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LAW REVIEW

"THE OFTEN-OVERLOOKED APPEAL: RESTRICTED APPEALS IN TEXAS"

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I. INTRODUCTION

Suppose you do not attend a hearing in your case, and the trial court signs a final judgment that is adverse to you. A few days later, you learn of the judgment and want to do something about it. At this point, you have a few options, including filing a motion for a new trial or an appeal. But what if it is more than 30 days after the trial judge signed the order? Are you simply unable to do anything about it? Not necessarily. In Texas, one often-overlooked mechanism for attacking an adverse judgment when you did not appear at the hearing is to file a restricted appeal. This article details the requirements you must meet to file and prevail on a restricted appeal and provides discussion of recent case law on the requirements for restricted appeals.

II. REQUIREMENTS OF RESTRICTED APPEALS

Texas Rule of Appellate Procedure 30 generally provides the requirements for a restricted appeal. To prevail in a restricted appeal, a party must show four

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requirements:

> (1) it filed the notice of restricted appeal within six months after the judgment is signed; (2) it was a party to the underlying lawsuit; (3) it did not participate in the hearing that resulted in the judgment complained of and did not timely file any post-judgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent on the face of the record.[1]

Importantly, the appellant bears the burden of establishing all four prongs of a restricted appeal at the court of appeals; if the appellant does not establish all four prongs, then the appellate court has no jurisdiction.[2] The appellate court may only review the face of the record in a restricted appeal, which includes "all the papers that were before the trial court at the time it rendered judgment."[3] The appellate court may not consider extrinsic evidence.[4] Additionally, there is no equitable component to a restricted appeal; there is no requirement that an appellant show that it was diligent or without negligence in order to bring a restricted appeal.[5] Thus, a party that had notice of the hearing but did not attend it is not barred from bringing a restricted appeal.[6]

III. DID NOT PARTICIPATE IN THE HEARING

Appellate courts liberally construe the non-participation element in favor of an appellant's right to prosecute a restricted appeal.[7] Clearly, an appellant who timely files a post-judgment motion after the order is signed—such as a motion for new trial[8]—or a request for findings of fact and conclusions of law is not entitled to a restricted appeal.[9] Although, if a post-judgment motion is untimely filed after the order is signed, it does not count for purposes of a restricted appeal.[10] If a post-judgment motion extends the amount of time the appellant has to file an ordinary appeal, it is considered a timely motion for purposes of Texas Rule of Appellate

[1] Alexander v. Lynda's Boutique, 134 S.W.3d 845, 848 (Tex. 2004).
[2] Ex parte E.M.P., 572 S.W.3d 361, 363 (Tex. App.—Amarillo 2019, no pet.).
[3] *Id.* (quoting Ex parte Gomez, No. 07-14-00206-CV, 2016 WL 1274989, at *1 (Tex. App.—Amarillo Mar. 30, 2016, no pet.) (mem. op.)).
[4] *E.M.P.*, 572 S.W.3d at 363.
[5] Tex. Dep't of Pub. Safety v. J.W.M., No. 03-17-00792-CV, 2018 WL 6519696, at *2 (Tex. App.—Austin Dec. 12, 2018, no pet.) (mem. op.) (citing Texaco, Inc. v. Central Power and Light Co., 925 S.W.2d 586, 590 (Tex. 1996).
[6] *Id.*
[7] Pike-Grant v. Grant, 447 S.W.3d 884, 886 (Tex. 2014) (per curiam).
[8] Chartway Fed. Credit Union v. Gleason, No. 01-03-00286-CV, 2003 WL 21299978, at *1 (Tex. App.—Houston [1st Dist.] June 5, 2003, no pet.) (per curiam) (mem. op.).
[9] *Lynda's Boutique*, 134 S.W.3d at 848.
[10] *See* Patricia Gonzalez v. Perez, No. 08-18-00206-CV, 2019 WL 3001521, at *2 (Tex. App.—El Paso July 10, 2019, no pet.).

Procedure 30.[11] Additionally, filing an answer, even when the trial court signs an order based only on the pleadings, does not count as participation.[12]

But how does an appellant show that they were not at the hearing? Again, look to the face of the record. If the record contains a recitation as to which parties appeared at a hearing, it can be used to demonstrate an appellant did not participate.[13] This can include the reporter's record, as that is part of the record in a restricted appeal.[14] Another way to establish non-participation may include whether appellant's counsel signed the order.[15] For example, in *Ex parte E.H.*, the Fort Worth Court of Appeals held that the appellant met the non-participation element, noting that: (1) "only [appellee's] counsel signed the order," and (2) "[n]o signature spaces were provided for any of the remaining agencies," including the appellant.[16] Although the court in *E.H.* noted these two facts, it based its conclusion that the appellant did not participate in the hearing on (1) the fact that the order was seven pages long, but the notification of a signed order faxed to the appellant was only two pages long; (2) the notification incorrectly stated the date the trial court signed the order; and, (3) the second fax receipt from the district clerk on the last day the appellant could have timely filed a post-judgment motion showed that something was faxed to the appellant, but it was not clear what was faxed to them.[17] However, the court seemed to indicate that the facts that only the appellee's counsel signed the order and there were no remaining signature spaces in the order, including for the appellant, could be considered in determining whether the appellant participated in the hearing.[18]

