
No. 09-0411

In the Supreme Court of Texas

**IN THE GUARDIANSHIP OF RAQUEL CANTÚ DE VILLARREAL,
AN INCAPACITATED PERSON**

*Interlocutory Appeal of Temporary Injunction
from the Court of Appeals for the Thirteenth District of Texas
Court of Appeals No. 13-08-00408-CV*

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PETITIONERS' BRIEF ON THE MERITS

TO THE HONORABLE SUPREME COURT OF TEXAS:

Two issues of first impression are presented by this appeal:

- (i) Do the Texas Rules of Civil Procedure that purport to govern “all temporary injunctions” apply to an order that is issued post judgment but commands action that is in addition to and different from that required by the judgment?
- (ii) May a Texas court issue an injunction that commands a party to obtain funds belonging to someone who is not a party to the litigation and deposit those funds in a bank account?

These issues arise in the context of an ongoing guardianship proceeding in which the trial court adopted as its judgment the settlement agreement of the ward’s seven adult children. One of the provisions of that agreement – and now judgment – provides that the ward’s children will obtain funds belonging to a Mexican corporation (of which the ward owns 99%) and deposit them into a trust account for the ward’s benefit. However, at the

request of one of the ward's children – the Respondent in this proceeding – the trial court issued an order that requires other of the ward's children – Petitioners – to obtain the Mexican corporation's funds and deposit them into a bank account to be controlled by two of the children. That order (i) granted an application that was not verified (ii) after a hearing at which the applicant did not prove a probable right to recover on a cause of action and (iii) does not require the applicant to post a bond. And that order was followed by writs of attachment that command Petitioners' arrest unless each posts a \$1 million bond. Petitioners now find themselves in a classic Catch-22: Either they comply with the judgment by committing the offense of stealing the Mexican corporation's money; or they do not commit that offense and instead continue to violate the court's order.

The procedural requirements for issuing a temporary injunction are mandatory, as this Court has so often held. And, as this case demonstrates, they are mandatory not for the sake of procedure but to protect the substantive rights of those sought to be enjoined. Because none of those “procedural niceties” was followed here, the substantive rights of Petitioners, their mother, and the Mexican corporation were trampled. Only this Court's intervention can command compliance with its mandatory procedures and restore justice.

STATEMENT OF THE CASE

This interlocutory appeal challenges a temporary injunction signed by the Honorable Laura Betancourt, presiding judge of County Court at Law No. 2 of Cameron County, Texas. The injunction was affirmed by the Court of Appeals for the Thirteenth District of Texas in a memorandum opinion authored by Justice Rodriguez and joined by Chief Justice Valdez and Justice Benavides. *In re Guardianship of Raquel Cantú de Villarreal*, No. 13-08-00408-CV,

2009 WL 888467 (Tex. App.—Corpus Christi–Edinburg, Apr. 2, 2009, pet. filed) (mem. op.). (Tab 1.)

STATEMENT OF JURISDICTION

Conflicts Jurisdiction — This Court has jurisdiction to review a temporary injunction when the court of appeals’ decision conflicts with that of another court of appeals or this Court. See *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 202 (Tex. 2002) (citing TEX. GOV’T CODE § 22.225(c)). Here, the court of appeals’ holding that Rules 682 and 684¹ do not apply to a temporary injunction conflicts with numerous holdings of this Court and other courts of appeals that the failure to comply with the “mandatory” procedures in Rules 682 and 684 renders a temporary injunction void. See, e.g., *Qwest Commc’n Corp. v. AT&T Corp.*, 24 S.W.3d 334, 337 (Tex. 2000) (per curiam); *In re Garza*, 126 S.W.3d 268, 273 (Tex. App.—San Antonio 2003, orig. proceeding).

Important Issue of First Impression — The Court should exercise its jurisdiction to review the court of appeals’ decision because it raises important questions of law involving issues of first impression for this Court. See TEX. GOV’T CODE § 22.001(a)(6). Chief among these is whether the mandatory procedures in Rules 682 and 684 for granting a temporary injunction apply to a temporary injunction purportedly issued to enforce a previous order. The court of appeals held they do not. *Villarreal*, Tab 2 at *4 (citing *Roosth v. Roosth*, 889 S.W.2d 445, 460 (Tex. App.—Houston [14th Dist.] 1994, writ denied)). However, in *Roosth*, the injunction was issued pursuant to the turnover statute to enforce a final judgment rendered after a trial on the merits, unlike here. And nothing in *Roosth* suggests that a court

¹ All rule references are to the Texas Rules of Civil Procedure unless otherwise noted.

may use a post-judgment injunction to require a party to turn over property that he does not own and that is not subject to his control, as the court did here.² Indeed, this case demonstrates that the *procedural* requirements in Rules 682-84 for the issuance of a temporary injunction, whenever issued, are mandatory to ensure that *substantive* rights are not trampled. This Court’s intervention is thus required to ensure that lower courts do not use “post-judgment enforcement orders,” signed without regard for mandatory procedural requirements, to deprive parties – and non-parties – of important substantive rights.

ISSUES PRESENTED

The court of appeals’ opinion affirming the temporary injunction and the order for writs of attachment raises the following important issues:

1. The statutory requirements to establish a guardianship are mandatory and jurisdictional. *In re Mask*, 198 S.W.3d 231, 234-35 (Tex. App.—San Antonio 2003, orig. proceeding). If a trial court fails to comply with those requirements, it lacks jurisdiction over the guardianship proceeding and all subsequent orders are void. *See id.* at 235.

Was the trial court’s jurisdiction over the guardianship proceeding ever properly invoked through compliance with the Probate Code’s mandatory requirements?

