POST JUDGMENT REMEDIES, JUDGMENT LIENS, GARNISHMENT, EXECUTION, TURNOVER PROCEEDINGS, RECEIVERSHIPS UNDER THE DTPA, AND "OTHER STUFF"

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CHAPTER 15

ATTACHMENTS:

POST-JUDGMENT REMEDIES: JUDGMENT LIENS, GARNISHMENT, EXECUTION, TURNOVER PROCEEDINGS, RECEIVERSHIPS UNDER THE DTPA, AND "OTHER STUFF"

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I. SCOPE OF ARTICLE. Successful collection of judgments requires the aggressive use of proper post-judgment remedies having first prepared oneself with adequate discovery. Knowing the debtor, his assets and activities, by thoroughly reviewing the client's files, visiting with the client on his knowledge of the debtor, post-judgment interrogatories and depositions, information gleaned from pre-trial discovery and contacts with the debtor, and perhaps the aid of a private investigator, assists the judgment debtor in determining the proper tools for successful post-judgment collection. An Areas of Examination Checklist is attached hereto as Form 17.

While many of the statutory aids discussed below may be available to the judgment creditor, the ultimate decision on which, if any, to use should be based on a careful cost/benefit analysis. The best remedy of all may be a post-judgment payment agreement whereby the judgment creditor agrees to withhold further collection efforts, i.e. periodic interrogatories and depositions in aid of judgment, in exchange for monthly installments.

II. THE JUDGMENT LIEN.

A. PURPOSE. A properly fixed judgment lien acts as a lien on all of the judgment debtor's nonexempt real property in the county of recordation.

B. APPLICABLE STATUTES. Judgment Liens - Tex. Prop. Code Ann. §§ 52.001-0011 (Vernon 1984) and Tex. Civ. Prac. & Rem. Code Ann. § 52.001, et seq. (Vernon Supp. 1990); Dormant Judgments - Tex. Civ. Prac. & Rem. Code Ann. § 34.001 (Vernon 1986); Revival of Judgments - Tex. Civ. Prac. & Rem. Code Ann. § 31.006 (Vernon 1986).

C. CREATION OF LIEN. A judgment lien is created by the proper recording and indexing of an abstract of judgment. The abstract of judgment must be filed in each county where the judgment lien is sought to be fixed. Tex. Prop. Code Ann. § 52.001 (Vernon 1984). The lien continues for ten years from the date of recordation and indexing if the judgment does not become dormant. Tex. Prop. Code Ann. § 52.006 (Vernon 1984).

D. FINAL JUDGMENTS AND APPEALS. The judgment on which the lien is based must be final, not interlocutory. Blankenship & Buchanan v. Herring, 132 S.W. 882 (Tex. Civ. App. 1910, no writ). An abstract can be filed on a final judgment if the judgment is being appealed or a supersedeas bond has been filed. If a judgment creditor has taken the necessary steps to obtain a lien before the judgment is appealed, the fact of appeal will not destroy the effect of such steps in the event of affirmance. Roman v. Goldberg, 7 S.W.2d 899 (Tex. Civ. App.--Waco 1928, writ ref'd).

The potential impact of the judgment lien was evidenced in the highly publicized Pennzoil Co. v. Texaco, Inc. litigation. Texaco, Inc. v. Pennzoil Co., 626 F.Supp. 250 (S.D.N.Y. 1986), rev'd, 107 S.Ct. 1519 (1987). Upon entry of the trial court's judgment, Pennzoil was entitled to obtain an abstract of judgment and place it on file in each county in Texas, thus placing a lien on all of Texaco's real property in Texas. Texaco realized the impact of this statute and filed suit in the United States District Court for the Southern District of New York challenging the constitutionality of the application of Texas's judgment lien and supersedeas bond provisions. While Texaco found relief in the District Court and the Second Circuit, the Supreme Court held that the Federal Courts should have abstained from interfering with the Texas judicial system and overturned the injunctive relief granted. Pennzoil Co. v. Texaco, Inc., 107 S.Ct. 1519 (1987). Texaco was forced to file Chapter 11 bankruptcy to prevent further action by Pennzoil to perfect its judgment liens.

In order to avoid the problems posed by the judgment lien statute Chapter 52 was added to the Civil Practices and Remedies Code regulating supersedeas bond requirements (and providing that this codification controls over the Supreme Courts rules relating to same where conflicting; Tex. R. App. Proc. Rule 24 [former Rules 47, 48, and 49] having already been amended for relief from burdensome supersedeas bond requirements). Chapter 52 of the Property Code also now allows suspension of the judgment lien pending appeal in certain instances. Tex. Civ. Prac. & Rem. Code Ann. §52.001, et seq. (Vernon Supp. 1990); Tex. Prop. Code Ann. §52.0011(a) (Vernon Supp. 1990) provides that the abstract does not create a lien if:

(1) the defendant has posted security as provided by law or is excused by law from posting security; and

(2) the court finds that the creation of the lien would not substantially increase the degree to which a judgment creditor's recovery

> under the judgment would be secured when balanced against the costs to the defendant after the exhaustion of all appellate remedies. A certified copy of the finding of the court must be recorded in the real property records in each county in which the abstract of judgment or a certified copy of the judgment is filed in the abstract of judgment records.

A procedure exists for the court's withdrawing its finding and filing such withdrawal in the abstract of judgment records. So, for example when the appellate remedies have been exhausted the judgment creditor could request the court withdraw the findings. Tex.Prop.Code Ann. §52.0011(b).

The court in Transcontinental Realty Investors v. Orix, 470 S.W.3d 844 (Tex.App. – Dallas, 2015, no pet.) held that a trial court's order under section 52.0011, whether it grants or denies the relief, is simply ancillary to the filing of the abstract and thus not appealable. The court suggested instead that, to seek appellate review of the trial court's order, a motion be filed in the appellate court with jurisdiction or potential jurisdiction over the appeal as is allowed under Rule 24, Texas Rules of Appellate Procedure.

E. JUDGMENTS NOT COVERED IN THIS PAPER. The rules discussed in this paper apply to Texas state trial court judgments. For a discussion of the enforcement of sister state, foreign, and federal court judgments see Texas Collections Manual (4th ed. 2011); Tex. Civ. Prac. & Rem. Code Ann. § 35.001-008 (Vernon 1986) (enforcement of judgments of other states and U.S. Courts) (Note, however, that the Uniform Enforcement of Foreign Judgments Act came under fire in Hill Country Spring Water of Texas v. Krug, 773 S.W.2d 637 (Tex. App.--San Antonio 1989, writ denied) on the basis that it failed to afford a judgment debtor an express remedy to contest the enforcement of a foreign judgment but the court found it unnecessary to rule on the statute's constitutionality; however, in Moncrief v. Harvey, 805 S.W.2d 20 (Tex. App. Dallas 1991, no writ), the court recognized the judgment debtor's filing of a motion to contest recognition of a foreign judgment as operating as a motion for new trial); the Uniform Foreign Country Money-Judgment Recognition Act previously found in Chapter 36 of the Texas Civil Practices & Remedies Code was repealed and replaced effective June 1, 2017 with the updated Uniform Foreign-Country Money Judgments Recognition Act, now in Chapter 36A (now requiring recognition to be obtained by filing suit or raising an issue in pending litigation, rather than the process of merely filing an authenticated copy of the foreign judgment); Tex. Prop. Code Ann. § 52.007 (Vernon 1984) (recordation of federal court abstracts of judgments); 28 U.S.C.A. §§ 1962-63 (West 1982) (federal court liens).

F. THE ABSTRACT OF JUDGMENT.

1. Preparation. Tex. Prop. Code Ann. § 52.002 (Vernon Supp. 2001) allows either the judge, justice of the peace, or the clerk of the court, or the judgment creditor or his agent, attorney or assignee to prepare the abstract of judgment for judgments rendered in all but small claims and justice courts. For those courts, the judgment creditor is not allowed to prepare his own abstract. Note also that abstracts of federal court judgments require the certificate of the clerk of the court. Tex. Prop. Code Ann. §52.007 (Vernon 1984).

2. Contents. No matter who prepares the abstract it should be reviewed carefully to make sure it complies with all the requirements of Tex. Prop. Code Ann. § 52.003 (Vernon 1984), as follows:

(a) An abstract of judgment must show:

(1) the names of the plaintiff and defendant;

(2) the birthdate of the defendant, if available to the clerk of justice;

(3) the last three numbers of the driver's license of the defendant, if available;

(4) the last three numbers of the social security number of the defendant, if available;

(5) the number of the suit in which the judgment was rendered;

(6) the defendant's address, or if the address is not shown in the suit, the nature of citation and the date and place of service of citation;

(7) the date on which the judgment was rendered;

(8) the amount for which the judgment was rendered and the balance due;

(9) the amount of the balance due, if any, for child support arrearage; and

(10) the rate of interest specified in the judgment.

(b) An abstract of judgment may show a mailing address for each plaintiff or judgment creditor.

While this section provides that the abstract may show a mailing address for each plaintiff or judgment creditor, Section 52.0041 provides that the abstract must include the mailing address for each plaintiff or judgment creditor and that if it does not a penalty filing fee will be imposed. A sample abstract of judgment form for use by the judgment creditor's attorney is attached hereto as Attachment No. 3. Note that the abstract prepared by the creditor's attorney must be verified. Tex. Prop. Code Ann § 52.002 (b). Unsworn declarations may not be used. Tex. Civ. Prac. Rem. Code Ann. § 132.001 (b).

3. Strict Compliance Necessary. The importance of compliance with judgment lien requirements was addressed in Rosenfield v. Alley & Stainless, Inc., 62 B.R. 515 (Bankr. N.D. Tex. 1986). The case contains an extensive discussion of Texas case law on the need for strict compliance with the statutes creating the lien. Rosenfield involved an action by a debtor in possession filed in a bankruptcy proceeding to avoid a judgment lien. The judgment was entered pursuant to a settlement agreement which provided for payments toward the judgment, allowed for the filing of the abstract of judgment, and provided that the judgment creditor would not execute on the judgment until default. The court stated that the agreement authorized the judgment creditor to "abstract both the judgment and the agreement simultaneously." Between the time the judgment was signed and the time the abstract was recorded several payments had been made on the judgment pursuant to the agreement, but credit for those payments was not included in the abstract before filing. The court held that, although the agreement provided a payment schedule, it did not provide sufficient information such that a third party could easily determine the amount credited to the judgment ("the balance due" on the judgment at time of filing) and thus did not substantially comply with the requirements for fixing a judgment lien. The court held that while it is the duty of the judgment debtor to update his credits on the abstract, citing Gordon-Sewall & Co. v. Walker, 258 S.W. 233 (Tex. Civ. App.--Beaumont 1924, writ dism'd), the burden is on the judgment creditor to provide the correct information at the time of issuance and recording. But see, Hoffman v. Heyland 74 S.W.3d 906 (Tex. App.-Dallas 2002, no writ), wherein the court found a judgment lien to be valid if the abstract correctly reflects the balance due when issued, even if it doesn't reflect the credits toward the judgment after it was issued and before filing.

