IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

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DONALD J. HEWITT,)

Plaintiff,)

vs.) 4-60
83-739

THE HONORABLE RODNEY J. RYAN)
Judge, Fifth Judicial District,)

Defendant.

Appeal from the Iowa District Court for Polk County - Rodney J. Ryan, Judge

Plaintiff seeks a writ of mandamus barring Judge Ryan from entertaining further proceedings concerning the valuation of certain stock. WRIT SUSTAINED.

Patrick H Payton, Des Moines, Iowa, for the plaintiff.

Richard H Doyle IV, Des Moines, Iowa, for the Defendant.

Considered by Snell, P.J., Schlegel, and Sackett, JJ.

In this original proceeding the plaintiff, Donald Hewitt, was granted leave to file a petition seeking a writ of mandamus against the Honorable Rodney J. Ryan, Judge of the Fifth Judicial District of Iowa. The plaintiff seeks to prevent Judge Ryan from entertaining further proceedings regarding the valuation of certain stock, arguing that such proceedings were not envisioned by an earlier decision of this court regarding the stock in question. We agree and sustain the writ of mandamus prohibiting such further proceedings.

In a decree dissolving the marriage between Donald Hewitt and Carol Hewitt, the trial court provided that Donald hold in trust for Carol Hewitt's benefit Stoner Development stock owned by him and "phantom stock" (the value of the stock the plaintiff was entitled to on his death or termination of his employment with the company) until its value and distribution could be determined. Apparently, the "phantom stock" referred to by the district court was actually a deferred compensation plan.

Donald Hewitt appealed from the provision of the decree regarding the stock and "phantom stock." The case was transferred to this court and, in an opinion filed on June 30, 1981, this court modified the trial court's decision as to the stock and "phantom stock." We concluded that it was unnecessary to determine the value of the stock interest because Carol Hewitt was entitled to one-half of it. On this basis we vacated the trial court's order requiring Donald to hold the stock in trust and awarded Carol Hewitt a one-half interest in the stock. We also concluded that there was no need to divide the stock to which Donald Hewitt would become entitled upon his death or termination and awarded that stock to him.

Donald Hewitt's stock is subject to an agreement allowing the Stoner Company to have the first purchase rights to the stock if Donald Hewitt wishes to sell the stock. The only market for the stock appears to be the Stoner Development Company.

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On March 3, 1981, Carol Hewitt filed an application for relief and oral hearing in the district court, stating that the court should evaluate the stock and that Donald should pay Carol for the stock. On March 25, 1983, Donald Hewitt filed an answer to the application alleging that an evaluation was unnecessary and that the relief requested was an attempt to modify a property settlement. Donald Hewitt asserted that the application was an attempt to modify the court of appeals decision and was beyond the district court's power. On June 2, 1983, the district court orally ordered the attorneys for the parties to present proposals for the evaluation of the stock.

On June 23, 1983, Donald Hewitt filed a petition for writ of mandamus, requesting that the oral order be vacated and that the trial court be barred from proceeding any further regarding the Hewitt dissolution. On July 8, 1983, the supreme court, by Chief Justice Reynoldson and Justice McCormick, entered an order granting the petition. The matter was subsequently transferred to this court.

I.

It is first argued on behalf of Judge Ryan that the issuance of a writ of mandamus by this court, as requested by Hewitt, "would be improper and is not authorized by the Iowa Constitution." Specifically, the defendant argues that the jurisdiction of the supreme court is "exclusively appellate, not original." This argument clearly lacks merit. Article V, section 4 of the Iowa Constitution, as amended, provides:

> The Supreme Court shall have appellate jurisdiction only in cases in chancery, and shall constitute a Court for the correction of errors at law, under such restrictions as the General Assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior Judicial tribunals throughout the State. [emphasis added]

Iowa Code section 661.1 (1983) provides for an action of mandamus "to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station." Section 661.4 (1983) specifically provides that the supreme court or court of appeals may issue a writ of mandamus "to any inferior court, if necessary, and in any other case where it is found necessary for either of those courts to exercise its legitimate power." Rule 22(b) of the Iowa Rules of Appellate Procedure contains the following language:

> **(a) Writs and Process, Supreme Court.** The Supreme Court shall issue all writs and process necessary for the exercise and enforcement of its appellate jurisdiction and in the furtherance of its supervisory and administrative control over all inferior judicial tribunals and officers thereof throughout the state; and may enforce its mandates by fine and imprisonment, and imprisonment may be continued until obeyed.
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> **(b) Writs and Process, Court of Appeals.** The Court of Appeals shall issue writs and other process necessary for the exercise and enforcement of its jurisdiction, but a writ, order or other process in any appeal not transferred to the Court of Appeals by the Supreme Court shall be of no effect.

The supreme court, upon the petition of Donald Hewitt, accepted jurisdiction of this mandamus action. That court then transferred the matter to this court. We reject defendant's argument that this court is without jurisdiction to issue the writ of mandamus as requested by plaintiff.

II.

We must next determine whether the issuance of a writ of mandamus is proper in this case. A mandamus action is a special proceeding authorized by chapter 661 of the Iowa Code. The Iowa Supreme Court discussed mandamus in Reed v. Gaylord, 216 N.W. 2d 327, 331-32 (1974), as follows:

> There are several well-established statutory or judicial principles governing mandamus. Mandamus can compel an inferior tribunal to act but cannot control its discretion. Section 661.2, The Code; Stith v. Civil Service Com'n of Des Moines, 159 N.W.2d 806, 808 (Iowa 1968). If there is a plain, speedy and adequate remedy in the

ordinary course of the law mandamus does not lie. Section 661.7. Mandamus will not lie where certiorari is available, because certiorari offers a plain, speedy and adequate remedy in the ordinary course of the law. Stith v. Civil Service Com'n of Des Moines, 159 N.W.2d at 809; Riley v. City of Des Moines, 203 Iowa 1240, 1244, 212 N.W. 716, 718; Sullivan v. Robbins, 109 Iowa 235, 238-239, 80 N.W. 340, 341. Where there is right to appeal or to take writ of error such is a plain, speedy or adequate remedy in the ordinary course of the law and therefore mandamus is improper. Pierce v. Green, 229 Iowa 22, 45, 294 N.W. 237, 251; 55 C.J.S. Mandamus §22; 52 Am.Jur.2d, Mandamus, section 9.

Since mandamus is a summary and extraordinary writ it will not be issued in doubtful cases but only where the rights and duties are clear and there is no other speedy and adequate remedy in the ordinary course of the law. Headid v. Rodman, 179 N.W.2d 767, 770-771 (Iowa 1970).

Mandamus is appropriate under certain circumstances in order to secure compliance with the judgment or mandate of an appellate court.

> Mandamus is an appropriate remedy to require a lower court to which a mandate is directed to comply with the terms of such mandate, and the writ will issue to keep a lower tribunal from interposing unauthorized obstructions to the enforcement of a judgment of a higher court. Where a mandate leaves nothing to the judgment or discretion of the court below, and that court mistakes or misconstrues the judgment or decree of the reviewing court, and does not give full effect to the mandate, its action may be controlled by writ of mandamus to execute the mandate. However, the writ will not issue if the lower court has not demonstrated an intention not to comply with the mandate, nor will it lie to review matters left open by the mandate, or matters as to which the court below must or may exercise judicial discretion.
>
> The opinion delivered by a higher court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate, and on an application for a writ of mandamus, it is for such court to construe its own mandate, and to act accordingly. Of course, the writ will not be issued if the mandate has been correctly interpreted by the lower court, and a higher court may refrain from directing a formal writ to the lower court under the assumption that the lower court will conform to its explanation of its mandate.

52 Am Jur 2d Mandamus §355 at 677-78 (emphasis added).

Corpus Juris Secundum also discusses the use of mandamus to compel an inferior court to perform the ministerial duty of entering and enforcing the mandate of the appellate court.