*If not, are the temporary injunction and order for writs of attachment void?*³

² *See Roosth*, 889 S.W.2d at 458 (noting that turnover order to enforce money judgment for attorney’s fees in divorce action required judgment debtor to turn over property listed on his previously filed inventory); *see also* TEX. CIV. PRAC. & REM. CODE § 31.002(b) (turnover order may reach only “property that is in debtor’s possession or is subject to debtor’s control”); *Resolution Trust Corp. v. Smith*, 53 F.3d 72, 78-79 (5th Cir. 1995) (holding that turnover statute cannot be used to determine substantive rights of party to litigation or property rights of third parties).

³ These issues are before the Court and briefed in a related case, *In re Consuelo Villarreal Cantú*, No.09-0441. Granting the petition in that case will moot this appeal.

2. The Texas Rules of Civil Procedure require a motion seeking injunctive relief to be verified and a temporary injunction to set a bond. *See* TEX. R. CIV. P. 682-84. These procedural requirements for granting a temporary injunction are mandatory. *E.g., Qwest*, 24 S.W.3d at 337. A temporary injunction that does not meet those requirements is void. *Id.* Additionally, if the evidence fails to establish a cause of action upon which the applicant has a probable right to recover, the temporary injunction may not stand. *Millwrights Local Union No. 2484 v. Rust Eng'g Co.*, 433 S.W.2d 683, 687 (Tex. 1968).

May a trial court enforce orders signed in an ongoing guardianship proceeding by granting a temporary injunction based upon an unverified motion, without hearing evidence, and without setting a bond?

If not, is the temporary injunction void?

3. A contempt proceeding must be initiated by a sworn affidavit and supported by evidence that a person subject to the injunction has disobeyed it. TEX. R. CIV. P. 692. When a temporary injunction is on interlocutory appeal, “only the appellate court in which the appeal is pending may enforce the order.” TEX. R. APP. P. 29.4.

May a trial court enforce a temporary injunction that is on appeal by signing an order for writs of attachment based upon a motion for contempt that is not verified and that is not supported by evidence admitted at the contempt hearing?

If not, is the order for writs of attachment void?

STATEMENT OF FACTS

The relevant facts – those that are “pertinent to the issues or points presented” in the Petition, *see* TEX. R. APP. P. 38.1(f) – are conclusively established by orders and other documents in the record:

1. Raquel files application for guardianship.

Raquel Villarreal Cantú (“Raquel”) initiated this proceeding by filing an application to appoint a temporary guardian to care for her mother, Raquel Villarreal Cantú (“Doña Raquel”).⁴ (*See* 1 CR 2-10.) However, the proceeding has become a protracted effort to divide a wide array of assets belonging to Doña Raquel, as well as a Mexican corporation in which she owns a controlling interest, among her seven adult children. (*See* Tab 4.) Doña Raquel’s eldest son, Ignacio, and three of his siblings – Consuelo, Martha, and Fernando – are Petitioners. Raquel is Respondent. Aligned with Raquel are the remaining two siblings, Marcelo and Carlos. Collectively, the seven children will be referred to as the Children.

2. The Children’s Settlement Agreement is adopted as the court’s judgment in the February 14 Order.

In an effort to resolve their differences, the Children engaged in mediation, which culminated in an order signed February 14 (“the February 14 Order”) approving the Children’s “Irrevocable Family Settlement Agreement, Assignment and Release, and Rule 11 Agreement.” (Tabs 4-5.) The February 14 Order finds that Doña Raquel is an incapacitated person and, in accordance with the Settlement Agreement, appoints a

⁴ The trial court granted the application and appointed Raquel as her mother’s temporary guardian without first complying with the Probate Code’s mandatory notice and hearing requirements, as more fully discussed in Relator’s brief on the merits in No. 09-0441, styled *In re Consuelo Villarreal Cantú*. At a minimum, the Court should hold this Petition pending further consideration of the Petition in No. 09-0441.

permanent guardian of her person. (Tab 5 at 2, 5.) The order does not appoint a permanent guardian of the estate because the court found that Doña Raquel had no estate in Texas. (*Id.* at 7.).

3. The June 11 Temporary Injunction

Peace did not ensue, in large measure because the Settlement Agreement (and by extension, the February 14 Order) goes far beyond agreeing to establish a guardian of the person. (*See* Tab 4, ¶ 14-22.) Although Doña Raquel was (and is) still very much alive, the Settlement Agreement creates a “hotchpotch”⁵ to be divided among the Children and requires that this hotchpotch be funded with, among other things, all of Doña Raquel’s shares in a Mexican corporation, San Pedro Impulsora de Inmuebles Espiales S.A. de CV., and all of San Pedro Impulsora’s funds on deposit at two Texas banks, whether in the name of Doña Raquel, Raquel, or San Pedro Impulsora, or held by the temporary administrator of the guardianship estate.⁶ (*See id.*) The Children also purported to agree that Doña Raquel’s estate included 34 million pesos being held in the registry of a Mexican court on behalf of San Pedro Impulsora and further agreed to “instruct their attorneys to take all necessary steps to have these funds released and delivered to [a Mexican trust to be created for Doña Raquel’s benefit].” (*See id.*, ¶ 14.)

Shortly after the February 14 Order was signed, on April 23, Raquel’s Mexican attorney, Miguel Angel Abramo Martinez, “released [the] injunction holding the 34 million

⁵ In this context, a “hotchpotch” is “the blending of properties to secure equality of division.” *See* Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 408 (2d ed. 1995).

⁶ Contrary to the assumption of ownership implicit in these statements in the Settlement Agreement, Ignacio has consistently testified that all of the property is Doña Raquel’s. (*E.g.*, 4 CR 1357.)

pesos in the registry of the Mexican court” and the money “was taken by the representative of Impulsora San Pedro,” its administrator, Hector Garza.⁷ (Tab 7 at 67.)