The attorney should make certain that the abstract complies with the above requirements because if these requirements are not met, no lien attaches. See Texas American Bank v. Southern Union Exploration, 714 S.W.2d 105 (Tex. App.--Eastland 1986, writ ref'd n.r.e.). (abstract did not state address of defendant, nature of citation, date of service, or place of service). But see Houston Investment Bankers Corp. v. First City Bank, 640 S.W.2d 660 (Tex. App.--Houston [14th Dist.] 1982, no writ) (object of statute is to provide means of ascertaining the existence of liens and to indicate source from which full information may be obtained; therefore, where abstract was properly alphabetized in the indices under all names required by statute, abbreviation of last two words of bank's name substantially complied with the statute and did create a lien). See, e.g., Bonner v. Grigsby, 84 Tex. 330, 19 S.W. 511 (1892) (cause number omitted); Rushing v. Willi, 28 S.W. 921 (Tex. Civ. App. 1894, no writ) (incorrect date). But see Smith v. Adams, 333 S.W.2d 892 (Tex. Civ. App.--Eastland 1960, writ ref'd n.r.e.) (a discrepancy of one day between actual date of judgment and date recited in abstract did not affect validity of lien).

Strict compliance can be tricky where "the names of the plaintiff and defendant" is concerned. One would think this provision requires one to track the name of the defendant as is reflected in the judgment. The judgment creditor in Wilson v. Dvorak, 228 S.W.3d 228 (Tex. App. – San Antonio 2007, pet. denied) did just that using the judgment debtor's maiden name reflected in the original judgment. The judgment creditor knew of the judgment debtor's marriage when she renewed and re-abstracted her judgment at a later date and attempted to accomplish 'notice' to subsequent purchasers and creditors by filing an additional affidavit in the real property records proving up the tie between the judgment debtor's maiden and married names. Unfortunately the clerk's office didn't properly index the affidavit and so there was nothing to put the world on notice in the real property records that the judgment debtor was the judgment debtor. This would support this author's practice of adding "aka's" to an abstract when the judgment debtor uses different names or is a 'serial spouse'. The key is that the clerk's office indexes the abstract under each of those names.

The requirement that the clerk include the defendant's date of birth and driver's license number if available has been construed to mean if "reasonably available." It has also been held that if this information is not available, the clerk is not required to state on the face of the abstract that it is not available. Fred Rizk Construction Co. v. Cousins Mortgage & Equity Investments, 627 S.W.2d 753, 756 (Tex. Civ. App.--Houston [1st Dist.] 1981, writ ref'd n.r.e.).

4. Recordation. The abstract of judgment should be recorded in each county in which the debtor has real property. The abstract is filed with the county clerk who records it in the county real property records. Attachment No. 13 is a form for the letter filing the Abstract of Judgment. The clerk is required to note on the abstract the day and hour of recordation. At the same time, he must enter the abstract in the alphabetical index to the real property records, showing the name of each plaintiff and of each defendant in the judgment and the number of the page in the records in which the abstract is recorded. Tex. Prop. Code Ann. § 52.004 (Vernon 1984). It is crucial that the abstract is properly indexed. A mistake in indexing can destroy the lien. City State Bank v. Bailey, 214 S.W.2d 901 (Tex. Civ. App.--Amarillo 1948, writ ref'd) (lien failed because judgment for City State Bank was indexed under B as "Bank, City State"); Sarny Holdings, Ltd. v. Letsos, 896 S.W.2d 274 (Tex. App.--Houston [1st Dist.] no writ) (judgment in favor of estate properly indexed in estate name even though suit brought by guardian). The name of every judgment defendant must be indexed; omission of one can destroy the lien on the others. McGlothlin v. Coody, 59 S.W.2d 819 (Tex. Comm'n App. 1933, holding approved). In Austin v. Coface, 506 S.W.3d 707 (Tex. App. – Houston [1st] 2016, pet. denied) a judgment lien was held to attach to a judgment debtor's property even when the debtor held property under the name Rafael Ojeda and the judgment against Rafael Augusto Martin Ojeda Miranda was indexed under "Mirandas". The court stated that the purchaser (and her title company!) were put on notice of the debtor's full name and his shortened name by virtue of a lis pendens that was filed in the property records. The Court did not specifically address how one would properly index a judgment against a judgment debtor with a first (paternal) and second (maternal) surname (citing Hispanic naming conventions as discussed in the Chicago Manual of Style), but instead found the purchaser to be on constructive notice of the names in the 'chain of title' – in this case a lis pendens. Practically speaking, it may be advised to name the defendant as an aka in the original suit documents, or if discovered after judgment draft the abstract naming the judgment debtor as sued and 'aka' to cover either remaining first or second surname.

Some authorities suggest that to insure proper indexing, copies of the records index should be obtained or a personal inspection made of the index to determine if the indexing is proper. In fact, the creditor's attorney should monitor all aspects of the preparation, recordation and indexing of the abstract because when a judgment lien is challenged, the burden of proof that all statutory requirements were met is on the party attempting to establish the lien. See McGlothlin v. Coody, supra; Day v. Day, 610 S.W.2d 195 (Tex. Civ. App.--Tyler 1980, writ ref'd n.r.e.).

5. Judgments Against Counter-defendants. Allied First National Bank of Mesquite v. Jones, 766 S.W.2d 800 (Tex. App.-- Dallas 1989, no writ) addressed compliance with the abstract statutes in the event a counter-plaintiff is successful in suit against a counter-defendant (plaintiff). For purposes of the abstract, the counter-defendant is the "defendant" and the counter-plaintiff has the responsibility to include the counter-defendant's address in the Counterclaim or serve the counter-plaintiff so as to have information with which to comply with Tex. Prop. Code Ann. §§ 52.003(d) (Vernon 1989) (abstract includes defendant's address shown in suit or the nature, date and place of service of citation).

6. Abstracts of Domesticated Judgments. The Uniform Enforcement of Foreign Judgments Act (Tex. Civ. Prac. & Rem. Code Ann. §35.001 et seq (Vernon 1986)) and the Uniform Foreign-Country Money Judgments Recognition Act (Tex. Civ. Prac. & Rem Code Ann. § 36A.001 et seq (Vernon 2017)) provide that judgments filed pursuant to the Acts are enforceable in the same manner as judgments in the court where filed. The lien requirements are clearly applicable to the foreign judgment holder domesticating the judgment in Texas. Reynolds v. Kessler, 669 S.W.2d 801 (Tex. App.--El Paso 1984, no writ); Citicorp Real Estate, Inc. v. Banque Arabe International D'Investment, 747 S.W.2d 926 (Tex. App.--Dallas 1988, writ denied).

Preparation of the abstract of judgment for a domesticated judgment raises some questions. While the names of the plaintiff and defendant, the defendant's address, the birthdate and driver's license number of the defendant, the amount for which the judgment was rendered, the balance due on the judgment and the rate of interest specified in the judgment are easily taken from the judgment to be domesticated, a question may arise as to the proper date and suit number. Is it the number in the original suit and date of the original judgment, or is it the number given by the clerk upon filing the authenticated copy and the date of filing in Texas? Further, common practice is also to include the court signing the judgment. Should the abstract of the domesticated judgment have no reference to the Texas court and cause number where domesticated? In Reynolds, supra, the court was faced with an abstract containing the date of registration in Texas instead of the date the judgment was rendered and the court in Texas where registered instead of the court where originally rendered. It found the date problem combined with a failure to include the judgment interest to create sufficient deficiencies in the abstract so as to make it ineffective to affix a lien. Although not specifi-

cally addressed, the manner in which the court pointed to the cause number question leads one to believe that perhaps it should have included the original number. To play it safe and to aid one searching the lien records in tracing the lienholder this author would suggest that the abstract include the cause number and court name for both the original court and the Texas court, and that it also include the date the original judgment was rendered along with the date of registration. Now what if the defendant's addresses changes between the time of the original suit and the time it is registered in Texas?

G. PROPERTY TO WHICH LIEN ATTACHES.

1. Non-Exempt Real Property. The judgment lien attaches to all of the defendant's nonexempt real property in the county of recordation. Tex. Prop. Code Ann. § 52.001 (Vernon Supp. 2007). In the 80th Legislative Session in 2007 Senate Bill 512 amended Section 52.001 to provide that the lien does not attach to exempt realty. Note that the amendment applies only to an abstract of judgment lien recorded and indexed on or after September 1, 2007, the effective date of the Act. Before the amendment, it was accepted that the lien would not be enforceable as to homesteads; however, title companies often listed the lien as an exception to title requiring the seller to obtain a release of the lien because the statute stated that it constituted "a lien on the real property of the defendant." Title companies may still require a release even for liens filed after September 1, 2007, but S.B.512 has provided an alternative means for securing a release as discussed at 2. Release of Record of Lien on Homestead Property below. In Allen-Pieroni v. Pieroni; No. 05-15-00774-CV (Tex. App. – Dallas 2016), rev. & rem., No. 16-0900 (Tex. 2017) a post amendment case, the Court of Appeals upheld damages for slander of title when a judgment creditor who had been paid (this issue was contested) refused to release a judgment lien for a 2009 judgment that was preventing a sale of a homestead. The opinion did not even analyze whether the lien properly attached to the homestead, only the creditor's refusal to release the lien on the homestead. One is not sure why the homestead claimant did not utilize the release of homestead procedure afforded by Tex.Prop.Code.Ann. §52.0012. The Supreme Court reversed the Court of Appeals on the measure of damages and remanded the case to the trial court. Upon examination of the brief, one learns that the judgment creditor represented herself pro se in the trial court.

