining of the trial court's failure to require the [trial] plaintiff to answer certain written discovery requests, the ex-wife insisted that the discovery she sought was necessary to establish certain meritorious defenses to the California judgment. *Id.* at 441. As had the trial court, the Third Court of Appeals found that the discovery sought by the ex-wife was irrelevant to the matters at issue in the bill of review. *Id.*

2. Dismissal as a Discovery Sanction

As punishment for the failure to furnish interrogatory answers to, and for the failure to pay monetary damages awarded in, post-judgment discovery in the original suit, the trial court in *McKellar Development Group, Inc.*, 827 S.W.2d at 581, ordered that a bill of review directed at the underlying judgment (out of which the discovery arose) be dismissed. On appeal, the San Antonio Court of Appeals held that it was an abuse of discretion to dismiss the bill of review as a post-judgment discovery sanction arising out of the original cause. *Id.* at 582.

G. Trial

The Texas Supreme Court outlined the procedure to be followed in a bill of review in *Baker,* 582 S.W.2d 404. As already discussed, the bill of review petitioner must allege, with particularity, sworn facts sufficient to constitute a defense or claim. The petitioner must then, as a pre-trial matter, present prima facie proof to support the alleged meritorious defense or claim; at this hearing, the only relevant inquiry is whether the petitioner has presented prima facie proof of a meritorious claim or defense. *Beck v. Beck*, 771 S.W.2d 141, 142 (Tex. 1989) ("[i]n order to assure that valuable court time is not wasted by conducting a spurious 'full-blown' examination of the merits..."). A prima facie defense or claim is presented if it is determined by the trial court that the petitioner's claim or defense is not barred as a matter of law, and that he or she will be entitled to judgment on re-trial if no contrary evidence is offered. *Baker*, 582 S.W.2d at 409.

If the court determines that a prima facie meritorious defense has not been made out, the proceeding terminates and the trial court dismisses the case. *Id.*

In contrast, if a meritorious claim or defense is shown at the pre-trial hearing, only then should the trial court proceed to the adjudication of the remaining two issues, (1) extrinsic fraud of the opposing party justifying the failure to present the claim or defense, (2) unmixed with the petitioner's fault or negligence. *Id.; see also Beck*, 771 S.W.2d at 142. The trial court may conduct the trial of the remaining two issues in conjunction with the re-trial of the underlying case, or it may try the two remaining bill of review issues separately. *Martin*, 840 S.W.2d at 591; *see also Kessler v. Kessler*, 693 S.W.2d 522, 526 (Tex.App.–Corpus Christi 1985, writ ref'd n.r.e.) (in the discretion of the trial court, a bill of review trial may be conducted in one hearing or in separate hearings). The bill of review petitioner may demand a jury trial upon the fraud and diligence issues. *Id.* at 591-92; *see also Rathmell*, 732 S.W.2d at 16.

In *Ortmann,* 999 S.W.2d at 87, the husband argued that the trial court was *required* to make a separate, preliminary determination as to whether the husband had presented a prima facie meritorious defense before disposing of the bill of review by summary judgment in favor of his former wife. On appeal, the Fourteenth Court of Appeals noted that while it was clear that the existence of a prima facie meritorious defense must be determined as a pretrial matter, nowhere in *Beck* or *Baker* did the Texas Supreme Court state that the trial court must conduct a separate hearing in making that determination. *Id.* at 88. According to the Houston appellate court, a requirement that a trial court must conduct a separate hearing to determine whether a meritorious defense exists would defeat the purpose of such a pretrial determination, *i.e.*, judicial economy. *Id.* Thus, held the Fourteenth Court of Appeals, the trial court did not err in overruling husband's objection to proceeding with the hearing on the former wife's summary judgment motion. *Id. Ortmann* should be compared to *In re T.R.R.*, 986 S.W.2d at 36, in which the San Antonio Court of Appeals acknowledged that the trial court did actually conduct the requisite pretrial meritorious defense hearing on the natural mother's petition for bill of review. According

to the San Antonio appellate court, the trial court followed the "proper procedure" in determining the meritorious defense issue. *Id.*

In *Markham*, 973 S.W.2d at 441, a hearing was scheduled on a motion for protective order. Once the protective order was granted, the bill of review defendant suggested that the court hear the plaintiff's evidence on her bill of review. *Id.* The plaintiff requested a continuance, which the trial court was prepared to grant, but the plaintiff withdrew her request and agreed to proceed to the merits of her claim for the bill of review. *Id.* After the court denied her bill of review, the plaintiff complained on appeal that the trial court should not have determined the meritorious defense issue. *Id.* at 440-41. To nobody's great surprise, the Austin Court of Appeals found that the plaintiff had failed to preserve her allegation of error. *Id.* The lesson here is that the meritorious defense issue is absolutely critical, being the mandatory first determination made in the bill of review action, and thus no prudent practitioner should ever approach the issue lightly.

H. Burden of Proof

A petitioner in a bill of review is not required to prove his or her meritorious defense by a preponderance of the evidence, but rather must show a prima facie meritorious defense, *i.e.,* the petitioner must show that his or her defense is not barred as a matter of law, and that he or she will be entitled to judgment on retrial if no evidence to the contrary is offered. *Baker,* 582 S.W.2d at 408-09.

Once the trial court determines that a meritorious defense exists, the petitioner must open and assume the burden of proving that the judgment was rendered as the result of the fraud, accident or wrongful act of the opposite party, or official mistake, unmixed with any negligence of his own. *Id.* at 409. According to the Texas Supreme Court, the burden placed on a bill of review petitioner may be onerous, but it is a major distinguishing factor between a bill of review and a motion for new trial since in a motion for new trial the movant is merely required to prove that his failure to answer in the prior trial was not intentional or the result of conscious indifference, but was due to accident or mistake, and that the granting of a new trial will occasion no delay or injury to the plaintiff. *Id.*

The bill of review defendant must assume the burden of proving his original cause of action, which will assure that the original, underlying cause of action is supported by the weight of the evidence. *Id.*

The fact finder determines whether the petitioner has established, by a preponderance of the evidence, that the prior judgment was rendered as a result of fraud, accident or wrongful act of the opposite party, or official mistake, unmixed with negligence on the petitioner's part. *Id.* The issue may be submitted to a jury in one broad issue. *Id.* Conditioned upon an affirmative finding to the fraud and due diligence issue, the fact finder then determines whether the bill of review defendant, the original plaintiff, has proved the elements of his original cause of action. *Id.; see also Chandler v. Chandler*, 842 S.W.2d 829, 832 (Tex.App.–El Paso 1992, writ denied) (the first question the jury should have answered was whether the husband-petitioner established by a preponderance of the evidence that the original divorce action was rendered as a result of fraud by the wife; the question should have been submitted in one broad issue, and, conditioned upon an affirmative finding to the issue, the jury should have then determined whether the bill of review defendant, the wife, proved the elements of her original cause of action, *i.e.,* divorce or validity of the marriage).