Shortly thereafter, the Children began to argue about which of them were not performing what promises and which promises were conditions of their having entered the Settlement Agreement. (*See, e.g.*, 3 CR 776-84, 825-30, 832-36.) For their part, Petitioners moved to set aside the February 14 Order, contending they would not have entered the Settlement Agreement had it not required Doña Raquel’s immediate return to Mexico; but “the Court, with the urging of opposing counsel, gutted the Agreement by ordering that [Doña Raquel] remain hostage in the United States” (3 CR 842 (emphasis omitted); *see also* 4 CR 1262-63.)

Conversely, Raquel moved to enforce the February 14 Order, alleging that Petitioners had withdrawn the 34 million pesos from the registry of the Mexican court and seeking an accounting, contempt, and a temporary injunction. (Tab 6.) Although Raquel’s motion was not verified (*see id.*), the trial court immediately set it for hearing (3 CR 1084) and, ultimately, after a non-evidentiary hearing (06/09/08 RR), granted Raquel’s motion and memorialized its oral ruling (*see id.* at 26) in a June 11 Temporary Injunction that requires Petitioners “to deposit . . . \$35,000,000.00 pesos . . . into an account” and “enjoin[s them]

⁷ The court of appeals’ opinion incorrectly states that “the money was released and acquired by representatives of [Petitioners].” *Villarreal*, Tab 2, at *5. The court was apparently under the mistaken impression that one of the Petitioners, Ignacio, was San Pedro Impulsora’s administrator when the funds were released. However, as Ignacio testified, he decided he no longer wanted to serve as San Pedro Impulsora’s administrator and was removed from that position at a February 2007 meeting of San Pedro Impulsora’s shareholders. (Tab 7.) Ignacio subsequently interviewed and hired Hector Garza Salas as his successor. (*Id.*) As Raquel’s counsel has recognized, after Ignacio’s removal, he had “no control over the corporation” (4 CR 1390.) It was thus Hector Garza Salas who took receipt of the 35 million pesos not as Petitioners’ representative but as San Pedro Impulsora’s agent. (Tab 7.)

from selling, encumbering or otherwise transferring” certain real estate.⁸ (Tab 1.) Although the Temporary Injunction set a final hearing on Raquel’s motion for June 27, it did not set a bond. (*Id.* at 1046.)

4. Appeal and Order for Writs of Attachment

Petitioners appealed.⁹ While the appeal was pending, Raquel asked the trial court to enforce the Temporary Injunction by finding Petitioners in contempt and incarcerating them until they complied with the Temporary Injunction. (3 CR 1080-83.) The trial court immediately set a hearing. (3 CR 1084.) In response, Petitioners asked the trial court to continue the hearing and stay enforcement of the Temporary Injunction while it was on appeal. (3 CR 1131-33, 1145-49.) However, the trial judge neither continued the hearing nor recognized that it lacked authority to proceed under Texas Rule of Appellate Procedure 29.4, which provides that only the appellate court in which the appeal of an interlocutory order is pending may enforce the order while it is on appeal. (3 CR 1151.) Petitioners also asked the court of appeals to prevent the trial court from attempting to enforce the Temporary Injunction while it was on appeal; but their motion for temporary relief was denied. (3 CR 1153-54.)

The day after the court of appeals denied Petitioners’ motion for temporary relief, on June 27, the trial court – “without notice to [Petitioners]” – granted what the order describes

⁸ References to the amount vary. (Tab 3 at 4 n.4.) The Settlement Agreement refers to 34 million pesos (Tab 4, ¶ 22), while Raquel’s motion and the Temporary Injunction refer to 35 million pesos. (*See* Tab 1 at 1, Tab 6 at 1.) However, the amount is irrelevant for purposes of this appeal.

⁹ (3 CR 1064; *see also* 3 CR 1123, 1128, 1142.) After Petitioners appealed, the trial court (1) removed Ignacio as Doña Raquel’s guardian and replaced him with Raquel and (2) ordered the Children to take their disputes – including when Doña Raquel would be permitted to return to Mexico – to the mediator who had mediated the Settlement Agreement. The trial court has since confirmed the mediator’s award. That order is on appeal to the Thirteenth Court of Appeals in No. 13-08-07-00708-CV, styled *In the Guardianship of Raquel Cantú de Villarreal*.

as Raquel’s “Application for Writ of Attachment”¹⁰ and signed an Order for Writs of Attachment. (See Tab 3.) The trial court based its order on a finding that Petitioners violated the June 11 Temporary Injunction by failing to appear on June 27 to show cause why they should not be found in contempt. (*Id.*, ¶ 2.) The Order for Writs of Attachment expressly provides that Petitioners “may purge himself or herself by [each] posting a bond in the amount of \$1,000,000.00” (*Id.*, ¶ 4.) In compliance with the order, the county clerk issued the writs, which command “[a]ny Sheriff or Constable of the State of Texas”:

to arrest [Petitioners] . . . and bring [them] personally before Cameron County Court at Law No. 2, instanter, to answer for [their] alleged contempts against the Court, resulting from [their] failure to Comply with the Orders of the Court dated February 14, 2008 and June 11, 2008, because [they] did not appear at the time and place specified in the June 11, 2008, and June 24, 2008 Orders of the Court . . . issued out of this Court and duly served upon [them].

(*Id.* at 1173.)

On appeal, the Thirteenth Court of Appeals affirmed the Temporary Injunction, holding that the trial court was not required to comply with the requirements of Rules 682 and 684 for issuing a temporary injunction because the Temporary Injunction enforces a previous order. *Villarreal*, Tab 2 at *4. The court also held that the trial court’s order of contempt was valid “notwithstanding the non-verification of the complaint” and that the Order for Writs of Attachment and the writs themselves “are not appealable orders.” *Id.* at *6.

¹⁰ The clerk’s file does not contain any such application.

Petitioners appeal, asking this Court to dissolve the Temporary Injunction as void because it fails to comply with Rules 682 and 684 and vacate both the order of contempt and the Order for Writs of Attachment because both rest upon the void Temporary Injunction.