> Where a judgment, decree, or order of a superior court made in review of the decision of an inferior court comes down to the lower court, it is the duty of the lower court to enter and enforce it, and, if it fails or refuses to do so, mandamus ordinarily will lie to compel compliance therewith, since, as a rule, the action required of the lower court in the matter is purely ministerial and not discretionary. However, the rendition of judgment by the lower court, after decision by the higher court, may call for the exercise by the trial court of judicial power or discretion, and not for a mere ministerial act, in which case it will not be subject to control by mandamus. The reviewing court will construe its own judgments, decrees, or orders, and, where the lower court has misconstrued such mandate, or has acted beyond its power in construing the mandate, the reviewing court will issue mandamus to review and correct the action of the lower court. An appellate court, although having power to issue mandamus to compel enforcement of its decrees, nevertheless may in the exercise of a sound judicial discretion under the circumstances refuse to do so.
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> In order to authorize the issuance of the writ it must clearly appear that the trial court has failed or refused to perform a duty required by the mandate, and, where the mandate has not been violated by the lower court, its action cannot be controlled by mandamus. Mandamus will not lie to compel a trial judge to vacate a judgment order made in accordance with a mandate from an intermediate appellate court, or by a court of last resort, whether or not the judgment was erroneous.

55 C J.S Mandamus §100(d) at 171-72 (emphasis added).

The United States Supreme Court, in United States v. Haley, 371 U.S. 18, 83 S Ct. 11, 9 L Ed. 2d 1(1962), granted the plaintiff's petition for a writ of mandamus. The Supreme Court, in a per curiam opinion, held that the order of the district court complained of rested on a misconception of the scope and effect of that court's opinion on the government's earlier appeal. The court held:

> The District Court's error should be rectified without delay, and we think that the proper means for accomplishing this is by mandamus. [citations omitted] Accordingly, in No. 139, Misc., the Government's motion for leave to file a petition for a writ of mandamus, and its petition for a writ of mandamus, are granted.

Id at 20, 83 S.Ct. at 12, 9 L.Ed. 2d at 3.

In Yablonski v. United Mine Workers of America, 454 F. 2d 1036, 1038(D.C. 1971), cert. denied 406 U.S.906, 92 S.Ct. 1609, 31 L.Ed.2d 86 (1972), the court said:

> [I]t is well settled that mandamus lies to rectify a deviation. That approach may appropriately be utilized to correct a misconception of the scope and effect of the appellate decision, or to prevent relitigation of issues already decided by the appellate court.

The court further stated:

> It is clear that the case may be sufficiently extraordinary for mandamus "where it [is] necessary to confine a lower court to the terms of an appellate tribunal's mandate."

Id at 1039

The Texas Court of Appeals, quoting Conley v. Anderson, 164 S.W. 985, 986 (Tex. 1913), said:

> [t]his court, having upon writ of error reversed the judgment of the district court in the former suit, and having entered final judgment in that case, no district court had jurisdiction to review that judgment, nor to interpret and enforce it, but must observe it as it was framed by this court. The interpretation and enforcement of that judgment belongs exclusively to this court, and no interference with its enforcement will be tolerated.

Bilbo Freight Lines, Inc. v. State, 645 S.W. 2d 925, 927 (Tex. App. 1983). The Court of Civil Appeals of Texas said in Curtis v. Nobles, 588 S.W. 2d 687, 688 (1979)

> It suffices to state that when a court of civil appeals has mandated the trial court to enter a particular judgment, jurisdiction over the matter remains with the appellate court until the particular judgment has been entered, and compliance with the mandate may be entered by writ of mandamus.

The Seventh Circuit Court of Appeals said in Oswald v. Mc Garr, 620 F.2d 1190, 1195 (1980), "[a] court of appeals has the power to enforce its mandate and mandamus is an appropriate remedy to enforce a previous judgment of an appellate court." The Tenth Circuit Court of Appeals found it necessary to enforce compliance with its mandate in Estate of Whitlock, 547 F.2d 506, 510

(1976). See also Evans Electrical Construction Co. v. McManus, 338 F. 2d 952, 953-54 (8th Cir. 1964); Iowa City - Montezuma Railroad Shippers Association v. United States, 338 F. Supp. 1383, 1386 (S.D. Iowa 1972); and In re United States, 207 F. 2d 567, 570 (5th Cir. 1953). The Wisconsin Supreme Court recognized in Gross v. Midwest Speedways, Inc., 81 Wis. 2d 129, 135, 260 N.W. 2d 36, 38-39 (1977), "that mandamus is the exclusive remedy to compel a trial court to follow a mandate of [an appellate] court."