Once it is found that the petitioner is suffering under a wrongfully obtained judgment that is unsupported by the weight of

the evidence, equity is satisfied and the court should grant the requested relief. *Baker,* 582 S.W.2d at 409.

I. Severance

Because a bill of review is an "independent" equitable action, filed under a different cause number than the case whose judgment the bill of review complainant is attacking, and because Texas practitioners nonetheless often fail to file their bills of review as "independent" actions, the issue of severing a bill of review from another pending action often raises its bothersome head. TEX.R.CIV.P. 41 grants the trial court wide discretion in questions of severance. "A claim is properly severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues." *Guaranty Federal Savings Bank v. The Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990).

In *Amanda*, 877 S.W.2d at 485, the former wife filed a motion to modify seeking an increase in child support; the former husband responded by filing a bill of review under the same cause number as the wife's motion to modify. The trial court denied the wife's request for severance. By so doing, the trial court committed a clear abuse of discretion, and got "mandamused," since the wife was entitled to have the bill of review proceed separately from her action to increase child support. *Id.*

In *Martin*, 840 S.W.2d at 588, the former wife filed a bill of review seeking to set aside the child support and property settlement provisions incorporated in the agreed judgment dissolving her marriage to her former husband; she alternatively pled for a division of the retained earnings of a corporation, property which she alleged was not disposed of in the divorce decree. Finally, she brought another action against three of the husband's daughters and the directors of the corporation for conspiring with the husband to retain the community earnings in the corporation and to conceal from her the true value of the corporate stock.

The trial court heard motions for summary judgment filed by both parties and conducted a *Baker v. Goldsmith* hearing to determine if the wife could offer prima facie proof of a meritorious claim. The trial court rendered an interlocutory order dismissing the bill of review because the wife had failed to meet her burden of establishing a prima facie case to warrant a full trial on the merits. Upon the wife's request, the trial court severed the bill of review proceeding from the other two causes of action alleged in the wife's petition. *Id.* at 588-89. Ultimately, both parties appealed.

On appeal, the husband argued that the trial court erred in severing the bill of review from the wife's alternative cause of action and third party action, which, the husband claimed, was done for the sole purpose of allowing an appeal of an otherwise interlocutory order. *Id.* at 593. However, the Tyler Court of Appeals concluded that the two causes from which the bill of review was severed were discreet and independent causes of action involving different parties and issues. *Id.* at 594. Furthermore, although all of the causes related generally to matters arising out of the divorce, the bill of review was not so interwoven with the remaining actions that they involved identical facts and issues, and thus the trial court did not abuse its discretion in ordering severance. *Id.*

VII. EQUITABLE DEFENSES

As a creature of equity, a bill of review is subject to equitable defenses. The "due diligence" requirement for a bill of review, for example, simply rephrases the traditional "clean hands" doctrine of equity. *See, e.g.*

Wright v. Wright, 710 S.W.2d 162, 166 (Tex.App.–San Antonio 1986, writ ref'd n.r.e.) (one seeking a bill of review must come into court with clean hands and must plead and prove that the judgment which he seeks to set aside was not the result of his own negligence and fraud, but was the fault of the other party). And recall that in *Wembley,* the Texas Supreme Court specifically noted that the plaintiff asserted "...neither estoppel nor other extenuating circumstances that might otherwise render relief by bill of review inequitable." *Wembley,* 43 Tex. Sup. Ct. J. at 143.

A. Laches

"Equity aids the diligent and not those who slumber on their rights." *Rivercenter Associates v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993). Consequently, since a bill of review is equitable in nature, laches may be raised as a defense to its prosecution. *See, e.g. Caldwell*, 975 S.W.2d at 538. The equitable affirmative defense of laches requires proof of (1) an unreasonable delay by a party having legal or equitable rights in asserting such rights, and (2) a good faith change of position by another to his detriment because of the delay. *See, e.g. Id.* On the one hand, delay alone is not sufficient to constitute laches; on the other, injury or prejudice is essential. *See, e.g. Lawrence*, 911 S.W.2d at 449. Laches is an affirmative defense. *Hill*, 827 S.W.2d at 63.

As already discussed, the residual four-year statute of limitations applies to bills of review. *Caldwell*, 975 S.W.2d at 538. With regard to limitations, the Texas Supreme Court has stated that "[g]enerally in the absence of some element of estoppel or such extraordinary circumstances as would render inequitable the enforcement of [the petitioner's] right after a delay, laches will not bar a suit short of the period set forth in the limitation statute." *Barfield v. Howard M. Smith Co.*, 426 S.W.2d 834, 840 (Tex. 1968). Thus, laches should not bar an action on which limitations has not run unless allowing the action would work a grave injustice. *Caldwell*, 975 S.W.2d at 538.

In *Caldwell,* the petitioner filed his bill of review within four years of a default judgment taken against him, but almost two years *after* he first learned of the judgment. *Id.* In *Caldwell,* the Texas Supreme Court first stated that "[i]n only two cases has this Court held that a bill of review was barred by laches even though limitations had not run" – *Ruland v. Ley,* 144 S.W.2d 883 (Tex. 1939) and *Myers v. Pickett*, 16 S.W. 643 (Tex. 1891). *Id.* at 539. In *Ruland v. Ley,* 144 S.W.2d at 884-85, the Court held that a plaintiff's unexplained delay of four months in filing a bill of review to set aside a dismissal for want of prosecution without notice was barred by laches. In *Myers v. Pickett*,16 S.W. at 644-45, the Court held that the plaintiffs' two-year delay in filing a bill of review was not adequately explained by the plaintiffs' assertion that they were not aware of the law that gave them grounds for setting aside the judgment against them. *Caldwell*, 975 S.W.2d at 539.