SUMMARY OF THE ARGUMENT

Jurisdiction – Raquel argues that the Court lacks jurisdiction over this appeal by pointing to cases involving temporary injunctions that do no more than command compliance with a previous judgment. That is not the case here. The June 11 Temporary Injunction imposes on Petitioners obligations that are in addition to and different from those imposed by the February 14 Order adopting the Children’s Settlement Agreement as the court’s judgment. The June 11 Temporary Injunction also expressly contemplates future court action: a hearing on Raquel’s motion for an accounting. The June 11 Temporary Injunction is therefore appealable, as confirmed in the Court’s recent decisions in *Schultz* and *Shestawy*.

Failure to Comply With Rules 682 and 684 – There can be no dispute that the June 11 Temporary Injunction was issued without compliance with the requirements of Rules 682 and 684. The application was not verified. The applicant did not prove a probable right to recover on a cause of action. And the applicant was not required to post and did not post a bond. All that is at issue is whether compliance with these procedural requirements for issuing a temporary injunction apply to an order that is issued after judgment but that imposes obligations in addition to and different from those imposed by the judgment. The Court should hold the rules apply to all orders that command action immediately until a final hearing unless the order, like a turnover order, falls into a class of injunctive orders that is

excepted from the rules' requirements by statute. To do otherwise will permit form to prevail over substance – a course of action this Court has rightly rejected so many times in the past. Therefore, because the Temporary Injunction commands action until a final hearing on Raquel's motion for an accounting, Raquel and the trial court were required to comply with Rules 682 and 684. Because they did not, the June 11 Temporary Injunction is void.

Order for Writs of Attachment – Because the June 11 Temporary Injunction is void, the Order for Writs of Attachment is likewise void as a matter of law.

ARGUMENT

I. The June 11 Order is a temporary injunction and therefore this Court has jurisdiction over this appeal.

To divert this Court's attention from the merits, Respondents argue that this Court lacks jurisdiction to review an order that “merely compels compliance with a prior unappealed judgment” and rashly accuse Petitioners of “engag[ing] in a calculated effort to commit fraud on Respondents and the Texas Judicial System.” (*See Resp. at v, 1-5.*) Respondents' jurisdictional argument is incorrect as a matter of law. And their wild accusations are not supported by the record and are, in any event, irrelevant to the purely procedural issues presented. (*See id.*)

Respondents make much of the fact that the June 11 Order purports to enforce the February 14 Order approving the Children's Settlement Agreement by means of a “temporary injunction.” (*See Tab 1.*) Respondents recognize, however, that an interlocutory temporary injunction is made appealable by statute. (*Resp. at v (quoting TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4).*) And they do not deny that this Court has “conflicts jurisdiction”

to review interlocutory orders. *See Butnaru*, 84 S.W.3d at 202 (citing TEX. GOV'T CODE § 22.225(c)). Instead, Respondents contend that the Court lacks jurisdiction because the June 11 Order is neither a final judgment nor an interlocutory order. (Resp. at v.) But every order is either final or interlocutory, and characterizing an order as a “post-judgment enforcement order” (*id.* at 6) has no bearing upon whether it is appealable or whether this Court’s has jurisdiction to review it, as demonstrated by the authority Respondents cite – *Wagner v. Warnasch*, 295 S.W.2d 890, 892 (Tex. 1956) – and as confirmed by the Court’s more recent opinions in *Schultz*¹¹ and *Sheshtawy*.¹²

A. The June 11 Order is readily distinguishable from the unappealable order in *Wagner*.

Wagner involved a suit to establish an easement over the Warnasches’ property. *Wagner*, 295 S.W.2d at 891. In accordance with the parties’ settlement agreement, the trial court signed a final judgment establishing the easement and ordering the Warnasches to construct cattle guards at designated locations on the roadway. *Id.* When the Warnasches failed to do so, the trial court signed a second order requiring the Warnasches to build the cattle guards within sixty days and then report back to the court; if they failed to do so, the court ordered, they would be held in contempt. *Id.* This Court dismissed the Warnasches’ appeal, holding that the second order was not appealable for two reasons: (i) “[i]n effect, it merely imposes upon the Warnasches the same obligations which were imposed by the consent judgment”; and (ii) “[i]t was not a final judgment disposing of the issues before the

¹¹ *Schultz v. Fifth Dist. Court of Appeals*, 810 S.W.2d 738 (Tex. 1991).

¹² *In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004).

court . . . so that no future action by the court will be necessary in order to settle and determine the entire controversy.” *Id.* at 892. As the Court noted, before the trial court could find the Warnasches in contempt, it would be required to issue yet another order and hold a hearing. *Id.*

The June 11 Order evidences neither of *Wagner’s* indicia of an unappealable interlocutory order:

1. The June 11 Order imposes different obligations.

Comparing the relevant terms of the February 14 and June 11 Orders reveals that the June 11 Order goes far beyond the terms of the February 14 Order, as demonstrated by the italicized language in the following table:

<u>February 14 Order (Tab 4)</u>	<u>June 11 Order (Tab 1)</u>
¶ 14: “[A]ll parties shall <i>instruct their attorneys to take all necessary steps to have these funds [i.e., “the 34 million pesos in the form of a check in a court in Mexico”] released and delivered to below mentioned Mexican Trust</i> that shall be created.”	Petitioners “are Ordered, within 10 <i>days</i> from the entry of this Order, to <i>deposit the \$35,000,000.00 pesos listed in paragraph 14 of the [Children’s Settlement Agreement] . . . into an account</i> created for the benefit of the trust referenced in said paragraph 14 of the [Settlement Agreement].”
¶ 24: “All parties shall <i>cooperate</i> to name Ignacio Villarreal Cantu as Guardian of the Person of the ward to return her immediately to Mexico and <i>upon the ward’s exit from the United States all parties shall cooperate to . . . establish a Mexican Trust . . .</i> ”	“IT IS <i>FURTHER ORDERED</i> ” that Petitioners “ <i>deposit said funds into an account</i> which will be under the joint control of Ignacio Villarreal and Marcelo Villarreal.”
¶ 21: “Except for Carlos Villarreal Cantú’s accounting of the loans and his partial	<i>Petitioners</i> “are Ordered, within 10 days from the entry of this Order, to <i>provide a detailed</i>

