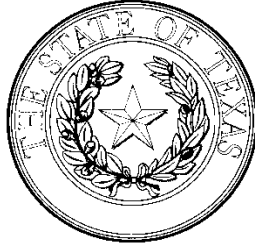


Opinion issued September 23, 2010.



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-09-00579-CV

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**IN THE INTEREST OF B.G., A CHILD**

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**On Appeal from the 308th District Court  
Harris County, Texas  
Trial Court Case No. 2007-74054**

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**MEMORANDUM OPINION**

Appellant, Eduardo S. Gutarra, appeals the trial court's dismissal of his petition for an equitable bill of review following the termination of his parental rights to his daughter, B.G. Eduardo asks that this Court vacate and set aside the trial court's dismissal, and he requests a new hearing on his petition for equitable relief.

We affirm.

### **Background**

Eduardo filed his petition for a bill or review in connection with a termination proceeding brought by the appellee, his ex-wife Adriana V. Thames. In April 2005, Adriana filed an original petition to terminate Eduardo's parental rights to B.G. and to create a parent-child relationship between B.G. and appellee's husband, Phillip Thames. At the June 25, 2007 bench trial on the termination, Eduardo, represented by counsel, contested Adriana's claims of voluntary abandonment, contending that he was unable to see his daughter because Adriana had secreted the child. On August 24, 2007, the trial court found in favor of Adriana and issued an order terminating Eduardo's parental rights. The trial court found that Eduardo "voluntarily left his child in the possession of another" and "failed to support the child in accordance with his ability" for at least one year prior to Adriana's filing of the termination suit. The trial court signed an order granting adoption on August 31, 2007, establishing a parent-child relationship between B.G. and Phillip Thames.

On November 15, 2007, Eduardo filed in this Court a notice of appeal of the termination order; he did not appeal the adoption order. *In re B.H.G.*, No. 01-07-01001-CV, 2008 WL 4837497, at \*1 (Tex. App.—Houston [1st Dist.] Nov. 6, 2008, no pet.) (mem. op.). Subsequently, Adriana filed a motion to dismiss the

appeal contending that Eduardo’s notice of appeal was untimely and, thus, we lacked subject matter jurisdiction. *Id.* Eduardo conceded that the notice of appeal was untimely, but he opposed Adriana’s motion to dismiss on the ground that his appellate counsel, through no fault of Eduardo’s, failed to timely perfect the appeal.<sup>1</sup> *Id.* On November 6, 2008, this Court dismissed Eduardo’s appeal for lack of subject matter jurisdiction. *Id.*

On December 6, 2007, during the pendency of his direct appeal, Eduardo filed a petition for an equitable bill of review in the trial court seeking to set aside and rescind the August 24, 2007 termination order. In his petition, Eduardo again alleged that (1) Adriana had fraudulently secreted his daughter and prevented him from visiting the child; (2) he did not voluntarily abandon his child; and (3) he paid child support for at least one year prior to the termination suit. He also alleged that “the court appointed amicus attorney . . . did not visit with Eduardo Gutarra and the child together, nor did she otherwise execute her duties under Texas Family

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<sup>1</sup> In an accelerated appeal, absent a motion to extend time under Texas Rule of Civil Procedure 26.3, “the deadline for filing a notice of appeal is strictly set at twenty days after the judgment is signed.” *In re K.A.F.*, 160 S.W.3d 923, 927 (Tex. 2005); *see* TEX. R. APP. P. 26.1(b). Because an appeal from a termination proceeding is accelerated, a notice of appeal is due 20 days after the decree is signed. TEX. R. APP. P. 26.1(b); *see* TEX. FAM. CODE ANN. § 109.002(a) (Vernon 2008); *see, e.g., In re J.A.G.*, 92 S.W.3d 539, 539–40 (Tex. App.—Amarillo 2002, no pet.) (dismissing appeal because notice of appeal was not filed within 20 days after termination order was signed).

Code section 107.003”;<sup>2</sup> that his trial counsel “did not adequately represent him at trial and made numerous, significant errors”; and that his appellate counsel, through no fault of Eduardo’s, did not timely file a notice of appeal.

Eduardo’s petition for bill of review stated generally that his claims are based on the fact that

(a) he had meritorious claim(s) or defense(s) in the underlying termination action; (b) he was prevented from raising these claims or defenses by . . . fraud, accident or wrongful acts and omissions through no fault of his own; and ([c]) the acts and omissions complained of were unmixed with any negligence on the part of Eduardo Gutarra[,] who exercised due diligence in attempting to present any and all known issues.