Although casting some doubt on the continuing vitality of *Ruland* and *Myers*, the Texas Supreme Court in *Caldwell* found that the petitioner had presented an adequate explanation for his delay, in that he had asserted his claims in the bill of review within weeks of learning of new evidence (corroborating his claim that he had not been served) that would constitute, in effect, a meritorious defense to the underlying default judgment. *Id.* Further, according to the Texas Supreme Court, the bill of review defendant would not be prejudiced by the petitioner's delay (because of the attorney fees expended in enforcing the judgment), since from the beginning of the enforcement action the petitioner had stated that he had not been served, and from that point on the defendant knew of the petitioner's position. *Id.* Therefore, the Texas Supreme Court held that allowing the petitioner to pursue his bill of

review certainly would not work a grave injustice, so as to justify the application of laches to bar an action on which limitations had not run. *Id.*

In *Lawrence*, 911 S.W.2d at 449, the wife argued that the husband's pleadings showed he waited a year and a half after his second attorney returned his file to seek his bill of review. She further argued that such time constituted an unreasonable delay, and that, during that period, she had changed her position to her detriment by filing a declaratory judgment suit seeking to impress a judgment lien on property the husband had transferred to his son. *Id.*

However, the Texarkana Court of Appeals noted that the wife failed to specify how her alleged change in position harmed her, and pointed out that her actions did not arise from the husband's failure to file a bill of review since she might have needed to seek a declaratory judgment even if he had timely filed a bill of review, or never filed one at all. *Id*. For these reasons, the Texarkana appellate court held that she had not proved her laches allegation. *Id.*

While in *Lawrence* the plaintiff failed to prove laches, in *Hill*, 827 S.W.2d at 63, the husband failed to establish laches as a matter of law in a summary judgment proceeding because he judicially admitted, among other things, that: (1) the wife's failure to assert a claim to a greater share of the parties' marital estate and to greater child support payments was not the result of any negligence or fault of the wife; and (2) the wife exercised due diligence in attempting to discover the husband's fraud.

B. Estoppel

According to the Texas Supreme Court, the equitable doctrine of estoppel may render relief by bill of review "inequitable." *Wembley,* 43 Tex. Sup. Ct. J. at 143. Typically, in bill of review cases, estoppel arguments are made with reference to "benefits" of the judgment assailed that have been "accepted" by the bill of review plaintiff.

1. Estoppel by Acceptance of Benefits

The longstanding "acceptance-of-benefits doctrine" provides that "a litigant cannot treat a judgment as both right and wrong, and if he [or she] has voluntarily accepted the benefits of a judgment, he [or she] cannot afterward prosecute an appeal therefrom." *See, e.g. Carle v. Carle*, 234 S.W.2d 1002, 1004 (Tex. 1951). It is well-established in Texas that the acceptance-of-benefits doctrine applies in equitable bill of review proceedings as well as direct and restricted appeals. *Newman v. Link*, 889 S.W.2d 288, 289 (Tex. 1994) (bill of review); *Bloom v. Bloom*, 935 S.W.2d 942, 945-46 (Tex.App.–San Antonio 1996, no writ) (petition for writ of error); *see also Swearingen v. Swearingen*, 487 S.W.2d 784, 788 (Tex.Civ.App.–San Antonio 1972, writ dism'd) (the acceptance of benefits doctrine "is a general rule which appears to be universally recognized," and prevented the former wife from challenging a default divorce judgment through a bill of review when she had voluntarily accepted benefits under such judgment by selling some of the property awarded her, and thereafter had retained the proceeds of the sale). However, the doctrine only applies if the benefits of the judgment were voluntarily accepted. *See, e.g. L.P.D. v. R.C.*, 959 S.W.2d 728, 731 (Tex.App.–Austin 1998, writ denied).

There are two exceptions to the *Carle* rule which even when the party accepts benefits under the judgment. However, these exceptions have been characterized as "narrow." *See, e.g., Swearingen*, 487 S.W.2d at 788.

The first exception is the "economic necessity exception" which applies when the acceptance of benefits is not voluntary because the party is driven to accept benefits out of economic necessity. *See Carle v. Carle*, 234 S.W.2d at 1004; *Gonzalez v. Gonzalez*, 614 S.W.2d 203 (Tex. Civ. App. -- Eastland 1981, writ dism'd w.o.j.). In other words, acceptance of benefits due to financial duress or

other economic circumstances does not constitute voluntary acceptance. *Cooper v. Bushong,* 10 S.W.3d 20, 23 (Tex.App.–Austin, pet. denied) (in a termination action, the mother, the single parent of two children, was not estopped to appeal although she had accepted the benefits of a $5000.00 check for child support, when she alleged she did so only "to pay for the necessities for the family," had difficulties making ends meet each month, and filed for bankruptcy to avoid foreclosure on her home prior to accepting the benefits of the check); *see also Smith v. Texas Commerce Bank*, 822 S.W.2d 812, 814 (Tex.App.–Corpus Christi 1992, writ denied) (the appellant was estopped from challenging the trial court's judgment approving a partition and enforcing the remaining portions of the parties' settlement by accepting benefits under the judgment; the appellant twice moved to enforce the judgment, accepted rent payments from the land partitioned to him, received partial payment of the amount that the appellees were required to pay him for release of certain claims, and was seeking by his appeal not merely to recover additional amounts, but repartition of numerous tracts of real property); *Haggard v. Haggard*, 550 S.W.2d 374, 376 (Tex.Civ.App.–Dallas 1977, no writ) (that the wife accepted four $100 checks paid to her under the judgment dividing the community property in the divorce proceeding did not estop her from appealing from the judgment when she accepted the checks because she was without sufficient funds to provide the necessities of life).

Thus, an "involuntary" acceptance falls within the *Carle* rule and will not result in estoppel. For example, in *L.P.D.*, 959 S.W.2d at 731, a paternity case, the alleged father sent three $200 child support payments to the mother before the default judgment was taken, and three $400 child support payments after the judgment. The checks were indisputably cashed although the parties disputed whether the mother or her new husband cashed them. The alleged father claimed that the mother endorsed at least one of the checks while the mother averred that her new husband cashed the checks without her knowledge. *Id.* Prudently, the mother remitted the funds into the registry of the court. *Id.* at 732. Nonetheless, the alleged father complained that the mother had retained the benefits of the paternity decree from the time she learned her husband had cashed and deposited the checks until the time when the funds were tendered into the district court's registry. *Id.* at 731.

The Austin Court of Appeals held that, under the circumstances, the alleged father did not meet his burden of proving that the mother voluntarily accepted the benefits of the child support judgment. *Id.* at 732. Further, the Third Court of Appeals cited *Twin City Fire Ins. Co. v. Jones*, 834 S.W.2d 114, 115-16 (Tex.App.–Houston [1st Dist.] 1992, writ denied), for the proposition that payment of the amount in controversy into the court's registry defeats the application of estoppel. 959 S.W.2d at 732.