<p>payments thereon as described and required hereinabove, <i>each party waives an accounting</i> from all other parties regarding any property.”</p>	<p><i>accounting</i> to this Court as to the whereabouts of said \$35,000,000.00 pesos listed in paragraph 14 of the [Settlement Agreement].”</p>
<p>¶ 14: <i>The real estate properties in Exhibits 1 and 2 “shall be placed into hotchpotch and distributed among and between the seven children of Raquel Cantu de Villarreal.”</i></p>	<p>“<i>IT IS FURTHER ORDERED</i>” that <i>Petitioners “are enjoined from selling, encumbering or otherwise transferring any of the real estate properties described in Exhibits 1 and 2 of the [Settlement Agreement] in any manner inconsistent with the disposition of said properties as provided in said [Settlement Agreement].”</i></p>

As shown by this table, the June 11 Order does not “merely compel[] compliance with a prior unappealed final judgment,” as Respondents incorrectly contend. (*See Resp. at v.*) Rather, the two orders differ from one another in three significant respects. The February 14 Order directs Petitioners to “instruct their attorneys” to take steps to have the funds in the registry of the Mexican court released and deposited into a trust account to be established after Doña Raquel was returned to Mexico, whereas the June 11 Order requires Petitioners to deposit the funds into an account “under the joint control of Ignacio Villarreal and Marcelo Villarreal” regardless of whether Doña Raquel has returned to Mexico. Similarly, in the February 14 Order, Respondents waived an accounting from Petitioners, whereas the June 11 Order requires Petitioners “to provide a detailed accounting to [the trial court] as to the whereabouts of [the] \$35,000,000.00 pesos.” Finally, the February 14 Order requires the parties to place various real properties into a “hotchpotch” to be divided among the Children,

whereas the June 11 Order prohibits Petitioners from “selling, encumbering or otherwise transferring any of th[ose] real estate properties.”

2. *The June 11 Order contemplates future action by the trial court*

Also unlike the order at issue in *Wagner*, the June 11 Order expressly contemplates future trial court action: a “final hearing” on Raquel’s motion for an accounting. (Tab 1 at 2.)

Because both of the *Wagner* indicia of an unappealable order are absent here, the June 11 order is an appealable interlocutory order. That holding is also compelled by the Court’s more recent opinions in *Schultz* and *Shestawy*.

B. *The June 11 Order is appealable under Schultz and Shestawy.*

At issue in *Shultz* was whether the trial court or the court of appeals had exclusive jurisdiction over the enforcement of a turnover order while it was pending on appeal. *See Schultz*, 810 S.W.2d at 739. The court of appeals held that jurisdiction was vested in the trial court and denied the judgment debtor’s motion for leave to file a motion for contempt. *Id.* at 739. This Court disagreed, holding that “the turnover order was in the nature of a mandatory injunction and was appealable.” *Id.* at 740. Significantly, the Court noted that to hold otherwise would mean that “third parties potentially aggrieved by the order [would] have no right of appellate review to protect their affected property interests.” *Id.* Thereafter, *Schultz*’s holding was codified in Texas Rule of Appellate Procedure 29.4. *See* TEX. R. APP. P. 29.4.

A decade after *Schultz*, the Court confronted the jurisdictional issue again on somewhat different facts. *See Shestawy*, 154 S.W.3d at 116. After Mr. Shestawy filed a

notice of appeal from the final decree in his divorce proceeding, he refused to comply with the spousal maintenance provisions in the decree even though its enforcement had not been superseded or stayed. *Id.* When Mrs. Shestawy instituted contempt proceedings in the trial court, Mr. Shestawy sought writs of prohibition and mandamus under the rule announced in *Schultz*. *See id.*

The Court recognized that its “decisions have not been uniform regarding a trial court’s authority to enforce a judgment or order while an appeal is pending.” *Id.* at 120. After an exhaustive review, however, and after expressly noting that Rule 29.4 governs enforcement proceedings during an *interlocutory* appeal, *id.* at 121, the Court ultimately was “unable to discern a compelling reason for withdrawing a trial court’s authority to enforce a *final* judgment pending appeal when that judgment has not been superseded or stayed and no statute or rule of procedure removes the trial court’s authority.” *Id.* at 124 (emphasis added). Therefore, the Court held that “when a *final* judgment has not been superseded or stayed pending an appeal, either the trial court or the court of appeals may entertain a motion for contempt.” *Id.* at 124-25 (emphasis added). The *Shestawy* Court thus left intact *Schultz*’s holding that an interlocutory order in the nature of a mandatory injunction is appealable. *See id.* at 125; *Schultz*, 810 S.W.2d at 740.

In the light of *Wagner* and the aftermath of *Shestawy* and *Schultz*, therefore, whether an order is appealable does not depend upon whether it is a “post-judgment enforcement order” but upon (i) whether it merely imposes the same obligations as the order it purports to enforce; (ii) whether future trial court action is required; and (iii) whether the order is “in the nature of a mandatory injunction.” Although the June 11 Order purports to “enforce” a

previous order, it in fact imposes new and different obligations; it enforces the new and different obligations with a mandatory injunction; and, by its plain language, it recognizes that future trial court action is required. The June 11 Order is therefore appealable. *See Schultz*, 810 S.W.2d at 740; *Wagner*, 295 S.W.2d at 892.

This Court not only has jurisdiction to review the June 11 Order, it must do so to ensure that the court of appeals' opinion does not embolden trial courts to ignore procedural requirements both mandated by due process and necessary to protect litigants' substantive rights. Respondents' challenge to this Court's jurisdiction should therefore be summarily rejected.