Prior to the recent amendment, the abstract did not create an enforceable lien on the judgment debtor's homestead, but it could nevertheless create a cloud on the title. Judgment debtors have been held to have a claim for damages against the judgment creditor who refused to release the lien as to the homestead when requested to do so by the judgment debtor. Tarrant Bank v. Miller, 833 S.W.2d 666 (Tex. App.--Eastland, no writ).

A judgment lien will attach to a debtor's previously exempt real property when it ceases to be a homestead, if at that time it is still owned by the judgment debtor. Walton v. Stinson, 140 S.W.2d 497 (Tex. Civ. App.--Dallas 1940, writ ref'd); Intertex, Inc. v. Kneisley, 837 S.W.2d 136 (Tex. Civ. App. - Houston [14th] 1982, writ denied); Drake Interiors v. Thomas; No. 14-17-00374-CV (Tex.App.-Houston [14th], mo. rehearing filed). (Court addressed issue of intent to abandon homestead to determine if lien attached). A perfected judgment lien attaches to property later acquired in the county where the abstract of judgment is recorded and indexed. Tex. Prop. Code Ann. § 52.001 (Vernon 1984); see Simmons v. Sikes, 56 S.W.2d 193, 195 (Tex. Civ. App.--Texarkana 1932, writ dism'd). A cotenant with a homestead right may find the property is subject to partition by a judgment debtor's creditor who purchases at execution the judgment debtor cotenant's non-exempt interest in the tract. Grant v. Clouser, 287 S.W.3d 914 (Tex.App.-Houston 14th 2009, no pet.) On the other hand, each spouse in a marriage has a separate and undivided possessory interest in the homestead, which is only lost by death or abandonment, and which may not be compromised by the other spouse or by his or her heirs, Fairfield Financial Group v. Synnott, 300 S.W.3d 316 (Tex.App.-Austin 2009, no pet.)(which went on to find that a judgment lien didn't attach to the husband's interest in a homestead even though he moved out as a result of separation and divorce.) A judgment lien will attach to jointly owned community property for a spouse's pre-marital debt, Drake Interiors v. Thomas, 433 S.W.3d 841 (Tex.App.-Houston 14th, 2014, pet. for review denied).

In the case of property acquired by a beneficiary upon intestacy or under a will, an interest in the property vests immediately in the beneficiary upon decedent's death, subject to payment of the debts of the decedent. A judgment against the beneficiary properly abstracted will attach to that interest in real property. However, the administrator's authority to sell the property and pay the debts of the decedent will extinguish the lien and the property will pass free and clear of the judgment lien if sold by the administrator to pay debts of the decedent's estate. Woodward v. Jaster, 933 S.W.2d 777 (Tex.App.--Austin 1996, no writ). A similar result may occur in the event a beneficiary exercises a right of disclaimer. Parks v. Parker, 957 S.W.2d 666 (Tex.App.--Austin 1997, no writ).

2. Release of Record of Lien on Homestead Property. It would seem that the amendment to Property Code

Section 52.001 would be sufficient to allow a judgment debtor to pass title to his homestead free and clear of judgment liens. However, perhaps anticipating the continuing requirements of title companies and acknowledging the difficulty in identifying what real property constitutes homestead, and thus whether a lien attaches, the Legislature has provided a mechanism for the judgment debtor to file a "Homestead Affidavit as Release of Judgment Lien" provided that the judgment debtor complies with the notice provisions of the statute. See Tex. Prop. Code Ann. §52.0012 (Vernon 2007), applicable only to an abstract of judgment lien recorded and indexed after September 1, 2007, the effective date of the Act.

Attachments 15 and 16 are forms for a release and a letter forwarding same for filing.

H. KEEPING THE JUDGMENT AND JUDGMENT LIEN ALIVE.

1. Non-governmental Judgments. The judgment lien continues for a period of 10 years following the date of recording and indexing the abstract except if the judgment becomes dormant, in which event the lien ceases. Tex. Prop. Code Ann. §52.006 (Vernon 2007). Therefore one must (1) keep the judgment alive and (2) obtain and record a new abstract of judgment.

A judgment becomes dormant if a writ of execution is not issued within 10 years after its rendition. Tex. Civ. Proc. & Rem. Code Ann. §34.001 (Vernon 1996). It can be revived by scire facias or by an action of debt brought not later than the second anniversary of the date that the judgment becomes dormant. Tex. Civ. Prac. & Rem. Code Ann. §31.006 (Vernon 1996). **Caution:** Do not be confused and base the revival action on the date of filing the abstract, rather than the date of the judgment and its dormancy, as the judgment creditor appeared to do in Hahn v. Love, 321 S.W.3d 517 (Tex. App.-Houston 1st 2009, pet. denied) although no one seemed to notice the error—not the opposing parties and not even the court!

The creditor's counsel failed to get a writ of execution issued before the judgment expired in Harper v. Spencer & Associates, PC, 446 S.W.3d 53 (Tex. App.—Houston [1st], 2014, petition denied) and failed to revive it within the two year period. The trial court issued a scire facias to revive the dormant judgment based on a writ of garnishment issued in an ancillary charging order proceeding filed in connection with the collection of the underlying judgment. On appeal the Court of Appeals found that the writ of garnishment was 'an execution'. The Supreme Court denied the petition. This author strongly disagrees with the Court of Appeals' holding and would not rely on garnishments or turnover orders or anything but writs of execution to prevent a judgment from becoming dormant. In Oukrop v. Tatsch, Cause No. 03-12-00721-CV (Tex. App.- Austin, 2014, no pet.) (mem.op.), the 3rd Court held that a turnover order did not keep the underlying judgment from becoming dormant. The 2nd Court held similarly in Jensen v. Briggs, Cause No. 02-14-00096-CV (Tex.App.-Ft. Worth, 2015, no pet.) (mem. op.)

Stretching to find a judgment revived, the court in Hawthorne v. Guenther, 461 S.W.3rd 218 (Tex. App.-San Antonio 2015, pet.rev. denied) found that an intervention filed in a personal injury suit was an 'action of debt' sufficient to revive a dormant judgment. This case, as well as Harper, Oukrop and Jensen above, underscores the need to either place the burden of judgment renewal review on the client, or insure that a reliable calendar system be in place so that writs of execution be issued before the 10th anniversary of the judgment date and before the 10th anniversary of the last writ. This author reviews files on the 9th anniversary to be safe.

Note that a Judgment may be alive and enforceable in Texas, but may not be effective for purposes of domestication and enforcement in other states if the law of the other state would render the judgment dormant and unenforceable in that state. See discussion in Hall v. Oklahoma Factors, Inc., 935 S.W.2d 504 (Tex-App.--Waco 1996, no writ) (Texas judgment less than ten (10) years old but more than five (5) years old was not enforceable in Oklahoma because it had become dormant under Oklahoma's five (5) year dormancy statute; Texas Court allowed an "action on judgment", although it correctly refused to comment on how this "new" judgment would be received by the Oklahoma Courts).

While the Civil Practices and Remedies Code does not specifically address whether a judgment can be renewed into infinity, the prior Article 3773, which was part of the codification in 1985, stated that "execution may issue at any time within ten years after the issuance of the preceding execution." This statute was discussed in Commerce Trust Co. v. Ramp 138 S.W.2d 531 (Tex. 1940) wherein the court stated that the judgment creditor may prolong the life of the judgment indefinitely.

2. State or State Agency Judgments. Tex. Prop. Code Ann. §52.006 (b), effective April 23, 2007, provides that judgments of the state or a state agency do not become dormant and that a properly filed abstract of judgment creates a lien for 20 years from date of filing and the lien can be renewed for an additional 20 year period by filing a renewed abstract of judgment.

3. Political Subdivisions. While judgments of political subdivisions (as defined in Civ. Prac. & Rem. Code

§16.61(a)) will go dormant per the dormancy statutes, the same section states that the political subdivision is not barred by the statute of limitations in Civ. Prac. & Rem. Code §31.006, the revival statute. Therefore judgments of political subdivisions can be revived at any time, not just within two years of dormancy. City of Dallas v. Ellis, No. 05-16-00348-CV (Tex.App. – Dallas 2017, no pet.) (mem. op.)

4. Child Support Judgments. Subsection (c) to §34.001 excepts judgments for child support from the dormancy statute and applies to all child support judgments whenever rendered.

I. CAN THE STATUTES OF LIMITATIONS ALTER THE LIFE OF THE JUDGMENT LIEN?

Texas Property Code Annotated § 52.006 (Vernon 1989) provides that the lien continues for ten years from the date of recordation and indexing if the judgment does not become dormant. The wording of the statute seems clear enough that ten years means ten years. The judgment creditor may have various reasons for not foreclosing on its judgment lien immediately, i.e., that there is insufficient equity in the property, there may be an agreement with the judgment debtor not to foreclose as long as payments are made toward reducing the judgment balance, or perhaps the lien attaches to property acquired by the judgment debtor at a time when the judgment creditor does not know the debtor's whereabouts and has placed collections efforts on hold?

Jones v. Harrison & Stephens, 773 S.W.2d 759 (Tex. App.--San Antonio 1989, writ denied) may prove to be an eye-opener to creditors who don't periodically confirm the ownership of all non-exempt real property, and its occupancy, of all of the creditors' judgment debtors. In Jones, a judgment creditor brought suit to foreclose a judgment lien for two different parcels of real property previously owned by the judgment debtor then sold separately to third parties after the judgment had been properly abstracted and indexed. The court found that the purchasers of the parcels had "extinguished" the judgment lien by establishing a limitations title by adverse possession under the three and five year statutes. Tex. Civ. Prac. & Rem. Code Ann. §§ 16.024, 16.025 and 16.030(a) (Vernon 1986). The court relied on Shaw v. Ball, 23 S.W.2d 291 (Tex. Comm'n App. 1930, Judgment Adopted) and White v. Pingenot, 90 S.W. 672 (Tex. Civ. App.--1905, writ ref'd n.r.e.). The problem with the holding in Shaw that possession by grantee under deed from judgment debtor acquires a new title not in privity with the judgment debtor thereby freeing and discharging the land of the lien is that this holding was unnecessary in that the grantee, purchasing at foreclosure under the Deed of Trust, had a vendor's lien prior to the filing of the abstract. Furthermore, Shaw relied on White. The White court also allowed a grantee holding title from a judgment debtor to "extinguish" the lien. Oddly, both Shaw and white involved cases with defective conveyances whereby the subsequent possession ripened into a "new" title. Would the result be the same if the conveyances had been regular? The White opinion indicates no.