The second exception is the "entitlement exception" which applies when the party accepts nothing more than what he or she would be entitled to receive on retrial. *Carle v. Carle*, 234 S.W.2d at 1004. *See Balaban v. Balaban*, 712 S.W.2d 775 (Tex. App. -- Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Hawkins v. Hawkins*, 999 S.W.2d 171, 178 (Tex.App.–Austin 1999, no pet.). Stated another way, when a party accepts only that part of the judgment that the other party concedes is due to him or her, he or she is not estopped from appealing on the ground that he or she is entitled to further recovery. *Hawkins*, 999 S.W.2d at 178.

In *Hawkins,* the former wife had defaulted her former husband, who at the time was serving in the United States Army. *Id.* at 173. The decree granted the divorce, ordered the former husband to pay child support for the three children listed in the wife's petition (the decree was silent as to a fourth child, who, everyone agreed, was not a child of the former husband), and awarded the wife an interest in the husband's military retirement pay. *Id.*

Some three years later, pursuant to the Soldiers' and Sailors' Civil Relief Act, the former husband, who by then had remarried, filed an application to set aside the final decree and/or a petition for a bill of review, seeking to reopen the portions of the divorce decree that addressed the paternity of two of the three children, the amount of military retirement benefits awarded to the wife, and the failure of the decree to include an express finding that the former husband was not

the biological father of the fourth child. *Id.* at 173-74.

At trial, the wife argued that the former husband should be estopped from attacking the finality of the divorce decree because he relied on it by remarrying and by paying child support during the intervening years. The trial court agreed, stating in its conclusions of law that former husband had waived his right to contest the paternity of the children or to otherwise attack the divorce decree. *Id.* at 177. The trial court therefore denied the husband's bill of review. *Id.* at 173. On appeal, the husband asserted that, as a matter of law, his actions only estopped him from attacking that portion of the decree that dissolved the marriage, but did not prevent him from attacking the portions dealing with paternity, child support, and military benefits. *Id.* at 177.

The Austin Court of Appeals agreed, stating that it was established law that remarriage by a party to a divorce estops that party from attacking the marriage dissolution, but does not estop an attack on other portions of the decree, such as child support or child custody. *Id.* at 177-78, *citing, Vinklarek v. Vinklarek*, 596 S.W.2d 197, 200 (Tex.Civ.App.–Houston [1st Dist.] 1980, writ dism'd), and *McFarland v. Reynolds*, 513 S.W.2d 620, 624 (Tex.Civ.App.–Corpus Christi 1974, no writ). Thus, the mere fact that the former husband had accepted the benefit of the divorce by his remarriage did not estop him from attacking the decree as to the issue of paternity, the related issue of child support, and the amount of military retirement benefits due to the former wife. *Id.* at 178.

Further, as to the wife's assertion that the husband should have been estopped from attacking the divorce decree because he paid child support, the Third Court of Appeals noted that the wife had misconstrued the acceptance-of-the-benefits doctrine, in that *Carle* precludes a litigant from *accepting* the benefits of a judgment and then subsequently challenging that portion of the judgment affording him those benefits. The Austin appellate court did not believe that the former husband, by acquiescing to the court-ordered *obligation* for child support, accepted a benefit of the divorce decree so as to estop him from challenging it. *Id.*

In *Kessler*, 693 S.W.2d at 525, the wife testified that, at the time the agreed property settlement was made, she was not aware that the husband had deposited $8,310.84 in his bank and that she did not learn of such deposit until six or seven months after the divorce decree became final. She also testified that she would not have agreed to the property settlement if she had known at the time that appellee had secreted such money. On appeal, the Corpus Christi Court of Appeals held that the wife's acceptance of the community property disposition made in the original judgment did not, as a matter of law, estop her from a review of that disposition because she alleged that she was led into the agreement through fraud and misrepresentation on the part of her husband, through no fault or negligence by her. *Id.*

In *Roa v. Roa*, 970 S.W.2d 163, 166 (Tex. App. -- Fort Worth 1998, no pet.), the Fort Worth Court of Appeals held that even though the wife had accepted the decree of divorce and division of property, she had not accepted those portions of the judgment addressing child custody, visitation, and support. The appellate court also recognized that issues related to the custody of children are severable from the remainder of a divorce decree. *Id.*

2. Judicial Estoppel

The issue of judicial estoppel, although rare, does crop up in bill of review contexts. For instance, in *Kelly v. Klein*, 827 S.W.2d 609, 610 (Tex.App.–Houston [14th Dist.] 1992, no writ), after the divorce, the ex-wife filed a motion to modify the existing agreed order between the parties, seeking increased visitation rights due to the fact that the child was living in Arizona with the father. *Id.* After a hearing, the trial court granted the ex-wife's request for modification of visitation rights. *Id.*

The ex-wife, however, also filed a bill of review, seeking to have the original agreed judgment declared void. *Id.* The bill of review went to trial. *Id.* The former husband raised the defense of judicial estoppel since the wife had already admitted, in her previous motion to modify, the validity of the agreed judgment, and

the trial court directed a verdict on that ground for the husband. *Id.* The wife appealed, but the Fourteenth Court of Appeals held that the wife had acknowledged the validity of the agreed order and recognized that it was in full force and effect; for that reason, she was judicially estopped from asserting its invalidity in her bill of review. *Id.*

C. Other Extenuating Circumstances

The Texas Supreme Court's rather cryptic remark in *Wembley* that the plaintiff asserted "neither estoppel nor other extenuating circumstances that might otherwise render relief by bill of review inequitable" may open the door to many creative arguments for many creative lawyers faced with a bill of review action. *Wembley,* 43 Tex. Sup. Ct. J. at 143; *cf. Comm'n of Contracts*, 882 S.W.2d at 583 ("special circumstances" militated against finding the petitioners had failed to use due diligence).

In *Martin*, 840 S.W.2d at 593, at the final hearing on the parties' divorce, the wife had stated, in response to the trial judge's question about the fairness of the settlement, "I know it can be taken back to court." In the wife's later bill of review proceeding, the husband contended that her statement demonstrated "bad faith" which should defeat her claim for equitable relief. *Id.* However, the Tyler Court of Appeals held that, considered in the context in which it was made, the wife's statement was an expression of her fear that she might lose the conservatorship of her child if the case went to trial, and thus, was not conclusive proof of bad faith barring her from seeking equitable relief. *Id.*

VIII. ATTORNEY'S FEES

When the petitioner on a bill of review prevails, the judgment previously entered is set aside, and a new judgment, based on the evidence heard on the bill of review, must be entered. *State By and Through Mattox*, 800 S.W.2d at 328; *Swenson v. Swenson*, 466 S.W.2d 424, 428 (Tex.Civ.App.–Houston [1st Dist.] 1971, no writ). Accordingly, it follows that attorney's fees are available to the successful party in a bill of review if there was a legal basis for awarding them pursuant to the underlying cause of action. *State By and Through Mattox*, 800 S.W.2d at 328; *see also Swenson*, 466 S.W.2d at 428.