Eduardo also alleged in the alternative “that an ‘official mistake’ occurred which prevented him from raising certain material claims and defenses, and from presenting key evidence earlier.” Although the petition was accompanied by Eduardo’s sworn statement that the facts alleged in the petition were true, he did not plead specific facts or outline specific claims or defenses that he was prevented from presenting. Nor did he file or present any evidentiary materials to support the allegations in his petition.

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<sup>2</sup> Family Code section 107.003 lists the duties of “an amicus attorney appointed to assist the court,” including conducting various interviews, “investigat[ing] the facts of the case to the extent the attorney considers appropriate,” obtaining “relevant” records, and “review[ing] and sign[ing], or declin[ing] to sign, a proposed or agreed order affecting the child.” TEX. FAM. CODE ANN. § 107.003 (Vernon 2008).

Adriana filed a motion to dismiss Eduardo’s petition for a bill of review, contending that his petition did not allege, with particularity, facts necessary to support bill of review relief. Specifically, Adriana contended that the petition: (1) did not allege or provide prima facie proof of a meritorious ground of appeal, (2) did not allege extrinsic fraud on her part, (3) admitted that Eduardo was responsible for the untimely appeal due to the negligence or mistake of his counsel, and (4) did not plead or provide prima facie proof that official mistake caused Eduardo’s untimely appeal. Eduardo did not file a response to Adriana’s motion to dismiss.

The trial court held a hearing on Eduardo’s bill of review, in which Eduardo’s appellate counsel alleged that the trial court made numerous errors during the termination proceeding. She also confirmed that the termination was granted after a trial at which Eduardo participated and that Eduardo attempted to appeal but was prevented from doing so because one of her associates failed to perfect the appeal. Adriana’s attorney interjected, “[Eduardo] appealed afterwards. [He] lost.” The trial court asked, “What’s the equity, unmixed with fault on your client[’s part]?” Eduardo’s counsel responded by restating Eduardo’s allegation that Adriana moved B.G. without letting Eduardo know. No evidence was presented during the hearing.

The trial court found that the petition was inadequate and, accordingly, granted Adriana's motion to dismiss. The trial court's order did not, however, state the grounds on which it relied in dismissing Eduardo's petition. Eduardo now appeals the trial court's dismissal of his petition for a bill of review.

### **Standard of Review**

A bill of review is an equitable action brought by a party to a prior suit who seeks to set aside a judgment that can no longer be challenged by a motion for new trial or appeal. *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (citing *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979)). Upon the expiration of a trial court's plenary power, a judgment cannot be set aside by the trial court except by bill of review, filed within the time allowed by law.<sup>3</sup> TEX. R. CIV. P. 329b(f); *State v. 1985 Chevrolet Pickup Truck*, 778 S.W.2d 463, 464 (Tex. 1989).

The grounds upon which a bill of review can be obtained are narrow because the procedure conflicts with the fundamental policy that judgments must, at some point, become final. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). A mere injustice is not sufficient to justify relief. *See Crouch v. McGaw*, 138 S.W.2d 94, 96 (Tex. 1940); *Nguyen v. Intertex, Inc.*, 93 S.W.3d 288, 293 (Tex.

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<sup>3</sup> A party to a termination of parental rights proceeding must seek a bill of review within the six-month statute of limitations contemplated by Family Code section 161.211. TEX. FAM. CODE ANN. § 161.211 (Vernon 2008); *In re L.N.M.*, 182 S.W.3d 470, 473–74 (Tex. App.—Dallas 2006, no pet.). Eduardo timely filed his petition for a bill of review.

App.—Houston [14th Dist.] 2002, no pet.). Generally, a party seeking a bill of review after participating in the trial court proceedings must plead and prove: (1) a meritorious ground for new trial or appeal (2) which the party was prevented from making by accident, fraud, or wrongful conduct of the opposing party, or official mistake, (3) unmixed with any fault or negligence of his own. *See Caldwell*, 154 S.W.3d at 96; *Thompson v. Ballard*, 149 S.W.3d 161, 164 (Tex. App.—Tyler 2004, no pet.). A petitioner by bill of review must allege, with particularity, sworn facts sufficient to constitute a meritorious ground of appeal or a defense and must present prima facie proof to support the contention at a pretrial hearing. *See Caldwell*, 154 S.W.3d at 97; *Baker*, 582 S.W.2d at 408.

A meritorious ground of appeal is one that, had it been presented to the appellate court, might, and probably would, have caused the judgment to be reversed. *Petro-Chem. Transp., Inc. v. Carroll*, 514 S.W.2d 240, 245 (Tex. 1974); *Thompson*, 149 S.W.3d at 164–65 (holding that meritorious ground of appeal may be meritorious defense to underlying action or meritorious ground for modification of judgment). A prima facie meritorious defense is established if the movant's defense is not barred as a matter of law and he would be entitled to judgment on retrial if no contrary evidence were offered. *Baker*, 582 S.W.2d at 408–09. This is a question of law for the trial court. *Id.* at 409.