We conclude that, if the statutory prerequisites are met, this is an appropriate case in which to issue a writ of mandamus to ensure compliance with an earlier mandate of this court.

III.

The trial court's original decree placed the stock in question in trust for the benefit of Carol pending future assessment of the stock's value, so that Carol's interest in it could be determined by a subsequent court proceeding. This court, on appeal, said:

> The Stoner Development Company is a closely held corporation in which Donald owns 5% and Tom Stoner owns 95% of the stock. Donald is entitled to another 5% of the stock upon his death or termination of employment. The only market for the stock is the Stoner Development Company itself. The trial court declined to value the stock and ordered Donald to hold it in trust for Carol's benefit pending future assessment of its value so that it could be evenly divided. Donald asks that we value the stock now and distribute all of it to him.
>
> It is unnecessary that we determine the value of Donald's stock interest, because whatever its value, Carol is entitled to one-half of it. Therefore, we vacate the trial court's order that Donald hold the stock in trust for Carol's benefit, and award Carol a one-half interest in the stock now owned by Donald. However, we see no need to divide the stock to which Donald is entitled upon his death or termination and accordingly award the stock to him. [emphasis added]

Carol argues that this court's language regarding the stock was "vague" and that "[i]t was reasonable for defendant to assume that the Court of Appeals would not go through the trouble to award Carol stock that was worth nothing to her."

She argues that the interpretation and enforcement of this court's order was purely discretionary on the part of the trial court and that Judge Ryan's actions on Carol's "Application for Relief" may not now be reached by this mandamus action. Carol argues further that Donald must await Judge Ryan's ultimate disposition of the application before seeking relief. We disagree.

While it is true that mandamus is improper if there is a "plain, speedy and adequate remedy in the ordinary course of the law," Iowa Code section 661.7(1983), we find no such alternative remedy available in this situation. While Donald could go forth with evidence regarding valuation in the proceedings before Judge Ryan and subsequently appeal any final order entered with respect to the stock, that is not the type of "plain, speedy and adequate remedy" which would preclude relief by way of mandamus. "[T]he other remedy must be competent to afford relief on the very subject matter in question, and be equally convenient, beneficial and effectual." Virginia Manor, Inc. v. City of Sioux City, 261 N.W. 2d 510, 514-15 (Iowa 1978) (citing Pierce v. Green, 229 Iowa 22, 47, 294 N.W. 237, 252 (1940); 55 C J.S., Mandamus, §17B, pp. 47-49 (1948)). Requiring Donald to put forth evidence on the valuation issue prior to seeking a ruling on the propriety of the proceedings themselves would not be an "equally convenient, beneficial and effectual" remedy in this case. It is the unnecessary putting forth of evidence regarding valuation which Donald seeks to avoid by this action. Donald's right to an eventual appeal from any final order issued with respect to Carol's application shall not, therefore, preclude Donald from seeking and receiving relief by way of mandamus.

IV.

We must finally determine whether Judge Ryan correctly ordered that the parties submit proposals on methods in which the stock could be valued. As we noted earlier, it is for this court to construe its own mandate and the writ will not be issued if the mandate has been correctly interpreted by the lower court. See 52 Am. Jur. 2d Mandamus §355 at p. 678. Where, however, the lower court has

misconstrued our mandate, mandamus is appropriate to review and correct the action of the lower court. 55 C.J.S. Mandamus §100 (d) at p. 172.