On the other hand, whether a party who successfully defends a bill of review is entitled to recover attorney's fees is a bit more problematic. In *Meece v. Moerbe*, 631 S.W.2d 729, 730 (Tex. 1982), the petitioner filed a bill of review attacking a judgment awarding damages against him based on a usury claim. The defendant answered and requested attorney's fees for contesting the bill of review. *Id*. The trial court held that the petitioner failed to establish a meritorious defense to the original usury claim, denied the bill of review, and awarded attorney's fees to the defendant. *Id*. On appeal, the court of appeals reversed the portion of the judgment awarding attorney's fees, holding that since the defense of a bill of review was not the equivalent of pleading and proving a cause of action under the usury statute, attorney's fees were not recoverable under the statute. *Id*. The Texas Supreme Court reversed the court of appeals, noting that the defendant would have been entitled to attorney's fees if the petitioner had been able to pursue the usual course of appeal. *Id*.

In a recent case, the San Antonio Court of Appeals stated that the focus of the Supreme Court's holding in *Meece* was whether the statute authorizing the recovery of attorney's fees drew a distinction between an award of attorney's fees at trial and an award of attorney's fees on appeal.
Lowe v. Farm Credit Bank of Texas, 2 S.W.3d 293, 299 (Tex.App.-San Antonio 1999, pet. filed). In the absence of such a distinction, according to the Fourth Court of Appeals, attorney's fees are recoverable in a bill of review proceeding to the same extent as attorney's fees were recoverable at trial. *Id., citing*, *Meece,* 631 S.W.2d at 730; *Bakali*, 830

S.W.2d at 257, and *Rodriguez*, 627 S.W.2d at 202-03 (construing a bill of review as an appeal for purposes of awarding attorney's fees). In *Lowe,* the San Antonio appellate court held that since the trial court had the discretion to award the bill of review defendant attorney's fees at the trial of the underlying deficiency claim, the bill of review defendant was entitled to attorney's fees in the bill of review proceeding. *Lowe*, 2 S.W.3d at 299.

The Corpus Christi Court of Appeals agrees in principal with the San Antonio Court of Appeals on this issue. The Corpus Christi appellate court has stated that when the movant on a bill of review does not prevail, the rights, liabilities and status of the parties, established by the judgment under attack, are not affected, and therefore attorney's fees are available to the defendant in an unsuccessful bill of review proceeding when attorney's fees would be available "on appeal," pursuant to the default judgment in the underlying cause of action. *State By and Through Mattox,* 800 S.W.2d at 328, *citing Rodriguez*, 627 S.W.2d at 202.

In the family law context, the legislature has authorized trial courts to award reasonable attorney's fees and expenses in divorce and post-divorce proceedings. TEX.FAM.CODE §6.708 (Vernon 1998) (divorce); TEX.FAM.CODE §9.014 (Vernon 1998) (suit to enforce decree); TEX.FAM.CODE §9.205 (Vernon 1998) (post-decree division of property). Trial courts also have the discretion to award reasonable attorney's fees for the appeal of divorce actions. *See, Dickson v. McWilliams*, 543 S.W.2d 868, 870 (Tex.App.–Houston [1st Dist.] 1976, no writ). Consequently, as mentioned, in bill of review proceedings regarding such divorce and post-divorce actions, attorney's fees are recoverable. *See*, *e.g., Bakali*, 830 S.W.2d at 257. Additionally, attorney's fees are recoverable in suits affecting the parent-child relationship. TEX.FAM.CODE §106.002 (Vernon Supp. 2000).

IX. SUMMARY JUDGMENT

A. Summary Judgment in a Bill of Review

As is obvious from the number of summary judgment cases discussed in this article, summary judgment is a powerful tool in litigation involving a bill of review. The ins and outs of summary judgment procedure are beyond the scope of the present discussion, but it should be emphasized that it is a particularly useful tactic when opposing a bill of review.

It should be recalled that a defendant seeking summary judgment must show as a matter of law that the plaintiff has no cause of action against him or her. *Citizens First Nat'l Bank v. CincoExploration Co.,* 540 S.W.2d 292, 294 (Tex. 1976). In order to prevail, therefore, the defendant must prove that no genuine issue of material fact exists with respect to at least one of the essential elements of the plaintiff's cause of action. *Lear Siegler, Inc. v. Perez,* 819 S.W.2d 470, 471 (Tex. 1991); *see also, e.g., McRoberts v. Ryals*, 863 S.W.2d 450, 453 (Tex.1993) (in order for their summary judgment on the bill of review to stand, the defendants had to negate, as a matter of law, one of the bill of review elements)*; Kennell*, 743 S.W.2d at 301-02 (when a defendant in a bill of review action moves for summary judgment and disproves even one element of the petitioner's case, the defendant is entitled to summary judgment unless the plaintiff raises a material issue of fact as to that element). On the other hand, the plaintiff is entitled to prevail on the defendant's motion for summary judgment if the plaintiff establishes the existence of a genuine issue of material fact on one or more of the essential elements of the plaintiff's cause of action. *Gibbs v. General Motors Corp.,* 450 S.W.2d 827, 828 (1970).

A proper motion for summary judgment may well prevent a trial of the trial of a bill of review (which is what it is

supposed to do). For example, why did the bill of review in *Kelly*, 827 S.W.2d 609, go to trial, and a jury trial at that? In *Kelly,* the ex-wife had filed a motion to modify a prior agreed order, but also filed a bill of review seeking to have the agreed order set aside. 827 S.W.2d at 610. It appears that, only after the bill of review went to trial before a jury, did the former husband raise the defense of judicial estoppel. *Id.* The defense was proved as a matter of law since the trial court directed a verdict on that ground for the husband, which survived an appeal by the ex-wife. *Id.* If the defense existed as a matter law, then it seems reasonable to have raised it before trial in a motion for summary judgment.