Both Shaw and White failed to adequately address the definition of adverse possession "an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another." Each case overlooked the premise that possession by a judgment debtor is not inconsistent with and hostile to the claims of a judgment creditor and so possession by this grantee under a valid or defective conveyance is likewise not adverse as to the judgment creditor. In line with these reasonings and decided subsequent to Shaw and White, the three year statute of limitations has been held not to bar a recorded lien in Rogers v. Smith, 31 S.W.2d 871 (Tex. Civ. App.--San Antonio 1930, no writ) and possession by a vendee of a mortgagor has been held not to be adverse as to the mortgagee in spite of an alleged repudiation in Moerbe v. Beckman, 132 S.W.2d 616 (Tex. Civ. App.--Austin 1939, dism. judgm. cor.). The Moerbe court was dealing with the question of adverse possession as to a mortgagee and stated:

> In this state the mortgagee of land acquires no title thereto by virtue of the mortgage, but merely holds a lien thereon to secure his debt. He is not entitled to possession of the land and can maintain no possessory action therefor. Other than to foreclose his lien, whether by suit or under a power, under the terms of his mortgage, he can maintain no action regarding the land except such as may be essential to protect his security. ...These rules apply to vendor's liens as well as to those secured by trust deeds and other forms of mortgage.
>
> It is likewise elementary that the possession of the mortgagor is in subordination to the rights of the mortgagee. His relation to the mortgaged property is analogous to that of trustee for the mortgagee. Also elementary is the proposition that his vendees, with notice, actual or constructive, of the mortgage, acquire no rights in the mortgaged property other than those held by the mortgagor, and occupy the same relation to the property as the mortgagor. The mortgagor and his vendees with such notice, having the right of possession and the obligation to pay the

> taxes, such possession and payment of taxes are entirely consistent with the rights of the mortgagee and are therefore in no sense adverse as to him. And since he can assert no possessory rights in the property, and his only cause of action in regard to it is foreclosure, which cause of action does not accrue until his debt matures, it would seem to follow that the mortgagor and his vendees with notice are powerless, by mere repudiation, to render their possession adverse as to him prior to the date of such maturity. This exact question does not appear to have been adjudicated in this state.

A judgment lien holder would surely have no greater rights to possession than that of a mortgagee. Therefore, possession by a vendee of a judgment debtor would not be adverse to the judgment lien holder.

In most instances when a judgment debtor sells real property subject to a judgment lien the lien is picked up by the title search and the purchaser (or the title company issuing title insurance) will require that the lien be released prior to the sale. Surely public policy would favor clearing title by proper release and payment of lawful creditors as opposed to reliance on limitations titles. The Supreme Court's denying the application for writ of error, though not expressly approving of the holding in Jones v. Harrison, encourages judgment debtors to convey uninsured and encumbered title, perhaps in collusion with their vendees. This author believes the case to be bad law. In order to protect its rights, the judgment lien holder will now need to review the debtor's assets at least every three (3) years so as to prevent losing its lien to an adverse possessor.

J. PAYMENT OF JUDGMENTS. Civil Practice and Remedies Code Section 31.008 provides a means for judgment debtors to obtain releases of judgments by payment into the registry of the court when the judgment creditor cannot be found. It allows judgment debtors to clear their real property from judgment liens and update their credit histories when the judgment creditor cannot be located. It also provides a means for releases of judgments when the judgment creditor refuses to accept payment of the judgment, or accepts payment and refuses to execute a release.

K. CANCELLATION OF JUDGMENT LIENS AFTER DISCHARGE. The provisions relating to cancellation of judgment liens after a debtor's discharge in bankruptcy were amended in 1993. See Texas Property Code, §52.021, et seq., §52.041 et seq.

L. PRACTICAL TIPS.

1. Recording of abstract of judgments is a relatively inexpensive insurance policy for future collection possibilities. Consider recording the abstract in:

    a. The debtor's current and previous counties of residence;

    b. The debtor's county of employment;

    c. The county where the debtor's family Resides (inheritance possibilities); and,

    d. The counties where the debtor previously owned property (he may try to invest again).

2. The creditor and his attorney are advised to maintain tickler systems to ensure that all judgments and judgment liens are kept alive. The process of obtaining a writ of execution and a new abstract should begin no later than nine years after the initial judgment is signed so that all procedures are complete prior to the judgment and judgment lien's ten year anniversary dates.

3. In light of Jones v. Harrison, supra, regular post-judgment discovery may be a must in order to insure the life of the lien.

4. Note that a court cannot provide in its judgment that the judgment is not to be abstracted unless the judgment debtor defaults in his payments (See Attorney General of Texas v. Wilson, 878 S.W.2d 690 (Tex. App.--Beaumont 1994, no writ)), but agreements not to abstract a judgment can be made between the parties as an incentive to encourage post-judgment payments.

III. WRIT OF EXECUTION.

A. PURPOSE. An execution is a judicial writ directing the enforcement of a district, county, or justice court judgment. The writ has a life of 30, 60, or 90 days depending on what is requested by the plaintiff, his agent, or his attorney. See Tex. R. Civ. P. 621. Pursuant to the writ of execution, the sheriff or constable will levy on the debtor's nonexempt property, sell it, and deliver the proceeds to the creditor to be applied toward satisfaction of the judgment. See Tex. R. Civ. P. 637.

B. APPLICABLE RULES AND STATUTES. Procedure Rules - Tex. R. Civ. P. 313, 621-656; Statutory Provisions - Tex. Civ. Prac. & Rem. Code Ann. §§ 34.001-.067 (Vernon 1986) and 30.018 (Vernon 2014); Property Exemptions - Tex. Const. art. XVI, §§

49-51; Tex. Prop. Code Ann. §§ 41.001-42.0021 (1984) and Tex. Labor Code §408.201; Fraudulent Transfers - Tex. Bus. & Com. Code Ann. §§ 24.001-24.013 (Vernon 1987); Duties of Officers - Tex. Civ. Prac. & Rem. Code § 34.047, 34.061-.067 (Vernon 2007), Tex. Local Gov't Code Ann. §§ 85.021, 86.021 and 86.024 (Vernon 2007).

C. ISSUANCE.

1. When. Upon request of the successful party or his attorney the writ of execution is issued after the expiration of 30 days from the time a final judgment is signed, or after the order overruling a motion for new trial is signed, provided that no supersedeas bond has been filed and approved. Tex. R. Civ. P. 627. Attachment 14 is a form for a letter requesting issuance of a writ of execution.

Care in drafting the 'final' judgment cannot be encouraged enough, especially when it is a default judgment. If the petition states multiple claims and the default judgment does not dispose of all the claims, one may find the writ of execution challenged by mandamus because execution cannot issue on an interlocutory judgment. In Re Roman, No. 08-17-00223-CV (Tex.App.-El Paso 2018, original proc.). Some practitioners will hold off requesting a writ of execution until the default judgment is over 6 months old, so that the deadline to challenge the judgment by restricted appeal under Rules of Appellate Procedure 26.1 (c) and 30 has lapsed. Or they will wait until the judgment is at least 90 days old, so as to eliminate a 306a motion to extend the time to file a motion for new trial if notice of entry of the judgment is not received.

Execution may issue prior to the 30 days provided in Rule 627 if the plaintiff or his agent or attorney files an affidavit that (i) the defendant is about to remove his nonexempt personal property from the county or, (ii) the defendant is about to transfer or secrete such personal property for the purpose of defrauding his creditors. Tex. R. Civ. P. 628. It should be pointed out that the qualifications are disjunctive and the removal of property is a sufficient ground without fraud for the early issuance of the writ. Clifford v. Fee, 23 S.W. 843 (Tex. Civ. App. 1893, no writ).

2. Requirement of Due Diligence. The creditor's attorney must ensure that the execution is prepared and issued by the clerk in a timely and proper manner. He must see that it is timely placed in the officer's hands, and that execution is made in a timely and proper manner. The creditor has the burden to prove that execution was issued on his judgment within the statutory period. See Boyd v. Ghent, 95 Tex. 46, 64 S.W. 929 (1901). Issuance means more than mere clerical preparation and includes unconditional delivery to an officer for enforcement. See Harrison v. Orr, 296 S.W. 871, 875-76 (Tex. Comm'n. App. 1927, jdgmt adopted); Williams v. Short, 730 S.W.2d 98 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e) (failure to show actual delivery or due diligence rendered execution ineffective and resulted in dormant judgment). It has been held that the plaintiff must use diligent efforts to secure issuance and levy of execution just as he must be diligent in securing issuance and service of citation. See Ross v. American Radiator & Standard Sanitary Corp., 507 S.W.2d 806 (Tex. Civ. App.--Dallas 1974, writ ref'd n.r.e.). Citing Carpenter v. Probst, 247 S.W.2d 460 (Tex. App. - San Antonio 1952, writ ref'd), the court in Bartz v. Randall, 396 S.W.3d 647 (Tex. App. – Dallas 2013, no pet.) held that once the writ is delivered to the officer, a presumption arises that the officer performed his duty in executing it. The Court went on to say that for purposes of extending the life of a judgment Tex. Civ. Prac. & Rem. Code 34.001 does not require an actual service of the writ. In Bartz, the judgment creditor had service of the writ attempted at the address given by the judgment debtor, which was not a correct address, and the court held the judgment creditor was not required to continue searching for a correct address. In Ross there was an unexplained delay from the time the clerk signed the writ and the time it was delivered to the Constable. This resulted in the 'issuance' being delayed beyond the time period for the writ to accomplish the renewal process in a timely manner and there was no showing of reasonable diligence in making the delivery.

3. Requisites of the Writ. The writ is prepared by the clerk of the court that rendered the judgment, and it is signed and sealed by the clerk. Every writ of execution must:

a. Be styled "The State of Texas";

b. Be directed to any sheriff or any constable within the State, not to a particular county (See also Tex. R. Civ. P. 622);

c. Describe the judgment, stating
   (1) the court in which it was rendered,
   (2) the time when it was rendered, and
   (3) the names of the parties in whose favor and against whom it was rendered;

d. Contain a correct copy of the bill of costs taxed against the defendant in execution (see also Tex. R. Civ. P. 622);

e. "Require the officer to execute it according to its terms, and to make the costs which have been adjudged against the defendant in execution and the further costs of executing the writ";

f. Require the officer to return it within 30, 60, or 90 days as directed by the plaintiff or his attorney;

g. Be signed officially by the clerk or justice of the peace; and

h. Bear the seal of the court if issued out of a district or county court.