We find, after a review of the previous proceedings in this dissolution matter, that our opinion filed June 30, 1981, did not envision the sort of valuation proceedings to which Donald is now objecting. Our opinion clearly stated that "[i]t is unnecessary that we determine the value of Donald's stock interest, because whatever its value, Carol is entitled to one-half of it." We then vacated the trial court's order placing the stock in trust and awarded Carol "a one-half interest in the stock." Judge Ryan, in ordering that the parties submit valuation proposals, clearly misconstrued our mandate. We did not, by our previous opinion, intend to require that Donald purchase Carol's one-half interest in the Stoner stock. All that remained to be done following our decision was for Donald to proceed in accordance with the "agreement regarding stock." Donald is required, by virtue of certain stock transfer restrictions placed on the stock in question, to first offer the stock to the corporation. The corporation must exercise its option to purchase all or any portion of the stock within thirty days after the receipt of the offer. The agreement provides for valuation of the stock and certain closing details.

In the event the corporation does accept the offer to sell the stock, Carol is entitled to one-half of any proceeds realized from the sale. In the event that the offer is refused, Donald shall, pursuant to the stock transfer agreement, transfer one-half of the shares of stock to Carol. If the corporation opts to purchase only a portion of the shares, Carol is entitled to one-half of the proceeds, plus one-half of the shares of stock not purchased by the corporation.

We find that the district court erred in finding that valuation of the stock was necessary in order to effectuate our mandate. The proper means for

rectifying this error is by mandamus. We shall not, however, issue a formal writ at this time, since we are confident that the district court, once its misconception of our order of June 30, 1981, has been called to its attention, will promptly take any steps necessary to effectuate our mandate. See United States v. Haley, 371 U.S. 18, 83 S. Ct. 11, 9 L. Ed. 2d 1 (1962)(Supreme Court granted petition for mandamus, but declined to issue a formal writ of mandamus where it was confident that the district court would take appropriate action once its misconception of the Supreme Court's judgment was called to its attention). If, however, the trial court has not cured its error within thirty days from the date of this decision, a formal writ will issue at that time.

WRIT SUSTAINED.

All judges concur except Schlegel, J., who dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

Our court, in its unpublished opinion in the case of In re Marriage of Hewitt, supreme court number 2-65517 (Iowa Ct. App. 1981), made the following ruling which is the basis for the case now before us:

> II. The Stoner Development Company is a closely held corporation in which Donald owns 5% and Tom Stoner owns 95% of the stock. Donald is entitled to another 5% of the stock upon his death or termination of employment. The only market for the stock is the Stoner Development Company itself. The trial court declined to value the stock and ordered Donald to hold it in trust for Carol's benefit pending future assessment of its value so it could be evenly divided. Donald asks that we value the stock now and distribute all of it to him.
>
> It is unnecessary that we determine the value of Donald's stock interest, because whatever its value, Carol is entitled to one-half of it. Therefore, we vacate the trial court's order that Donald hold the stock in trust for Carol's benefit, and award Carol a one-half interest in the stock now owned by Donald . . . .

It is upon the basis of this holding that the majority believes it is justified in issuing an order of mandamus to stop the district court from proceeding further in this matter. The majority apparently interprets the quoted part of the opinion as being an order that must be obeyed by the district court. The majority's holding indicates its belief that this court has the power to stop the district court's attempt to resolve a problem concerning the stock in question because it appears that the district court is strongly indicating its intention to value the stock.

Iowa Code section 661.1 (1983) does provide for an action of mandamus "to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station." (Emphasis added.) The opinion of this court, however, did not order the district court to "do or not to do" anything in connection with the valuation of the stock. The most it said was that "[i]t is unnecessary that we determine the value of Donald's stock interest, . . ." (emphasis added). The majority apparently reads that provision as an injunction

against the district court's future attempt to value the stock, or an order not to value it, subjecting it to the provisions of Iowa Code section 661.1. I must disagree.

The language of the opinion of this court in Hewitt neither constitutes such an order nor imposes such a duty that it is necessary for this court to issue a writ or other process "for the exercise and enforcement of its jurisdiction, . . ." Iowa R App. P. 22(b). The majority, in its rush to stop the district court and to devise a solution to the problem raised by Carol's Application for Relief, usurps the general and original jurisdiction of the district court, and establishes a precedent that threatens the constitutional authority of that court.