B. Summary Judgment in Equitable Actions

The Austin Court of Appeals has stated that summary judgment in a case governed by equitable principles presents even more potential difficulties than in the usual summary judgment case. *Fleetwood v. Med Center Bank*, 786 S.W.2d 550, 556 (Tex.App.–Austin 1990, writ denied). As stated, summary judgment may be granted only when the summary judgment evidence affirmatively shows that there is no genuine issue as to any material fact. *See, e.g. Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999) (on appeal of a favorable summary judgment, the movant still bears the burden of showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law). In a case governed by legal principles, the elements of the plaintiff's cause of action provide relatively well-defined guidelines for determining what is a "material fact." *Fleetwood,* 786 S.W.2d at 556. Consequently, the court need only review the summary judgment evidence and, on the basis of established rules of relevancy, decide if that evidence establishes the fact–or its absence–as a matter of law. *Id.*

However, in a case governed by equitable principles, there are no such clear guidelines for determining what is a material fact. *Id.* The main guiding principle is the prevention of an unfair or unjust result. *See, e.g. Johnson v. Cherry*, 726 S.W.2d 4, 8 (Tex. 1987) ("[t]he equitable power of the court exists to do fairness and is flexible and adaptable to particular exigencies, 'so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other,'" *quoting, Warren v. Osborne*, 154 S.W.2d 944, 946 (Tex.Civ.App.–Texarkana 1941, writ ref'd)). Thus, in an equitable action, the trial court must often take into consideration a myriad of circumstances and factors that would be immaterial in a legal action, resulting in an extraordinary burden on litigants in attempting to show – and courts in purporting to conclude – that there is no genuine issue as to any material fact. *Fleetwood,* 786 S.W.2d at 556.

Moreover, trial courts have a measure of discretion "in all cases governed by equitable principles." *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). According to the Third Court of Appeals, the concept of discretion is not altogether consistent with the concept of summary judgment, the purpose of which is to eliminate patently unmeritorious claims and untenable defenses. *Fleetwood,* 786 S.W.2d at 557. In the words of a noted Texas jurist:

> If there is a range of equitable discretion within the authority of the trial judge apart from his authority to find facts, reviewable only for abuse of discretion, the matters which may be so determined are more nearly analogous to fact inferences to be drawn from the entire record than to conclusions of law resulting from application of established rules to undisputed facts.

> Consequently, such discretion should not be exercised without development of the evidence at a full trial.... *Summary judgment is proper only when the summary-judgment proof shows that no question of equitable discretion exists.*

Reynolds-Penland Co. v. Hexter & Lobello, 567 S.W.2d 237, 245 (Tex.Civ.App.–Dallas 1978, writ dism'd by agr.) (Guittard, C.J., dissenting) (emphasis added). Justice Guittard's language seems to imply a rather different summary judgment standard in equitable actions than prevails in straight "legal" actions. Rather than no genuine issue of material fact, there should exist "no question of equitable discretion."

The point is that any party resisting a motion for summary judgment in an equitable bill of review action should remind the trial court that, pursuant to established case law in Texas, it should be even more cautious than usual before granting summary judgment. *See Fleetwood,* 786 S.W.2d at 557.

X. POST-JUDGMENT CONSIDERATIONS

Although a detailed treatment of the appellate process, even only as it concerns a bill of review, is beyond the scope of this article. Nonetheless, several post-judgment considerations deserve discussion.

A. Res Judicata

Without a doubt, res judicata applies to bill of review proceedings. *Rizk* , 603 S.W.2d at 779 (just as a bill of review may not be used when one neglects to urge a motion for new trial or appeal when he has time to do so, a bill of review may not be used as an additional remedy after one has timely filed a motion to reinstate and a motion for new trial and has made a timely but unsuccessful appeal); *see also Holloway v. Starnes*, 840 S.W.2d 14, 19 (Tex.App.–Dallas 1992, writ denied), *cert. denied,* 114 S.Ct. 93 (1993) (prior federal judgment barred subsequent bill of review filed in state court).

Joiner v. Vasquez, 632 S.W.2d 755 (Tex.App.–Dallas 1981, writ ref'd n.r.e.), *cert. denied*, 104 S.Ct. 422 (1983), presents an interesting example of the application of res judicata to bill of review proceedings. In *Joiner,* the father's parental rights were terminated in 1976. *Id.* at 756. Eight months later, the father filed his first bill of review. *Id.* The trial court heard evidence on the first bill of review and denied the relief sought the father on September 22, 1977. *Id.* The father did not appeal, but instead, filed a second bill of review on the same grounds which the court dismissed on a plea of res judicata. *Id.* Again, the father did not appeal. *Id.* In early 1980, the father filed his third bill of review, alleging the same grounds as in his first bill of review, and other grounds as well. *Id.* In particular, among other things, the father alleged in his third bill of review that citation by publication in the termination suit was improper because the officer's return did not show diligence in attempting personal service, that the appointed attorney ad litem did not provide effective representation, and that the judgment of September 22, 1977 denying his first bill of review, did not bar his present bill of review "because the defense of res judicata is not applicable to jurisdictional questions." *Id.* at 756-57.

In response to the third bill of review, the mother (an ex-wife) filed a plea of res judicata based on the judgment denying the first bill of review which the trial court sustained, thereby denying the third bill of review. *Id.* at 757.

On the father's (first) appeal of the denial of his (third) bill of review, the Dallas Court of Appeals held that the termination decree was not "void" because of defective service by publication in the sense that it

could be disregarded anywhere and at any time as the father contended. *Id.* The Dallas appellate court also held that the plea of res judicata was properly sustained because the judgment denying the first bill of review is conclusive on the issue of the trial court's jurisdiction in the termination suit. *Id.*

The father argued that he should not be bound by the judgment denying his first bill of review because he raised additional issues that were not raised in that proceeding, *i.e.,* the best interest of the children, which, according to the father, was the paramount consideration and had never been determined. *Id.* at 758. Although the Fifth Court of Appeals noted that the father's argument had a strong appeal, it held that such argument could not prevail against the established rules governing the finality of judgments because the assertion of additional grounds which, by the use of diligence, might have been tried in an earlier proceeding, did not avoid the bar of res judicata; otherwise, as the Dallas Court of Appeals commented, a resourceful lawyer could always allege an additional ground and litigation would never end. *Id.* at 758.