Tex. R. Civ. P. 629.

Additional requirements for particular writs for execution on a money judgment, for sale of particular property, for delivery of personal property and for possession or value of personal property are found in Tex. R. Civ. P. 630, 631, 632, and 633 respectively. For example, for executions on money of judgments the writ "must specify in the body thereof the sum recovered or directed to be paid and the sum actually due when it is issued and the rate of interest upon the sum due. The writ must require the officer to satisfy the judgment and costs out of the property of the judgment debtor subject to execution by law." Tex. R. Civ. P. 630.

It should be noted that in actions against estates, a judgment against an executor appointed and acting under a will dispensing with the action of the county court for that estate shall be enforced against the property of the testator in the hands of the executor, by execution. Otherwise, execution will not issue against a personal representative acting as such, but rather, the judgment should be certified to the probate court for payments. Tex. R. Civ. P. 313.

Writs of execution issued after mandate by the court of appeals shall include appellate costs with the trial cost in any process to enforce the judgment. Tex. R. App. P. 51.1(b). Walston v. Walston, 971 S.W.2d 687,697 (Tex. App. – Waco 1998, pet.denied.)

D. LEVY OF THE WRIT. Tex. R. Civ. P. 637 provides that when an execution is delivered to an officer, he shall proceed without delay to levy upon property of the defendant found within the county not exempt from execution, unless otherwise directed by the plaintiff, his agent, or his attorney.

The defendant does have the right to designate property for levy; therefore, the officer must first call on the defendant to designate the property to be levied on, and the levy shall first be upon property designated by the defendant or his agent. If the officer believes the designated property will not sell for enough to satisfy the execution and costs of sale, he is to require additional designation by the defendant. If no property is designated by the defendant, the officer must levy on any of the defendant's property subject to execution. If the defendant cannot be found or is absent, the officer may call upon any known agent of the defendant in the county to make the designation. Id.

What if the constable receives two writs for levy on the same judgment debtor for two different judgment creditors? Tex. R. Civ. P. 636 provides that " the officer receiving the execution shall indorse thereon the exact hour and day when he received it" and that "if he receives more than one on the same day against the same person he shall number them as received." If the officer fails to number the writs as received then he and his sureties are liable to plaintiff in execution for damages suffered because of the failure to endorse the write. Tex. Civ. Prac. & Rem. Code Ann. § 34.063 (Vernon 2007). If the judgment creditor forwarding the first writ holds off on the levy for any reason, i.e. to negotiate a payment, the judgment creditor forwarding the second writ may direct that levy proceed on the second writ; however, the proceeds from the sale must first be applied toward the first writ. Garner v. Cutler, 28 Tex. 175 (1866).

Practice Note: Judgment creditors who are already familiar with a judgment debtor's assets often ask the creditor's attorney to direct the constable handling the writ to go after a particular item of the debtor's assets. Rule 637 discussed above 'prohibits' this by instead providing that "the officer must first call on the defendant to designate the property to be levied on". It can be an "irregularity in sale" that could aid in setting aside an execution sale. Reyes v. Barrasa, No. 04-12-00673-CV (Tex. App. – San Antonio 2013, pet. denied)(mem.op).

Methods of Levy on Particular Kinds of Property:

1. Real Property Generally. To levy on real property, the officer need not "go upon the ground" but can merely indorse the levy on the writ. Tex. R. Civ. P. 639. The sale procedure is discussed in the following section.

2. Personal Property Generally. If the judgment debtor is entitled to possession of the property, the officer levies on it by taking possession of it. If the debtor has an interest in the property but is not entitled to possession of it, levy is made by giving notice to the person who is

entitled to possession, or if several persons are entitled to possession, to one of them. Tex. R. Civ. P. 639.

3. Livestock. To levy on livestock that are "running at large in a range" and cannot be herded and penned "without great inconvenience and expense," the officer may designate by reasonable estimate the number of animals or may describe them by their marks and brands. The levy must be made in the presence of two or more credible persons, and written notice of the levy must be given to "the owner or his herder or agent, if residing within the county and known to the officer." Tex. R. Civ. P. 640.

4. Bulky Property. In the case of property "of great bulk and weight and immobility, which is so cumbersome that it may not be moved except at large expense and effort, it is a sufficient levy if the levying officer go upon the premises, point out the property, assume dominion over it, and forbid its removal by the person against whom the writ has issued." Smith v. Harvey, 104 S.W.2d 938, 940 (Tex. Civ. App.--San Antonio 1937, writ ref'd). This is done sometimes with a combination of locks and/or labels on the property stating that removal of the property is a violation of the law. The constable may also require bonded security guards to secure the property until it is sold.

5. Corporate Shares. Levy on shares of a corporation or joint stock company for which a certificate exists is made by the officer taking possession of the certificate. Tex. R. Civ. P. 641.

6. Collateral. "Goods and chattels pledged, assigned or mortgaged as security for any debt or contract, may be levied upon and sold on execution against the person making the pledge, assignment or mortgage subject thereto; and the purchaser shall be entitled to the possession when it is held by the pledgee, assignee or mortgagee, on complying with the conditions of the pledge, assignment or mortgage." Tex. R. Civ. P. 643. But see discussion of Grocers Supply v. Intercity Investment Properties, Inc., infra at p. 15.

E. SALE OF PROPERTY UNDER WRIT OF EXECUTION.

1. Real Property. Realty is to be sold at public auction held at the courthouse door of the county in which it is located, between 10:00 a.m. and 4:00 p.m. on the first Tuesday of the month, although the court may order the sale to be held at the site of the property. Tex. R. Civ. P. 646a. Provided, however, if the first Tuesday falls on January 1 or July 4, the sale will occur on the first Wednesday of the Month. See Tex. Civ. Prac. & Rem. Code § 34.04(c) (became law May 26, 2017 with the passage of HB1128). The sale must be preceded by publication by the officer of an advertisement of the time and place of sale, and the officer must give the defendant or his attorney written notice of the sale, by mail or in person, which notice should substantially conform to the requirement of the published advertisement. The advertisement must be published once a week for three consecutive weeks before the sale, in a newspaper published in the county where the property is located, with the first publication appearing not less than twenty days before the sale. Id. It must be in English and must contain:

a. A statement of the authority by which the sale will be made;

b. The time of levy;

c. The time and place of sale;

d. A brief description of the property;

e. The number of acres, original survey, and location in the county; and

f. The name by which the land is most generally known.

Tex. R. Civ. P. 647. The officer will prepare the notice; the creditor's attorney should request a copy. Please note that the sale of city lots and rural property differs. See Tex. Civ. Prac. & Rem. Code §§ 34.042 and 34.043 (Vernon 1986) and Keda Development Corporation v. Stanglin, 721 S.W.2d 897 (Tex. App.--Dallas 1986, no writ).

While TRCP Rule 646a provides for sale of real estate at the courthouse door and T.R.C.P. Rule 648 defines "Courthouse Door" [and similarly Rule 649 makes sales of personal property at the courthouse door an option], many execution sales are not literally at the "courthouse door", but at another place designated by the commissioners court under Tex. Civ. Prac. & Rem. Code §34.041, which in turn provides for the designation to be filed in the real property records of the county.

Section 34.0445 of the Civil Practice and Remedies Code provides that persons eligible to purchase real property at execution sales must present the officer conducting the sale with a written statement from the county tax assessor-collector that they owe no delinquent taxes or a written registration statement issued pursuant to Section 34.011 of the Texas Tax Code stating that they are a registered bidder. The process of registration to bid is new and only applies in counties where the commissioner's court adopts rules for registration.

HB3951, effective January 1, 2016. This provision relating to sales of real property at execution applies to counties with a population of 250,000 or more and to counties of less than 250,000 where commissioners' court has by order adopted the provision. Note that the written statement or bidder registration are a pre-requisite for the officer executing or delivering a deed to the purchaser. It is not a bidding qualification. [The requirement of being a registered bidder at tax sales in counties in which the registration process is adopted is a requirement to bid at tax sales. Texas Tax Code § 34.011(b)] That said, local practice varies. Some counties have a process for the bidders to exhibit their right to purchase as a right to bid and to "check in" with authorities to show eligibility to purchase. Other counties only require the statement, sometimes referred to as a bidder's statement or certificate of no taxes due, if the bidder is successful. Note also that Section 34.0445(b) states that an individual cannot "bid on or purchase the property in the name of another individual." Again, local practice addresses the need for perhaps an attorney bidding on behalf of the client. In that case the officer will want a letter signed by the client showing authority to bid. **One should always make inquiry of local practices to be prepared to fully participate in the execution sale process.**

The Sheriff or Constable conducting the sale will often prepare the deed after the sale, but in counties in which few execution sales are conducted the creditor's attorney may need to prepare the deed. A sample Sheriff's Deed is included as Attachment 11.

Note that filing an abstract of judgment is not a prerequisite for a valid execution sale, although filing an abstract of judgment is always a good practice to maintain one's lien position. Won v. Fernandez, 324 S.W.3d 833 (Tex. App.-Houston [14th] 2010, no pet.). See also B & T Distributors v. White, 325 S.W.3d 786 (Tex. App.-El Paso 2010, no pet.) A good discussion of the interplay of the judgment lien and its foreclosure by execution sale or independent suit is found in Gordon v. West Houston Trees, 352 S.W.3d 32 (Tex. App. Houston [1st] 2011, no pet.). Citing Won the court stated that a judgment lien and an execution lien work together so that "if a judgment creditor obtains a judgment lien and then executes on the judgment, the date of the execution lien relates back to the date of the judgment lien, timely giving the judgment creditor priority over other creditors with claims arising after the date of the judgment lien" and also "priority over subsequent purchasers." The question would be: how do you get a Sheriff or Constable to levy on property of a subsequent purchaser based solely on a pre-existing judgment lien? It may be necessary to foreclose on the judgment lien through an independent suit.

2. Personal Property. Personal property is to be sold:

   a. On the premises where it was taken in execution; or

   b. At the courthouse door of the county in which it is located; or

   c. At some other place if it is more convenient to exhibit it to purchasers at that place because of the nature of the property.