II. Under well-established Texas law, the Temporary Injunction is void.

Under well-established Texas law, a temporary injunction may not issue unless the applicant pleads and proves (1) a cause of action (2) upon which she has a probable right to the relief sought and (3) a probable, imminent, and irreparable injury. *See* TEX. R. CIV. P. 680, 682, and 684; *Butnaru*, 84 S.W.3d at 204. Unless each element is established by evidence adduced at the hearing, “[t]he judgment cannot stand.” *Millwrights Local*, 433 S.W.2d at 687. As this Court has explained:

An applicant for a temporary injunction seeks extraordinary equitable relief. He seeks to immobilize the defendant from a course of conduct which it may well be his legal right to pursue The applicant has, and in equity and good conscience ought to have, the burden of offering some evidence which, under applicable rules of law, establishes a probable right of recovery.

In re Tex. Nat. Res. Conservation Comm’n, 85 S.W.3d 201, 204 (Tex. 2002) (quoting *Camp v. Shannon*, 348 S.W.2d 517, 519 (Tex. 1961)).

Equally well-established is that a temporary injunction must (1) state the reasons for its issuance in specific terms, (2) describe in reasonable detail the acts enjoined, (3) set the cause for trial, and (4) fix the amount of security to be given by the applicant. TEX. R. CIV. P. 683, 684. If these mandatory procedural requirements are not met, the temporary injunction is void. *Qwest*, 24 S.W.3d at 337; *Ex parte Jordan*, 787 S.W.2d 367, 368 (Tex. 1990) (per curiam).

Under this well-established Texas law, the June 11 Temporary Injunction is void for the following three reasons:

1. The motion is not verified. (*See* Tab 6.)
2. No evidence establishing that Raquel had a probable right to recover on her motion for an accounting or any other cause of action (*e.g.*, for breach of the settlement agreement) was admitted at the temporary injunction hearing. (*See* 06/09/08 RR.)
3. The Temporary Injunction does not set a bond. (*See* Tab 1 at 1047.)

Qwest, 24 S.W.3d at 337; *Ex parte Jordan*, 787 S.W.2d at 368. Therefore, “[t]he judgment cannot stand.” *Millwrights Local*, 433 S.W.2d at 687.

III. The court of appeals’ analysis is legally and factually flawed.

Beginning with its jurisdictional analysis, however, the court of appeals likened its jurisdiction over the appeal of the Temporary Injunction to that over an appeal of a turnover order – even though a temporary injunction, unlike a turnover order, is expressly made appealable by statute.¹³ *Villarreal*, Tab 2 at *3-4. The court apparently did so in order to adopt the holding in *Roosth* that “the typical [procedural requirements for an injunction are

¹³ TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4).

not applicable to an injunction granted pursuant to” the turnover statute. (*Id.* at *4 (citing *Roosth*, 889 S.W.2d at 460). The court likewise dispensed with the substantive requirement that the applicant prove a cause of action upon which she has a probable right to the relief sought by reference to testimony elicited at a hearing that occurred almost a month before the temporary injunction hearing. *See id.* at *5. But this analysis fails legally and factually.

A. The court of appeals’ analysis is legally insupportable.

This Court has repeatedly rejected the argument that “matters of form control the nature of the order itself – it is the character and function of an order that determine its classification.” *Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992). That analysis compels a holding that the June 11 Order is a temporary injunction.

1. In character and in function, the June 11 Order is a temporary injunction.

Raquel did not request, and the trial court did not issue, a turnover order. (*See* Tabs 1 and 6.) Raquel’s motion never once mentioned the turnover statute; it expressly sought an “injunction,” pleaded the elements required for an injunction, recognized her obligation to post a bond and asked the court to set the amount, “to preserve the status quo during the pendency of this action. (*See* Tab 6 at 923, 926-81, 831.) And the trial court’s order is expressly titled “temporary injunction”; it encompasses both a mandatory injunction – “order[ing]” Petitioners to take affirmative action – and a prohibitive injunction – “enjoin[ing]” them from taking other actions. (Tab 1 at 1045-46.) *See generally Qwest*, 24 S.W.3d at 337 (noting that injunction may command or restrain action and holding that

injunction that places restrictions on conduct and is effective immediately during pendency of suit is appealable temporary injunction, rather than permanent injunction).

Perhaps most importantly, the order sets Raquel's motion for a final hearing. (Tab 1 at 1046.) The trial court's June 11 Order is therefore, in character and function, a temporary injunction. *See Del Valle*, 845 S.W.2d at 809.

2. *No basis exists for treating the June 11 Temporary Injunction like a turnover order.*

The court of appeals' analysis is also flawed because there is no basis for treating the June 11 Temporary Injunction like a turnover order, which springs from philosophical moorings and factual predicates that are vastly different from those underlying a temporary injunction. A turnover order is available only to aid a "judgment creditor" "to reach property to obtain satisfaction on the judgment" TEX. CIV. PRAC. & REM. CODE § 31.002(a). A "judgment creditor" is "[a] person having a legal right to enforce execution of a judgment for a specific sum of money." BLACK'S LAW DICTIONARY 861 (8th ed. 2004). The availability of a turnover order thus turns upon the judgment debtor's liability to the judgment creditor for a specific sum of money having already been adjudicated. *See, e.g., Resolution Trust Corp.*, 53 F.3d at 78-79 (holding that turnover statute cannot be used to determine substantive rights of party to litigation or property rights of third parties).

Unlike a turnover order, a temporary injunction is premised not on a previous adjudication of liability but on proof of a probable right to recover on a cause of action at the temporary injunction hearing. *E.g., Butnaru*, 84 S.W.3d at 204. And it is certainly not the case with this Temporary Injunction, which rests upon the trial court's February 14 Order

approving a settlement agreement in which the Children purported to decide that they owned and could divide property that belonged to their mother and a Mexican corporation. Their entitlement to that property has never been adjudicated. Nor can it be under the undisputed facts as they have existed since this proceeding was instituted.