If the trial court concludes that a petitioner has not shown a meritorious ground of appeal or defense, it may dismiss the petition for bill of review without conducting a trial. *Id.* Prima facie proof does not have to consist of live testimony but may be comprised of “documents, answers to interrogatories, admissions, and affidavits on file along with such other evidence that the trial court may receive in its discretion.” *Id.*; *Thompson*, 149 S.W.3d at 165.

We review the trial court’s decision to deny a bill of review for an abuse of discretion and indulge every presumption in favor of the trial court’s ruling. *Davis v. Smith*, 227 S.W.3d 299, 302 (Tex. App.—Houston [1st Dist.] 2007, no pet.). A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner or without reference to guiding rules and principles. *Id.* When, as here, the trial court did not file findings of fact and conclusions of law, the judgment will be sustained on any legal theory supported by the evidence. *Id.*; *Nguyen*, 93 S.W.3d at 293.

### **Analysis**

On appeal, Eduardo asks that we vacate and set aside the trial court’s order dismissing his bill of review. Eduardo argues only that the trial court’s dismissal was wrongfully based on Adriana’s attorney’s representation that Eduardo had appealed the underlying termination proceeding and had lost. Eduardo asserts that he was not able to pursue his direct appeal of the termination because of his



appellate attorney's error in failing to timely perfect his appeal.<sup>4</sup> However, the trial court's order does not state the ground or grounds upon which it relied in dismissing the bill of review, nor did it file any findings of fact or conclusions of law. Thus, we examine whether any legal theory supports the dismissal of Eduardo's bill of review. *See Nguyen*, 93 S.W.3d at 293.

Eduardo's petition failed to plead with particularity and prove a meritorious ground for appeal or defense that he was prevented from presenting at trial by official mistake or accident, fraud, or the wrongful conduct of Adriana, the opposing party. *See Caldwell*, 154 S.W.3d at 96–97. Although Eduardo's petition states that Adriana fraudulently secreted his daughter and prevented him from visiting the child, that he did not voluntarily abandon his child, and that he paid child support for at least one year prior to the termination suit, it does not allege that he was prevented from presenting these arguments to the trial court during the

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<sup>4</sup> Eduardo also requested in his brief that we “order the immediate return of his child and an immediate restoration of his parental rights”; that we vacate the 2007 termination order; that we “suspend all judgments and orders pending the resolution of this appeal; that we grant him a “new jury trial on the merits”; and that we reverse “all punitive orders in place against him . . . including a new order of full restitution for all fines and attorney's fees and costs” that he paid to Adriana. However, a bill of review is an independent, equitable proceeding to set aside a judgment that is not void on the face of the record but is no longer appealable or subject to a motion for new trial. *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). Thus, “a bill of review is a separate proceeding from the underlying suit.” *Ross v. Nat'l Ctr. for the Employment of the Disabled*, 197 S.W.3d 795, 798 (Tex. 2006). Our jurisdiction in this case is limited to reviewing the judgment of the trial court dismissing Eduardo's petition for bill of review; therefore, we decline to consider Eduardo's complaints arising from the underlying termination order.

termination proceedings. Eduardo’s petition also generally alleges that the amicus attorney “did not visit with [him] and the child together” or “otherwise execute her duties” and that his trial counsel “did not adequately represent him at trial and made numerous, significant errors.” However, these general claims are not specific enough to sufficiently establish a meritorious ground for appeal or defense, nor did Eduardo present any proof in support of these claims. *See id.* (holding that petitioner by bill of review must allege, with particularity, sworn facts sufficient to constitute meritorious ground of appeal or defense and must present prima facie proof to support contention at pretrial hearing); *see also Baker*, 582 S.W.2d at 409 (stating that prima facie proof may be comprised of “documents, answers to interrogatories, admissions, and affidavits on file along with such other evidence that the trial court may receive in its discretion”).

Eduardo’s petition failed to establish a meritorious ground of appeal or defense. *See Caldwell*, 154 S.W.3d at 96. Accordingly, the trial court did not abuse its discretion in dismissing the bill of review. *See Baker*, 582 S.W.2d at 409 (holding that trial court may dismiss petition for bill of review if it concludes that meritorious ground of appeal or defense has not been shown); *see also Nguyen*, 93 S.W.3d at 293 (holding that when trial court does not file findings of fact or conclusions of law, judgment will be sustained on any legal theory supported by the evidence).

## **Conclusion**

We affirm the judgment of the trial court.

Evelyn V. Keyes  
Justice

Panel consists of Justices Keyes, Higley, Bland.