Tex. R. Civ. P. 649.

Most personal property cannot be sold without being presented for viewing by those attending the sale; exceptions exist for shares of stock, property in which the defendant had only an interest without the right to exclusive possession, and livestock running at large on the range. Tex. R. Civ. P. 649. Notice of the sale must be given by posting a notice for ten successive days immediately before the sale "at the courthouse door of any county and at the place where the sale is to be made." Tex. R. Civ. P. 650. The officer will prepare the notice; the creditor's attorney should request a copy. Often the "more convenient" place is the constable's office.

3. Order of Sale. Texas Rules of Civil Procedure Rule 309 provides that judgments for the foreclosure of mortgages and other liens shall provide for recovery of the debt and issuance of an order of sale directed to any Sheriff or Constable and if the property cannot be found or if the proceeds of the sale be insufficient the officer is to seize additional assets to satisfy the judgment. The corresponding execution Rule 631 provides that the execution shall particularly describe the property. See attachment 10 for a writ of execution with order of sale. The court is Brown v. EMC Mortgage Corporation, 326 S.W.3d 648 (Tex. App. – Dallas 2010, no pet.) held that in a suit for foreclosure of a real estate lien the judgment could not provide for foreclosure by the creditor at public auction, but necessarily required an order of sale be issued to the Sheriff or Constable for a sale by the officer. On the other hand the court in Williams v. Gillespie, 346 S.W.3d 727 (Tex. App. – Texarkana 2011, no pet.) held that a judgment including an order of sale for personal property required either a judicial sale or compliance with Article 9. The Williams case involved a contested oral agreement between the judgment creditor and judgment debtor over the judgment creditor's private sale of the personal property that was the subject of the order of sale. The lesson: agreements varying terms of a judgment and/or its satisfaction should be in writing.

4. Venditioni Exponas. The term Venditioni Exponas is referenced in Rule 647 of the Texas Rules of Civil Procedure, yet it is not defined in the Rules, nor is it defined in any statute. The writ of Venditioni Exponas is used to extend the life of a writ of execution when the property has been seized and the writ under which it was seized will expire before the property can be sold. While its only reference is in Rule 647 relating to Notices of Sale of Real Estate, the writ has been used per case law to extend the life of the writ of execution on personal property as well. Warnock v. Marin, 93 S.W.2d 793 (Tex. App. – El Paso, 1936, no wirt). Regardless of the efforts of the officer and the plaintiff, sometimes real or personal property levied on cannot be sold before the writ expires, i.e. discovery of errors in publication, delay in seizure of property due to acts of the defendant, etc. Attachment No. 9 is a form for the Venditioni Exponas.

F. DEFENDANT'S RIGHT TO REPLEVY.

1. Return of Property to Debtor. Personal property taken in execution may be returned to the defendant by the officer if the defendant gives the officer a bond payable to the plaintiff with two or more sureties approved by the officer. The debtor must agree in the bond to pay the officer the fair value of the property (stated in the bond) or to return the property to the officer at the time and place stated in the bond. If the property is returned it will be sold according to law. Tex. R. Civ. P. 644. The defendant may dispose of the property and pay the officer the amount in the bond. Tex. R. Civ. P. 645.

2. Forfeiture of Bond. If the property is not returned or the stated value is not paid according to the terms of the bond, the officer is to indorse the bond "Forfeited" and return it to the clerk of the court or justice of the peace who issued it. The clerk or justice will then issue execution against the principal debtor and his sureties. Tex. R. Civ. P. 646.

G. SUSPENDING EXECUTION. If a supersedeas bond is properly filed and approved, the clerk or justice of the peace must immediately issue a writ of supersedeas suspending all further proceedings under any previously issued execution. Tex. R. Civ. P. 634. In Texas Employers' Insurance Assoc. v. Engelke, 790 S.W.2d 93 (Tex. App.--Houston [1st Dist.] 1990, no writ), the supersedeas bond was not filed until after the sheriff levied on the judgment debtor's bank account, but before the funds were disbursed to the judgment creditor. The majority held that the judgment lien was fixed upon levy and the supersedeas bond could not affect the judgment creditor's rights to the funds. The dissent would hold that the "execution process" is suspended. Posting of the supersedeas preserves the status quo prior to judgment. While Tex. R. App. P. 24.1(f) provides for issuance of a writ of supersedeas by the clerk if a writ of execution had been issued, the court also has discretion to issue a writ of supersedeas when a writ of execution has not been issued. In re Fuentes, 530 S.W.3d 244 (Tex. App.-Houston [1st Dist.] 2017) (orig. proceeding) (in order to place judgment defendant back in possession of property lost in divorce that was on appeal). There is no deadline to supersede a judgment. Abuzaid v. Modjarrad & Associates, No. 05-17-00976-CV (Tex. App.-Dallas, 2017) (mem. op. on Rule 24.4 Motion) (judgment debtor deposited $10 with the trial court clerk and filed an affidavit stating he had a negative net worth; superseded a turnover order that required turnover of a judgment to the sheriff for sale at execution because the execution had not occurred.)

Rule 635 provides for the stay of an execution in the justice court. A justice court execution can be delayed for three months from the date of judgment, if, after ten days after rendition, the defendant in execution posts a bond and files an affidavit that he does not have the money to pay the judgment and that enforcement of the judgment by execution within the three months would be hardship on him and would cause a sacrifice of his property which would not likely occur if the judgment and execution were stayed. Tex. R. Civ. P. 635. Civil Practice and Remedies Code Sections 65.013 and 65.014 provide for injunctions to stay execution of any valid judgment for up to one year after the judgment was rendered (with additional tolling provisions under certain circumstances) to stay as much of the recovery as the complainant in his petition shows himself equitably entitled to be relieved against. Such injunctive action must be tried in the Court in which the judgment was rendered. Tex. R. Civ. Prac. & Rem. Code Ann. § 65.023(b)(Vernon 1997); Burton v. Cantu 960 S.W.2d 91 (Tex. App.--Corpus Christi 1997, no writ). However, Section 65.023(b) has been held not to apply in situations in which a non-party to the underlying judgment seeks to prevent execution on that judgment from its assets. Shor v. Pelican Oil & Gas Management, LLC, 405 S.W.3d 737(Tex. App. – Houston [1st] 2013, no pet.).

In Texaco, Inc. v. Pennzoil, discussed supra, Texaco attempted to attack the constitutionality of the Texas execution statutes as well as the judgment lien statutes. Coming up with the funds to post the supersedeas bond and to suspend execution was an impossible task. When its constitutional attack filed in the New York federal court was dismissed by the United States Supreme Court, its only alternative for protection from execution was bankruptcy and the resulting automatic stay. The need for such drastic action may not arise again as a result of the amendment to Tex. R. App. P.47 which now allows the court to set a lesser bond than the full amount of the judgment if after hearing the court finds that posting the

larger amount would cause irreparable harm to the judgment debtor and not posting such bond will cause no substantial harm to the judgment creditor. Furthermore, Chapter 52 of the Civil Practices and Remedies Code now codifies guidelines for reduced supersedeas bonds in certain judgments. See discussion at Section II, D., supra.

H. RECOVERY OF SEIZED PROPERTY/ SETTING ASIDE THE SALE; RESTITUTION. A person is entitled to recover his property that has been seized through execution of a writ issued by a court if the judgment on which the execution is issued is later reversed or set aside, unless the property has been sold at an execution sale. Tex. Civ. Prac. & Rem. Code Ann. § 34.021 (1986). If the property has been sold, a person who would otherwise be entitled to recover the property is entitled to recover from the judgment creditor the market value of the property sold at the time of the sale. § 34.022. For a discussion of setting aside a Sheriff's sale due to irregularities in the sale, see Apex Financial Corporation v. Brown, 7 S. W. 3d 820 (Tex.App.-Texarkana 1999, no writ) and Reyes v. Barrasa, No. 04-12-00673-CV (Tex. App. – San Antonio 2013, pet. denied). (mem. op.)

Similarly, if a Constable collets money from a judgment debtor when executing a writ of execution, the judgment debtor is entitled to restitution of those sums if a judgment is set aside. J&J Container Manufacturing, Inc. v. Cintas-R U.S., L.P., case No. 01-16-00432-CV (Tex.App. – Houston [1st] 2017, no pet.), citing Miga v. Jensen, 299 S.W.3d 98 (Tex. 2009). The same right of recovery should apply as to sums paid to a receiver when the underlying judgment is set aside.

I. PROPERTY SUBJECT TO AND EXEMPT FROM EXECUTION.

1. Property Subject to Execution. The judgment debtor's property is subject to levy by execution if it is not exempted by constitution, statute, or other rule of law. See Tex. Const. art. XVI, §§ 49-51; Tex. Prop. Code Ann. §§ 41.001-42.004 (Vernon 1984); Tex. R. Civ. P. 637. In most instances, the following kinds of property will not be exempt:

a. Cash on hand or in checking or savings accounts;

b. Pleasure boats and their motors and trailers;

c. Collections (stamps, coins, etc.);

d. Stocks, bonds, notes, and other investments;

e. Real property not claimed as the homestead (summer home, rent property, etc.); and

f. Airplanes.

NOTE: Corporations have no exempt property.

Attachment No. 17 is an Areas of Examination Checklist which may be useful in taking deposition and formulating interrogatories to determine the identity and extent of a judgment debtor's assets.

2. Property Exempt from Execution. Property in the following categories is exempt from execution, whether for a family or for a single adult:

a. The homestead (defined infra);

b. Personal property of various categories specified by statute, up to the aggregate fair market value of $100,000.00 for a family or $50,000.00 for a single adult who is not a member of a family (Tex. Prop. Code §42.001) (Vernon Supp. 1993);

c. Current wages for personal service (except for payment of child support) and unpaid commissions for personal services not to exceed twenty-five percent (25%) of the $50/$100,000 aggregate limitations (Tex. Prop. Code §42.001) (Vernon Supp. 1993);

d. Professionally prescribed health aids (Tex. Prop. Code §42.001) (Vernon Supp. 1993);

e. Worker's compensation payments (Tex. Labor Code §408.201);

f. Cemetery lots held for purposes of sepulcher (Tex. Prop. Code Ann. § 41.002 (Vernon 1987);

g. Property that the judgment debtor sold, mortgaged, or conveyed in trust if the purchaser, mortgagee, or trustee points out other property of the debtor sufficient to satisfy the execution;

h. Assets in the hands of the trustee of a spendthrift trust for the benefit of the judgment debtor (Hines v. Sands, 312 S.W.2d 275 (Tex. Civ. App.--Fort Worth 1958, no writ); Note, however, that when a settlor/beneficiary contributes part of the

property to a spendthrift trust, the creditors of the settlor/beneficiary can reach the specific property contributed by the settlor/beneficiary. In Re: Shurley, 1997 U.S. App. LEXIS 14874 (Fifth Cir. 1997).

i. Certain insurance benefits (see discussion below); and

j. Certain savings plans, including retirement benefits and health savings plans (see discussion below).

k. College Savings Plans. Tex. Prop. Code Ann. § 42.0022.

l. Certain consigned artwork (see discussion below.)