None of the Children has a justiciable interest in, or the legal capacity to sue to recover, any asset in Doña Raquel's estate or that of a third party like San Pedro Impulsora; consequently, none of the Children can establish a probable right to recover on the merits of a claim to enforce any aspect of the Settlement Agreement requiring the relinquishment of property that is owned by Doña Raquel or San Pedro Impulsora. *See Pike v. Crosby*, 472 S.W.2d 588, 591 (Tex. Civ. App.—Eastland 1971, no writ) (dissolving temporary injunction because pleadings of heirs and devisees established they had no justiciable interest in decedent's assets or legal capacity to sue to cancel decedent's trust conveyance of her assets to trustee; consequently, they could not establish a probable right to recover on the merits); *see also, e.g., Morrison v. City of Fort Worth*, 155 S.W.2d 908, 909 (Tex. 1941) (noting that courts will not aid in enforcement of illegal contract).

Moreover, property obtained pursuant to a turnover order is not turned over to the judgment creditor but to “a designated sheriff or constable for execution,” to the court for it to “apply the property to the satisfaction of the judgment,” or to a receiver to “sell it and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.” TEX. CIV. PRAC. & REM. CODE § 31.002(b). The June 11 Temporary Injunction, on the other hand, commands Petitioners to deposit San Pedro Impulsora's 35 million pesos “into an

account which will be under the joint control of Ignacio Villarreal and Marcelo Villarreal.” (Tab 1 at 1045-46.) That would amount to nothing short of theft.

In sum, the Temporary Injunction is nothing like a turnover order and is, in character and function, a temporary injunction. The turnover cases cited by Respondent are therefore wholly immaterial.¹⁴

B. The court of appeals’ analysis is also factually flawed.

The court of appeals rejected Petitioners’ argument that the Temporary Injunction was not supported by any evidence adduced at the injunction hearing because “the trial court had before it substantial evidence presented in connection with numerous hearings and trial on the merits of this cause.” (Tab 2 at *5.) But there had never been a trial on the merits. As pointed out above, the sole predicate for the Temporary Injunction is the February 14 Order approving a settlement agreement in which the Children purported to decide that they owned and could divide property that belonged to their mother and a Mexican corporation.

Nor was the court of appeals correct in stating that Miguel Angel Abramo Martinez testified that, “after he had released an injunction holding the 34 million pesos in the registry of the Mexican court,” “the money was released and acquired by representatives of

¹⁴ See *Ex parte Johnson*, 654 S.W.2d 415, 418 (Tex. 1983) (turnover statute “allows ex parte entry of [an] order without notice and hearing”); *In re Estate of Herring*, 983 S.W.2d 61, 65 (Tex. App.—Corpus Christi 1998, no pet.) (bond not required for application of receiver pursuant to turnover statute); *Thomas v. Thomas*, 917 S.W.2d 425, 433 (Tex. App.—Waco 1996, no writ) (notice and hearing not required for turnover order); *Roosth*, 889 S.W.2d at 460 (“typical requirements for an injunction are not applicable to an injunction granted pursuant to [the turnover statute]”); *Plaza Court, Ltd. v. West*, 879 S.W.2d 271, 276 (Tex. App.—Houston [14th Dist.] 1994, orig. proceeding) (no right to notice or a hearing before enforcement of a turnover order); *Schultz v. The Cadle Co.*, 825 S.W.2d 151, 155 (Tex. App.—Dallas 1992, writ denied) (bond not required for appointment of receiver pursuant to turnover statute); *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 272 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (notice and hearing not required by turnover statute). The only remaining authority cited by Respondent involves a writ of garnishment to enforce a money judgment. See *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285, 289 (1924) (notice and hearing not required before issuance of writ of garnishment). However, the June 11 Order was not issued to enforce a money judgment; nor is it a writ of garnishment. *Endicott-Johnson* has no relevance to the present case.

[Petitioners]” (Tab 2 at *5.) In fact, Martinez testified the money “was taken by the representative of Impulsora San Pedro,” its administrator, Hector Garza. (Tab 7.) And even Raquel’s counsel has recognized, after Ignacio’s removal as the corporation’s administrator in February 2007, he had “no control over the corporation” (4 CR 1390.) There is simply no record evidence establishing that any Petitioner owns or has control over the corporation’s funds.

In short, the Temporary Injunction is just that, in character and function; and it commands Petitioners to turn over property that the evidence conclusively establishes they do not own or control. Like any other temporary injunction, the Temporary Injunction at issue here should be subject to the mandatory requirements of Rules 682 and 684. Because it does not comply with either rule, it should be held void. That it was purportedly issued to enforce a previous court order should not change that result.

IV. A verified application, evidence, and a bond are required for a temporary injunction purportedly issued to enforce a previous order.

To the knowledge of the undersigned, neither this Court nor any Texas court – other than the court of appeals in this case – has held that Rules 680-84 do not apply when a temporary injunction purports to enforce a previous order. Certainly, the plain text of the rules make them applicable to *all* temporary restraining orders and temporary injunctions, whenever issued. *See* TEX. R. CIV. P. 680 (“*No* temporary restraining order shall be granted”; “*Every* temporary restraining order”; “*Every* restraining order”); 681 (“*No* temporary injunction”); 682 (“*No* writ of injunction”); 683 (“*Every* order granting

an injunction and every restraining order); 684 (“In the order granting *any* . . . temporary injunction”) (emphasis added throughout).

This Court has never addressed whether the rules apply to an order that purports to enforce a prior order . But it has held that a bond is required for an injunction issued post-judgment to *enjoin* enforcement of a previous judgment. *Ricker v. Douglas*, 12 S.W. 975 (Tex. 1889). And the Thirteenth Court of Appeals has held that a party, like Raquel, seeking an injunction to restrain acts in violation of a settlement agreement must prove the same elements that must be proved for a temporary injunction. *See BFI Waste Sys. of N.A., Inc. v. N. Alamo Water Sup. Corp.*, No. 13-04-00069-CV, 2006 WL 949949, at *6 (Tex. App.—Corpus Christi-Edinburg Apr. 13, 2006) (mem. op.), *pet. denied per curiam*, 251 S.W.3d 30 (Tex. 2007).