As early as 1864, the Iowa Supreme Court acknowledged the inviolability of the power and authority of the district court. In its interpretation of the constitutional provisions relating to the district court, the court stated in the case of Sterritt v. Robinson, 17 Iowa 61, 62-63 (1864):

> The jurisdiction of the District Court, which is a superior court of general original jurisdiction (Const., art. 5th, § 6; Rev., § 2663), can only be taken away by express words or irresistible implication. No mere negative words will oust the jurisdiction of the superior tribunal . . . . And the District Courts of Iowa have been declared (Davis County v. Horn, 4 G. Greene, 94 [(1853)]), to be invested "with all the attributes of common law tribunals to the same extent as the King's Bench, Common Pleas and Exchequer Courts of Westminister.

Again, in Hummer v. Hummer, 3 Greene 42, 45 (1851), the Iowa Supreme Court stated:

> The district court in this state, possesses the jurisdiction which is conferred upon those courts which are designated as superior. It has been decided that the jurisdiction of such courts can only be taken away by express words of repeal, or irresistible implication . . . . (emphasis in original).

The majority acknowledges that mandamus is improper if there is a plain, speedy and adequate remedy in the ordinary course of the law, but then, without explaining its reasoning, states that "[r]equiring Donald to put forth evidence on

the valuation issue prior to seeking a ruling on the propriety of the proceedings themselves would not be an 'equally convenient, beneficial and effectual' remedy in this case." The cases cited by the majority do not discuss this issue.

The rule, applicable to this case, that mandamus, being an extraordinary remedy, will not be used except in clear cases is quite well settled. The issuance of an order of mandamus is exceptional, and will not issue in doubtful cases. Headid v. Rodman, 179 N.W.2d 767, 770 (Iowa 1970). "The writ will not issue in doubtful cases, but only where the right involved and the duty sought to be enforced are clear and certain and where no other specific and adequate mode of relief is available to the complaining party." Id. (quoting 34 Am. Jur. Mandamus § 32 (1941)). See also 52 Am. Jur. 2d Mandamus § 31 (1970). The purpose of mandamus is "to enforce an established right and to enforce a corresponding duty imposed by law." Stith v. Civil Service Commission, 159 N.W.2d 806, 808 (Iowa 1968). "Mandamus is not available to establish legal rights, but only to enforce legal rights that are clear and certain." (emphasis added.) Stafford v. Valley Community School District, 298 N.W.2d 307, 309 (Iowa 1980); Reed v. Gaylord, 216 N W.2d 327, 332 (Iowa 1974); Headid v. Rodman, 179 N.W.2d at 770.

"Mandamus is an extraordinary writ of limited dimensions the use of which is justified only in exceptional circumstances amounting to judicial usurpation of power." United States v. Powers, 622 F.2d 317, 320 n.2 (8th Cir.), cert. denied, 449 U.S. 837, 101 S. Ct. 112, 66 L. Ed. 2d 49 (1980). Mandamus will not lie where there is another adequate remedy. Stafford v. Valley Community School District, 298 N.W.2d at 309; Virginia Manor v. Sioux City, 261 N.W.2d 510, 514 (Iowa 1978); Headid v. Rodman, 179 N.W.2d at 770; Reed v. Gaylord, 216 N.W.2d at 331; Marshall v. Sloan, 35 Iowa 445, 447 (1872). It has been held that mandamus is not available when certiorari is available, Stafford v. Valley Community School District, 298 N.W.2d at 309, and that mandamus is not available when an appeal of right is available. Marshall v. Sloan, 35 Iowa at 448.

It has also been held that the writ of mandamus will not issue where its issuance would affect one not a party to the mandamus action. Headid v. Rodman, 179 N.W.2d at 771. In this case the parties are Donald Hewitt and the Honorable Rodney Ryan, a district court judge. The majority, by its decision, adjudicates Carol's rights even though she is not a party to this action.

Finally, the majority gives an advisory opinion on how this controversy should be resolved. Not only does the majority order the district court to refrain from exercising its original jurisdiction in this controversy, it seeks to exercise that very jurisdiction itself.

The only appropriate disposition of this action would be to dismiss the petition for order of mandamus; permit the action to proceed in the district court; and, upon the dissatisfaction of either party, review that proceeding by certiorari or by an interlocutory or final appeal. I would deny the writ and dismiss the petition