This is not a complete list of exemptions, but covers only those likely to be encountered when levying against an individual.

3. Debtor's Homestead.

a. Basis for Exemption. The homestead of a family or a single adult is exempt from execution for a debt, except for its purchase money, taxes on the homestead, or work and materials used for improvements on the homestead (if consent is in writing and properly executed). Tex. Const. art. XVI, § 50; see Tex. Prop. Code Ann. § 41.001 (Vernon Supp. 1987). Additionally, proceeds of a sale of a homestead are not subject to seizure for a creditor's claim for six months after the date of the sale. Tex. Prop. Code Ann. § 41.001(c).

b. Property that Constitutes Homestead. The Texas Constitution describes rural homesteads and urban homesteads depending on whether the land is "in a town or city." See Tex. Const. art. XVI, § 51. One cannot simultaneously claim both a rural homestead and an urban one. Ran v. City National Bank, 272 S.W. 510, 515 (Tex. Civ. App.--Fort Worth 1925, writ dism'd). The urban homestead must be used as a home or for the claimant's business. Temporarily renting the homestead does not affect its status if another homestead has not been acquired. Tex. Const. art. XVI, § 51; Tex. Prop. Code Ann. § 41.001(b) (Vernon Supp. 1987). Rental income from a homestead is not exempt, however a long term lease (30 years) can constitute abandonment. In re Crump 533 B.R. 567(Bankr. N.D. Tex. 2015). Note that the business homestead has been held to apply even to real property titled to a family member but leased to a corporation owned by a family member. McKee v. Smith, 965 S.W.2d 52 (Tex.App--Ft. Wroth 1998, no writ). Royalties from minerals removed from homestead as well as severed crops are subject to execution. Aetna Finance Company v. First Federal Savings & Loan Ass'n, 607 S.W.2d 312 (Tex. Civ. App.--Austin 1980, writ ref'd n.r.e.). However, the homestead exemption extends to the minerals owned by the homestead claimant if located under the homestead. In Re: Poer, 76 B.R. 98 (Bankr. N.D. Tex. 1987). But see Fitzgerald v. Cadle Company, No. 12-16-00338-CV (Tex. App.-Tyler 2017, no pet.)(mem.op.) the court found royalty payments from a mineral lease or a homestead to be exempt from turnover as proceeds of the exempt homestead. Mobile homes can also qualify for the homestead exemption if affixed to real property, even if the realty is not owned by the claimant. The key is that the claimant have a possessory interest. See Capitol Aggregates, Inc. v. Walker, 448 S.W.2d 830 (Tex. Civ. App.--Austin 1969, writ ref'd n.r.e.); Gann v. Montgomery, (Tex. Civ. App.--Fort Worth 1948, writ ref'd n.r.e.). See also In re See, No. 14-11006-TMD (Bankr. W.D. Tex. 2015). (debtor has possessory interest in real estate via leases and court found the options to buy the property were not severable and thus also exempt). In Norris v. Thomas, 215 S.W.3d 851 (Tex. 2007), the court declined to give exempt status to a boat the debtor used as his primary residence finding that " to qualify as a homestead, a residence must rest on the land and have a requisite degree of physical permanency, immobility, and attachment to fixed realty."

(1) Rural Homestead. The rural homestead includes improvements and may be in one or more parcels. There is no requirement that the parcels be contiguous. Tex. Const. art. XVI, § 51, Tex. Prop. Code Ann. § 41.002(b) (Vernon Supp. 1987). A family's homestead cannot exceed 200 acres; that of a single adult who is not a constituent of a family cannot exceed 100 acres. Tex. Prop. Code Ann. § 41.002(b) (Vernon Supp. 1987).

(2) Expansion or Limitation of the Urban Homestead. With the passage of constitutional amendments in 1999, the urban homestead was expanded to 10 acres from one acre. Tex. Const. art. XVI, § 51; Tex. Prop. Code Ann. § 41.002(a) (Vernon Supp. 1999). See Wilcox v. Marriott, 230 S.W.3d 266 (Tex. App.-Beaumont 2007, no pet.) for a discussion of the application of the revised homestead laws on an existing judgment lien. However, if that 10 acres is in one or more lots, the lots must be contiguous. Prior to the amendments, the one or more lots consisting of an urban homestead need only be in the same urban area. With the passage of the constitutional amendments, some will lose their business urban homestead if it is not contiguous to the lot on which their home is located.

(3) Determining if Homestead is Rural or Urban.
Prior to the 1989 amendment to Section 41.002 of the Property Code which added (c) and (d), established

case law determined whether the tract was urban or rural based on the conditions and circumstances which surrounded it at the time the adverse right is asserted. M. H. Laucheimer & Sons v. Saunders, 76 S.W 750 (1903). See Urech, The Changing Homestead: When the City Meets the Farm, 18 S. Tex. L.J. 145 (1977). The 1989 amendments required a factual determination as to whether the property was served by municipal utilities and fire and police protection and determined rural vs. urban by defining a rural homestead as a homestead that, at the time designation was made, was not served by municipal utilities and fire and police protection. Commentary suggested that the Legislature did not have the power to effectively amend the Constitutional definitions "in a city, town or village" (referring to urban homesteads) or "not in a city, town or village" (referring to rural homesteads), McSwain, The Texas Business Homestead in 1990, 42 Baylor L.R. 657 at 661 (1990). Case law was split on whether this definition was a hard and fast rule, or whether it merely created a rebuttable presumption. In Re: Bradley, 960 F.2d 502 (5th Cir. 1992); In Re: Mitchell, 132 B.R. 553 (W.D. Texas, 1991).

Beginning September 1, 1999, urban vs. rural is determined by instead defining urban homesteads in Section 41.002 (c) of the Property Code as follows:

> (c) A homestead is considered to be urban if, at the time the designation is made, the property is:
>
> (1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and
>
> (2) served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality:
>
> (a) electric;
> (b) natural gas;
> (c) sewer;
> (d) storm sewer; and
> (e) water.

The court in In Re: Perry 267 B.R. 759 (W.D. Tex. 2001) discussed the application of the amended Section 41.002 (c). It found that if the property fails either the (c) (1) test or one of the two inquiries under (c) (2) , the property will be deemed rural and the court's analysis will be at an end. The court went on to say that if it does not fail either test, it will initially qualify as "urban," but that the court must then proceed to the "traditional" test and the court will consider "(1) the location of the land with respect to the limits of the municipality; (2) the situs of the lot in question; (3) the existence of municipal utilities and services; (4) the use of the lot and adjacent property; and (5) the property of platted streets, blocks, and the like." The Fifth Circuit in In Re: Bouchie, 324 F 3d 780 (5th Cir. 2003); disapproved of Perry's bifurcated approach and its application of the traditional test. Bouchie held that section 41.002 (c) is the exclusive means of determining whether the homestead is urban or rural.

Whether or not all rural tracts will be impressed with the homestead character will be determined by whether they are used for the purposes of a home. Painwebber, Inc. v. Murray, 260 B.R. 815 (E.D. Tex. 2001); In Re: Webb, 263 B.R. 788 (Bankr. W.D. Tex. 2001). And while rural homestead tracts need not be contiguous, one must be used for a residence and the other(s) must be used for the comfort, convenience or support of the family. In re Scholt 449 B.R. 697,702 (Bankr. W.D. Tex. 2011); In re Baker 307 B.R. 860,863 (Bankr. N.D. Tex. 2003). The extent that one can claim an urban business homestead is similarly limited to that necessary for the operations of the business. In Re: Kang, 243 B.R. 666 (Bankr. N.D. Tex. 1999).

A simple reading of the Constitution and the Property Code is only the beginning step for analyzing the viability of the homestead claim and the extent of the claim. A thorough examination of the latest cases, especially those from the bankruptcy courts, is necessary to provide a "best guess" for determining whether a homestead claim is supportable.

c. Designation of Homestead. Property Code § 41.005 provides for the voluntary designation of homesteads. If a judgment debtor does not have a voluntary designation on file with the county clerk, the judgment creditor will give him notice to designate, which notice will provide that the court will appoint a commissioner to make the designation if he fails to do so. Upon execution, the excess property not included in the homestead designation is sold. Tex. Prop. Code Ann. §§ 41.021, 41.023(a), and 41.024 (Vernon Supp. 1988). Property Code §41.005 also provides that property on which the person receives an exemption from taxation as a homestead is considered to have been designated as the person's homestead if the property is listed as the person's residence on the most recent appraisal role, unless other property is specifically designated as homestead.

d. Effect of Death on Homestead Claim. Former Probate Code Section 279, provided "should the estate, upon final settlement, prove to be insolvent, the title of the surviving spouse and children… should not be taken

for any debts of the estate" except as provided in the code and constitution. The courts held this provision to mean that the homestead passes free and clear of the decedent's debts where a constituent member of the family (i.e., spouse, minor child or unmarried adult child residing with the family) survives. National Union Fire Ins. Co. of Pittsburgh v. Olson, 920 S.W.2d 458 (Tex. App.--Austin 1996, no writ). Effective January 1, 2014, the Estates Code §102.004 provides that "If the descendent was survived by a spouse or minor child" that the homestead isn't liable except for certain debts, which are similar to the previous exceptions.