IV. ERROR ON THE FACE OF THE RECORD

Whether error is apparent on the face of the record is largely self-explanatory, but it is worth discussing a couple of points of error that are common to restricted appeals. The first is when an appellant complains that it did not receive notice of the hearing. Unlike in traditional appeals, in which the appellate court makes all presumptions necessary to support a judgment, in a restricted appeal an appellate court will not presume valid issuance, service, nor return of citation when examining a judgment.[19] Thus, absent a showing that the appellant waived service, there must be an affirmative showing on the face of the record that the appellant

[11] Hollis v. Hollis, No. 12-09-00402-CV, 2010 WL 3440330, at *2 (Tex. App.—Tyler Sept. 1, 2010, no pet.) (mem. op.).
[12] *E.M.P.*, 572 S.W.3d at 364.
[13] *See* Ex parte V.T.C., No. 04-18-00455-CV, 2019 WL 3805492, at *2 (Tex. App.—San Antonio Aug. 14, 2019, no pet.) (mem. op.).
[14] In re K.M., 401 S.W.3d 864, 866 (Tex. App.—Houston [14th Dist.] 2013, no pet.).
[15] Ex parte E.H., 582 S.W.3d 445, 448 (Tex. App.—Fort Worth, pet. granted).
[16] *Id.*
[17] *Id.* at 449.
[18] *Id.* at 448.
[19] Primate Constr., Inc. v. Silver, 884 S.W.2d 151, 152 (Tex. 1994).

was served with process, aside from recitals in the judgment.[20] Put another way, a mere statement in the judgment that the appellant was served with process is not enough.[21] The second common point of error in a restricted appeal is the absence of a reporter's record when the appellant raises a sufficiency-of-the-evidence argument. Unlike in a traditional appeal in which a party bears the burden to object to a court reporter's failure to record the proceedings, in a restricted appeal, a party may show error on the face of the record if there was no reporter's record.[22] This is because, without a reporter's record, the appellate court cannot know what evidence, if any, was introduced at the hearing.[23] However, the appellant must complain about the lack of a reporter's record on appeal in order to successfully argue there was error due to the lack of a reporter's record.[24]

V. TIMELINESS

Restricted appeals allow parties to appeal adverse judgments up to six months after an order is signed.[25] When computing the deadline to file a restricted appeal, it is important to remember to calculate months, not days. Six months means six calendar months, not a certain number of days.[26] Thus, a party that files its notice of appeal 181 days after an order is signed, but within six calendar months, has timely filed an appeal.[27]

VI. PARTY TO THE UNDERLYING LAWSUIT

An appellant can establish that it was a party to the underlying lawsuit if it asserts such in its briefing and the appellee does not dispute that fact.[28] An appellant may also establish that it was a party if it was named in the pleadings at the trial court,[29] or if it is a party by statute.[30]

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[20] *K.M.*, 401 S.W.3d at 866.
[21] *See id.*
[22] *See, e.g.*, Ex parte Ruiz, No. 04-11-00808-CV, 2012 WL 2834898, at *1 (Tex. App.—San Antonio July 11, 2012, no pet.) (mem. op.).
[23] *Id.*
[24] *Id.*; *see also* Tex. Dep't of Pub. Safety v. Cantu, No. 04-01-00210-CV, 2002 WL 1021649, at *1 (Tex. App.—San Antonio May 22, 2002, no pet.) (not designated for publication) (holding there was no error on the face of the record when the appellant complained of insufficient evidence in a restricted appeal but did not complain of the lack of a reporter's record on appeal).
[25] Tex. R. App. P. 26.1(c).
[26] Gulf Cas. Co. v. Garner, 48 S.W.2d 746, 747 (Tex. Civ. App.—El Paso 1932, writ ref'd).
[27] *See, e.g.*, Ex parte K.K., No. 02-17-00158-CV, 2018 WL 1324696, at *2 (Tex. App.—Fort Worth Mar. 15, 2018, no pet.) (mem. op.) (holding that a party that filed a restricted appeal on May 3, 2017, when the order was signed November 3, 2016, timely filed the appeal, even though more than 180 days had passed).
[28] *Id.*
[29] Ex parte F.T.K., No. 13-16-00535-CV, 2018 WL 2440545, at *2 (Tex. App.—Waco May 31, 2018, no pet.) (mem. op.).
[30] *See, e.g.*, In re Expunction of M.T., 495 S.W.3d 617, 621 (Tex. App.—El Paso 2016, no pet.) (holding that county attorney was "considered a party entitled to appeal [an] expunction order" because it was named in the order as an entity that may have records subject to expunction and that

VII. CONCLUSION

Restricted appeals are an often-overlooked mechanism that can be used to attack an adverse judgment in certain circumstances. Although the circumstances in which a party can successfully bring a restricted appeal are narrow, such an appeal can be a very useful tool when used properly. If an appellant can show that: (1) it filed its notice of restricted appeal within six months after the trial court signed the order; (2) that it was a party to the underlying lawsuit; and, (3) that it did not participate in the hearing below, then the appellate court will consider whether there is error on the face of the record. If the appellant can show that there is error on the face of the record, the appellant will prevail in its appeal.

"[a]ll agencies that may have records a petitioner wants expunged are entitled to notice and to be represented by counsel at an expunction hearing" pursuant to statute).