The Fifth Court of Appeals also could not accept the father's premise that the established rules governing the finality of judgments did not apply when the interests of minor children were at issue. *Id.* Rather, according to the Dallas appellate court, it applied to them with special force. *Id.*

On the father's motion for rehearing, the Dallas appellate court acknowledged that even though, under the circumstances, the juvenile court might have erred in the first bill of review (regarding the effectiveness of the service by publication), any such error could not avail the father in his third bill of review. *Id.* at 760. The father could have undertaken to prove defective service in his *first* bill of review, but the trial court declined to give him relief on that ground, and he failed to appeal that ruling. *Id.* Accordingly, although the termination decree may have been void for lack of jurisdiction over his person, the judgment in the first bill of review was not void since the father appeared and invoked the court's jurisdiction to determine whether it had jurisdiction of the termination action. *Id.* In other words, stated the Dallas Court of Appeals, the first bill of review judgment, though possibly erroneous, was valid in the jurisdictional sense, and the father's remedy was to appeal. *Id.* Rather than appeal, continued the Dallas appellate court, the father brought another bill of review on the same grounds, and, when relief was again denied, he brought a third, although he had never made any proper attack on the judgment in the first bill of review. *Id.* The Fifth Court of Appeals concluded by remarking that, if the father was unsuccessful again, he might have attempted a fourth, and so on, contending each time, as he did on the appeal of the third bill of review, that no binding judgment could be rendered until he was finally heard on the merits of the original termination action, and that was something the Dallas appellate court simply could not condone. *Id.*

B. Final Judgment in a Bill of Review

An appeal may be prosecuted only from a final judgment which disposes of all issues and parties in the case. *North East Indep. School Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966). In a bill of review, the final judgment should either deny any relief to the petitioner or grant the bill of review and set aside the former judgment, insofar as it is attacked, and substitute a new judgment which properly adjudicates the entire controversy. *Kessler*, 693 S.W.2d at 25. A bill of review which sets aside a prior judgment but does not dispose of the case on the merits is interlocutory and not appealable. *Jordan v. Jordan*, 907 S.W.2d 471, 472 (Tex. 1995); *see also, Edison*, 994 S.W.2d at 828 n.1 (when the trial court granted the petition for bill of review and vacated the default judgment, the trial court's judgment could not be appealed since a bill of review which sets aside a prior judgment but does not dispose of the case on

the merits is interlocutory and not appealable); *State v. Buentello*, 771 S.W.2d at 710 (when the trial court found in its judgment on bill of review that the parties' divorce decree should be set aside, it disposed of the first issue in a bill of review as mandated by *Baker,* but since the trial court did not address the next question of whether the ex-wife had met her burden of proving the elements of her underlying divorce action, division of property, and child support claim, the judgment did not dispose of the case on the merits, was not final, was not appealable, and therefore remained on the docket of the trial court). In such a situation, the appellate court must dismiss any appeal for want of jurisdiction since the judgment from which the appeal is taken is interlocutory; such dismissal is without prejudice to the right to proceed to a final disposition of the entire controversy. *Kessler*, 693 S.W.2d at 526.

In *Kessler,* the evidence adduced at the trial of the ex-wife's bill of review showed conclusively that the ex-husband, in the original divorce trial, fraudulently concealed a cash deposit which constituted community property, in the amount of $8,310.84; the evidence also established that the ex-wife was entitled to bill of review relief. 693 S.W.2d 526. Ultimately, the trial court awarded a judgment to the ex-wife against the ex-husband in the amount of $6,233.13. *Id.* at 524.

On appeal, the Corpus Christi Court of Appeals voiced its opinion that the trial judge apparently believed that the judgment in the bill of review action would be supplementary to the original judgment, and that the two judgments would be sufficient to equitably divide all of the community property acquired by the parties. *Id.* at 527. According to the Corpus Christi appellate court, the bill of review judgment did not expressly set aside either the property settlement agreement or the former judgment insofar as it divided the community property of the parties. The bill of review judgment was merely a personal judgment against the husband for the recovery of money. *Id.* But, a bill of review based on extrinsic fraud does not contemplate the rendition of a judgment which merely awards the petitioner money because of such fraud, but it contemplates a re-examination of the entire case and the rendition of a judgment which fairly and finally disposes of all issues raised in the original trial and in the bill of review itself. *Id.* at 526. Further, stated the Corpus Christi Court of Appeals, an existing judgment could not be set aside in a bill of review proceeding by implication. *Id*. at 527.

In other words, reiterated the Thirteenth Court of Appeals, in a bill of review proceeding, a judgment which is merely supplementary to the former judgment, without setting aside the prior judgment and rendering a final judgment on the merits of the controversy, is a nullity, and leaves the former judgment "standing undisturbed." *Id.* But that, continued the appellate court, cannot be done, since there is no law which permits a final judgment in an original proceeding to be supplemented by a subsequent judgment in a bill of review proceeding. *Id.* at 526. As a result, the Corpus Christi Court of Appeals dismissed the appeal for want of jurisdiction. *Id.* at 528.

The result, and analysis, in *Kessler* should be contrasted with the result and analysis in *Rathmell,* 732 S.W.2d 6. In *Rathmell,* after a trial of the ex-wife's bill of review, the trial court awarded the ex-wife a judgment against her ex-husband for $3,000,000.00. *Id.* at 10. The trial court's order also stated: "[a]s to all other matters, the previous divorce decree and property settlement agreement...remains in effect." *Id.*

On appeal, the ex-husband argued that the bill of review judgment did not set aside the divorce decree, that the earlier divorce decree remained in full force and effect, and that the bill of review judgment violated the prohibition against more than a single final judgment. *Id.* Understandably, the ex-

husband relied on *Kessler* in support of his argument. *Id.*

The Fourteenth Court of Appeals, however, distinguished *Kessler* by noting that in *Kessler,* the judgment did not refer in any way to the parties' prior divorce decree and property settlement agreement. *Id.* According to the Houston appellate court, the provision in the *Rathmell* judgment that provided "[a]s to all other matters, the previous divorce decree and property settlement agreement...remains in effect," when coupled with the money judgment in favor of the ex-wife, was equivalent to setting aside the divorce decree and property division under the property settlement agreement, and substituting therefor a new judgment in which each party was awarded the same properties as were awarded in the original decree and settlement agreement, and, in order to make the property division just and right, the ex-wife was awarded a $3,000,000 judgment against the ex-husband. *Id.* at 10-11. The Fourteenth Court of Appeals reasoned that since the original divorce decree and settlement agreement could have provided for just such a disposition of the parties' community property, there was no reason why the same result cannot be achieved in the bill of review judgment (unless, of course, the *Kessler* court was correct in holding that a judgment could not be set aside by implication in a bill of review). *Id.* at 11.