Nor should the Court hold that a post-judgment injunction escapes a temporary injunction’s “stringent proof requirements.” *In re Tex. Nat. Res. Conservation Comm’n*, 85 S.W.3d at 204. As the Court has noted, “[a]n applicant for a temporary injunction seeks extraordinary relief” and “has, and in equity and good conscience ought to have, the burden of offering some evidence which, under applicable rules of law, establishes a probable right of recovery.” *Id.* (quoting *Camp*, 348 S.W.2d at 519). That is no less true for an injunction purportedly issued to enforce a previous order.

V. The Orders for Writs of Attachment are likewise void.

The court of appeals refused to consider the validity of the Order for Writs of Attachment because the Order and the writs themselves “are not appealable orders.” *Villarreal*, Tab 2 at *6.) But whether the Order or writs are appealable is immaterial. If the

Temporary Injunction is void of “legal effect,” it “will not support an order of contempt.” *Ex parte Lesher*, 651 S.W.2d 734, 736 (Tex. 1983) (temporary restraining order); *see also Lancaster v. Lancaster*, 291 S.W.2d 303, 308 (Tex. 1956) (temporary injunction). Therefore, as this Court has held on numerous occasions, a trial court that holds a party in contempt for violating a void order necessarily abuses its discretion. *E.g., Ex parte Shaffer*, 649 S.W.2d 300, 301-02 (Tex. 1983). This holding is particularly warranted here because the trial court’s Order for Writs of Attachment arises out of procedures that were as irregular as those that produced the facially void Temporary Injunction. Specifically:

- (i) Raquel’s motion for contempt was not verified (Tab 6) and thus did not invoke the court’s jurisdiction. *See Ex parte Winfree*, 263 S.W.2d 154, 156 (Tex. 1953).
- (ii) Raquel’s motion for contempt sought to enforce a temporary injunction that is void on its face because it fails to set a bond and thus must be reversed and dissolved. When the ““underlying judgment is reversed on appeal, then the [enforcement] order must be reversed also.”” *Ross v. Nat’l Ctr. for the Employment of the Disabled*, 201 S.W.3d 694, 695 (Tex. 2006) (quoting *Matthiessen v. Schaefer*, 915 S.W.2d 479, 480 (Tex. 1995)).

Moreover, even if Rule 692’s requirements had been satisfied, a temporary injunction that is on appeal cannot be enforced by the trial court. *See TEX. R. APP. P. 29.4*. Rather, as discussed above, the Court has held that, although the trial court may enforce an un superseded *final* judgment pending appeal, “our current rules of appellate procedure provide that during an *interlocutory* appeal, ‘only the appellate court in which the appeal is pending may enforce the order.’” *Sheshtawy*, 154 S.W.3d at 121 (quoting *TEX. R. APP. P. 29.4*) (emphasis added). Because only the appellate court in which the appeal is pending has

authority to enforce an interlocutory order, any enforcement efforts by the trial court necessarily interfere with the court of appeals' exclusive enforcement jurisdiction. *See id.*

CONCLUSION AND PRAYER

Purporting to enforce a judgment that would require Petitioners to deposit funds belonging to a Mexican corporation into a Mexican trust account, the trial court granted a temporary injunction based on an application that was not verified as required by Rule 682, without supporting evidence as required by *Millwrights Local*, and without requiring a bond as required by Rule 684. The temporary injunction is therefore void. *See, e.g., Qwest*, 24 S.W.3d at 337. In addition, while the void temporary injunction was on appeal, the trial court purported to enforce it by ordering writs of attachment that command Petitioners' arrest unless each posts a \$1 million bond.

The trial court clearly erred. But this case is not about the mere correction of "procedural" errors. Because the trial court's errors have had a significant affect on Petitioners' substantive rights, the issues raised in this Petition demand this Court's attention.

For the foregoing reasons, Petitioners Ignacio, Consuelo, Martha, and Fernando Villarreal Cantú respectfully request that the Court grant their Petition, dissolve the trial court's June 11 Temporary Injunction, vacate the trial court's June 27 orders for contempt and for issuance of writs of attachment, and order the writs withdrawn. Petitioners also pray for all other and further relief to which they may be entitled.

Respectfully submitted,

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I hereby certify that on February 24, 2010, a true and correct copy of the foregoing was served on the following counsel of record via U.S. mail, postage prepaid:

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In the Supreme Court of Texas

**IN THE GUARDIANSHIP OF RAQUEL CANTÚ DE VILLARREAL,
AN INCAPACITATED PERSON**

*Interlocutory Appeal of Temporary Injunction
from the Court of Appeals for the Thirteenth District of Texas
Court of Appeals No. 13-08-00408-CV*

APPENDIX

Tab

- 1 Temporary Injunction (June 11, 2008)
- 2 Court of Appeals Opinion (April 2, 2009)
- 3 Order for Issuance of Writ of Attachment (June 27, 2008)
- 4 Irrevocable Family Settlement Agreement (Feb. 12, 2008)
- 5 First Amended Order Approving Irrevocable Family Settlement Agreement, Assignment, and Release and Rule 11 Agreement (Feb. 14, 2008)
- 6 Petitioner Raquel Villarreal's Second Amended Motion for Accounting of the \$34 Million Pesos Withdrawn by Respondents and the Real Estate Property Which is the Subject of This Lawsuit, Application for Temporary Restraining Order, Temporary Injunction and Permanent Injunction and Fourth Motion for Contempt (May 19, 2008)
- 7 Excerpt from testimony of Miguel Angel Abramo Martinez (4 CR 1295, 1353)