In conclusion, however, the Houston appellate court in *Rathmell* noted that, since the case had to be reversed and remanded for a new trial on other grounds, it would preferable that, in order to eliminate any question in regard to the propriety of the judgment, following a retrial (and assuming a similar result), the trial court's judgment should specifically set aside the original divorce decree and property division, and then specifically set forth the terms of the new property division even if those terms were identical with the terms set out in the original decree, plus any appropriate money judgment. *Id.*

C. Review by Mandamus, or Appeal?

May an interlocutory order granting a bill of review be reviewed by mandamus? Two courts of appeals have held that an erroneously granted bill of review is effectively a void order granting a new trial and an abuse of discretion that affords no adequate remedy at law. *See National Unity Ins. Co.*, 963 S.W.2d at 877; *Schnitzius v. Koons*, 813 S.W.2d 213, 218 (Tex.App.–Dallas 1991, orig. proceeding) (holding that if a trial court improperly grants a petition for bill of review and thereby effectively enters a void order granting an untimely motion for new trial, mandamus will lie).

Conversely, at least two courts of appeals have held that an interlocutory order granting a bill of review may not be reviewed by mandamus, but only by appeal of the eventual final judgment in the underlying case. *See Texas Mexican Ry. Co. v. Hunter*, 726 S.W.2d 616, 617-18 (Tex.App.–Corpus Christi 1987, orig. proceeding); *In re Moreno*, 4 S.W.3d 278, 280 (Tex.App.–Houston [14th Dist.] 1999, orig. proceeding).

In *Texas Mexican Ry. Co.*, the Corpus Christi Court of Appeals held that mandamus will not lie to review a ruling which can be reviewed on appeal. 726 S.W.2d at 618, *citing, Abor v. Black*, 695 S.W.2d 564, 566 (Tex. 1985), and *Wike v. Dagget*, 696 S.W.2d 79, 82 (Tex.App.–Houston [14th Dist.] 1985, no writ). In *Arbor,* the trial judge was called upon to decide a plea in abatement in which, the plaintiff argued, the defendants were attempting an unauthorized use of the declaratory judgment act (to declare their nonliability in the case); the plaintiff desired to have its subsequently refiled suit in another Texas county have priority. 695 S.W.2d at 567. The trial court denied the plea in abatement. *Id.* Upon the plaintiff's request

for the Texas Supreme Court to issue mandamus, the Texas Supreme Court held that the trial judge did not act in violation of a clear duty under the law, nor was the denial of the plea in abatement a clear abuse of discretion because the law in Texas was not settled at the time. *Id.* The Texas Supreme Court then added, "[f]urthermore, [the plaintiff] has a remedy by appeal to correct this incidental ruling [of the trial court]." In conclusion, the Texas Supreme Court stated: "we decline to grant mandamus relief here because there is no conflict of jurisdiction." *Id.* Consequently, it does not appear that the Texas Supreme Court's holding in *Arbor* was grounded on the adequate remedy by appeal issue.

In *Wike,* the father sought a writ of mandamus to compel the vacation of an order transferring a child custody action to the county of mother's residence. 696 S.W.2d at 80. The Fourteenth Court of Appeals held that, since the father was not given sufficient notice, the transfer order was voidable, but not void (the court properly had jurisdiction of the parties and the subject matter). *Id.* at 82. Consequently, the Houston appellate court held that "[m]andamus is therefore inappropriate for this reason." *Id.* Secondly, continued the Houston Fourteenth Court of Appeals, while the father did not have the right to an interlocutory appeal from the order, he did have the right to appeal the final judgment and have reviewed at that time the validity of the transfer order. *Id.* The Houston appellate court concluded by stating again: "[m]andamus is therefore inappropriate for this reason." *Id.*

In *In re Moreno,* the trial court "granted" a bill of review, but did not rule on the merits of the underlying lawsuit. 4 S.W.3d. at 280. The defendants first filed a notice appeal, but then filed a mandamus action, after which they withdrew their notice of appeal. *Id.* at n.1. The defendants complained that because the petitioner did not satisfy the requirements for relief by bill of review, the trial court erroneously granted relief, and thus, under *National Unity* and *Schnitzius*, the court's order granting the bill of review was void and mandamus was appropriate. *Id.*

The Houston Fourteenth Court of Appeals agreed that the order was interlocutory, and not appealable. *Id.* However, the Houston appellate court disagreed that mandamus was an appropriate remedy, noting the holding in *Texas Mexican Ry. Co. Id.* Without further analysis, the Fourteenth Court of Appeals concluded that *Texas Mexican Ry. Co.* was "the correct statement of the law," and denied mandamus relief. *Id.*

D. Writ of Prohibition

A writ of prohibition is properly issued to prevent an inferior court from entertaining a suit to relitigate controversies previously settled by the issuing court. *See, Sparenberg v. Lattimore*, 139 S.W.2d 77, 80 (Tex. 1940). In *Tice*, 767 S.W.2d at 702, the petitioner's bill of review alleged a conspiracy to suborn perjury, which the Texas Supreme Court held to be an allegation of intrinsic fraud. Since only extrinsic fraud could be the basis of a meritorious bill of review, the petition in *Tice* was insufficient. *Id.* The Texas Supreme Court then stated that "[w]here the movant's allegations are legally insufficient to warrant a bill of review, a writ of prohibition will issue." *Id.*

At the conclusion of the opinion, however, because it clearly appeared that the bill of review constituted an attempt on the part of the petitioner to relitigate the same issues which had already been litigated by the same parties, and which had already been decided by the Texas Supreme Court, and because, therefore, the bill of review would interfere with the its prior judgment, the Texas Supreme Court stated that "we hold that [the petitioner was] prohibited and enjoined from further prosecuting [the bill of review] suit."

Id. at 705; *see also*, *Kyles v. Anthony*, 720 S.W.2d 198, 199 (Tex.App.–Houston [14th Dist.] 1986, orig. proceeding) (when the defense in a petition for bill of review was an administrative order that the appellate court had already held invalid, the Fourteenth Court of Appeals prohibited the petitioner from prosecuting its bill of review since the bill of review simply attempted to relitigate issues previously settled by the appellate court).

Interestingly, in *Amanda,* in which the wife requested a writ of mandamus directed at the trial court directing it to vacate its refusal to sever a bill of review from other claims in the lawsuit, the Houston First Court of Appeals cited *Tice* for the proposition that when a bill of review's allegations are legally insufficient to warrant bill of review relief, "extraordinary relief is appropriate." 877 S.W.2d at 486-87. In addition, the Houston appellate court noted that, in *Tice,* the Texas Supreme Court issued a writ of prohibition, and not a writ of mandamus. *Id.* at n.6. It is probably realistic to expect that the broad statement in *Amanda* (*i.e.,* when a bill of review's allegations are legally insufficient, extraordinary relief is appropriate) will appear in the next reported appellate case in which the erroneous granting of a bill of review is reviewed by mandamus.