The majority of the re-codification was to be non-substantive, but this may be an accidental substantive change. Think, for example, an adult special needs family member.

e. Homestead in Qualifying Trust. Section 41.0021 to the Property Code provides that property held in certain qualifying trusts to be considered homestead.

f. Proceeds from Insurance Claims. Proceeds from the settlement of insurance claims on a debtor's homestead have been held to be exempt. In Re Okwonna-Felix, No. 10-31663-H4-13, 2011 WL 3421561 at *7(Bankr.S.D.Tex.2011) (debtor exempted settlement proceeds on a claim against the policy on his homestead under the federal "wild card" exemption provided by 11 U.S.C. §522(d)(5)); In Re Hill, No. 08-36267, 2011 WL 6936357 at *10(Bankr.S.D.Tex.2011) (the debtor exempted the proceeds under Texas Property Code §41.001); In Re Carlew, No. 11-37886, 2012 WL 3002197 (Bankr.S.D.Tex.2012) (proceeds exempt under 41.001 and did not lose their exemption after 6 months because they were not proceeds from a sale of the homestead). The language of the cases is such that one could argue that insurance proceeds from a policy on a homestead are exempt even if not as a result of a lawsuit and even if not in a bankruptcy context.

4. Debtor's Personal Property. The standard personal property exemption includes an inquiry into the value of the property as well as a categorization of the property. The following exemptions included in Sections 42.001, 42.002 and 42.0021, however, do not afford protection from child support liens established by the Family Code. Tex. Prop. Code Ann. §42.005 (Vernon 1991).

a. The Aggregate Limitation, Plus Health Aids, Wages and Certain Commissions.

Property Code Section 42.001 provides:

Sec. 42.001. PERSONAL PROPERTY EXEMPTION.

(a) Personal property, as described in Section 42.002, is exempt from garnishment, attachment, execution, or other seizure if:

(1) the property is provided for a family and has an aggregate fair market value of not more than $100,000, exclusive of the amount of any liens, security interests, or other charges encumbering the property; or

(2) the property is owned by a single adult, who is not a member of a family, and has an aggregate fair market value of not more than $50,000, exclusive of the amount of any liens, security interests, or other charges encumbering the property.

(b) The following personal property is exempt from seizure and is not included in the aggregate limitations prescribed by Subsection (a):

(1) current wages for personal services, except for the enforcement of court-ordered child support payments;

(2) professionally prescribed health aids of a debtor or a dependent of a debtor;

(3) alimony, support, or separate maintenance received or to be received by the debtor for the support of the debtor or a dependent of the debtor; and

(4) a religious bible or other book containing sacred writings of a religion that is seized by a creditor other than a lessor of real property who is exercising the lessor's contractual or statutory right to seize personal property after a tenant breaches a lease agreement for or abandons the real property.

(c) Except as provided by Subsection (b) (4), this section does not prevent seizure by a secured creditor with a contractual landlord's lien or other security in the property to be seized.

(d) Unpaid commissions for personal services not to exceed 25 percent of the aggregate limitations prescribed by Subsection (a) are exempt from seizure and are included in the aggregate.

(e) A religious bible or other book described by Subsection (b) (4) that is seized by a lessor of real property in the exercise of the lessor's contractual or statutory right to seize personal property after a

tenant breaches a lease agreement for the real property or abandons the real property may not be included in the aggregate limitations prescribed by Subsection (a).

The increase in the total value of the laundry list of personal property exemptions from $60-$100,000 for families and $30-$50,000 for a single person not a constituent member of a family was effective September 1, 2015, HB 2706.

b. The "Laundry List". The laundry list of eligible personal property for the aggregate exemption is included in Property Code, Section 42.002 which provides:

Sec. 42.002. PERSONAL PROPERTY.

(a) The following personal property is exempt under Section 42.001(a):

(1) home furnishings, including family heirlooms;

(2) provisions for consumption;

(3) farming or ranching vehicles and implements;

(4) tools, equipment, books, and apparatus, including boats and motor vehicles, used in a trade or profession;

(5) wearing apparel;

(6) jewelry not to exceed twenty-five percent (25%) of the aggregate limitations prescribed by Section 42.001(a);

(7) two firearms;

(8) athletic and sporting equipment, including bicycles;

(9) a two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of the family or single adult who holds a driver's license or who does not hold a driver's license but who relies on another person to operate the vehicle for the benefit of the nonlicensed person.

(10) the following animals and forage on hand for their consumption:

(A) two horses, mules, or donkeys and a saddle, blanket, and bridle for each;

(B) 12 head of cattle;

(C) 60 head of other types of livestock; and

(D) 120 fowl.

(11) household pets; and

(b) Personal property, unless precluded from being encumbered by other law, may be encumbered by a security interest under Section 9.203, Business & Commerce Code, or Sections 41 and 42, Certificate of Title Act (Article 6687-1, Vernon's Texas Civil Statutes), or by a lien fixed by other law, and the security interest or lien may not be avoided on the ground that the property is exempt under this chapter.

c. Additional Exemption for Insurance Benefits. The Insurance Code exempts without dollar limits all benefits of any kind, including policy proceeds and cash values of any policy of any life, health or accident insurance company or under any program of annuities and benefits. The only exception to the exemption is for premium payments made in fraud of creditors or for debt secured by the policy or proceeds. Tex. Ins. Code Ann. § 1108.051, et seq (Vernon 2001). Leibman v. Grand, 981 S.W.2d 426 (Tex. App. – El Paso, 1998, no writ) (annuity found subject to turnover order; judgment debtor had converted non-exempt assets to cash and purchased annuity to avoid paying judgment creditor). The provisions of this chapter were previously found in Article 21.22 of the Insurance Code, repealed effective June 1, 2003. For a discussion of the history of this statute as well as some case law limitations, see Jones, The Texas Insurance Exemption Statute: Article 21.22 of the Texas Insurance Code -Simple Words But What Do They Mean, 29 Hous. L. Rev. 719 (1992).

d. Additional Exemption for Certain Savings Plans. Certain retirement plans, or portions thereof, are exempt under Section 42.0021 of the Property Code. Health savings accounts were added to this section in 2005. The provision exempts the right to the assets held in or to receive payments from these plans without any limitation to the funds in the plan. Senate Bill 1810, effective May 25, 2011, made changes to Section 42.0021 that were intended to clarify rather than change existing law. It took out the references to whether the plans were 'qualified' and instead focused on whether the plan is exempt for federal income tax action or to the extent tax

was deferred. Contributions to IRAs that exceed the deductible amounts and any accrued earnings on those contributions were not exempt unless otherwise exempt by law under the 2011 statute. Roth IRA's were also exempt under this section even though contributions to Roth IRA's are not deductible. SB 649, effective September 1, 2013, extended the exemption to nondeductible contributions to a traditional IRA. Only the contributions to IRAs, including Roth IRAs, that exceed amounts "permitted" by the IRS are non-exempt.

See Lozano v. Lozano 975 S.W.2d 63 (Tex.App.--Houston [14th] 1998, no writ) for a discussion of the burden of proof to show exempt status of account. The exemption for retirement plans specifically includes annuities and protects distributions from plans for sixty (60) days if they qualify as non-taxable rollover contributions. Further, it allows a participant or beneficiary of a plan to grant security interests in the participant's or beneficiary's right to the assets or right to receive payments under the plan to secure a loan and makes the security interest specifically enforceable. Section 42.0021 also includes savings clause language in the event subsection (a) is declared preempted by federal law. A detailed discussion of the interaction of Section 42.0021, ERISA and bankruptcy implications is beyond the scope of this paper. The Fifth Circuit settled the question of whether ERISA preempts Section 42.0021 in Heitkamp v. Dyke, 943 F.2d. 1435 (5th Cir. 1991) holding that there is no preemption. Section 42.0021 has been held not to apply retroactively. In Steves & Sons, Inc. v. House of Doors, Inc. et al, 749 S.W.2d 172 (Tex. App.--San Antonio 1988, writ denied) the court was faced with a post-judgment garnishment of an individual retirement annuity contract. The court found that the new § 42.0021 was not in effect at the time of the suit and would not apply the section retroactively. It reversed and remanded a take-nothing judgment ordering that the trial court render judgment in favor of the garnishor finding that the annuity contract did not qualify as a life insurance policy. Similarly, in Williams v. Texas Commerce Bank-First State, 766 S.W.2d 344 (Tex. App.--El Paso 1989, no writ), the court found § 42.0021 not applicable retroactively so as to protect an individual retirement plan from garnishment. Merely placing funds in a retirement plan does not grant them protection if they are not eligible rollovers or are not otherwise exempt. Jones v. American Airlines, 131 S.W.3d 261 (Tex. App.-Ft. Worth, no writ) (turnover used to recover funds not owned by the judgment debtor that were placed in an IRA is an attempt to "protect" them as "exempt"). In In re Jarboe, 2007 WL 987314 (Bkrtcy. S.D. Tex. 2007), the court held that IRA accounts inherited by someone other than a spouse are not exempt. Inherited accounts are now exempt to the extent the account is exempt from federal income tax, or to the extent tax is deferred as provided therein, as of the 2011 amendments.

e. Additional Exemption for College Savings Plans. Tex. Prop. Code Ann. §42.0022.

f. Consigned Artwork Exempt from Dealer's Creditors. Section 2101.003 of the Occupations Code provides that a work of art delivered to an art dealer and the proceeds from its sale are not subject to a claim, lien or security interest of a creditor of the dealer. Perhaps, however, the commission the dealer is allowed to retain from the proceeds would be subject to a turnover order. The definition of art includes "sound recordings of a musical performance" and section 2101.004 exempts them from the creditors of the recording distributor.

g. Designation of Exempt Property. Section 42.003 provides:

> (a) If the number or amount of a type of personal property owned by a debtor exceeds the exemption allowed by Section 42.002 and the debtor can be found in the county where the property is located, the officer making a levy on the property shall ask the debtor to designate the personal property to be levied on. If the debtor cannot be found in the county or the debtor fails to make a designation within a reasonable time after the officer's request, the officer shall make the designation.
>
> (b) If the aggregate value of a debtor's personal property exceeds the amount exempt from seizure under Section 42.001(a), the debtor may designate the portion of the property to be levied on. If, after a court's request, the debtor fails to make a designation within a reasonable time or if for any reason a creditor contests that the property is exempt, the court shall make the designation.

Under part (a) the debtor who has eligible personal property exceeding the numbers allowed under the laundry list can designate the property to be levied on, i.e., if he had three guns (when limited to two guns) he can designate which one gun could be levied on. The officer levying requests the designation. If the officer can not find the debtor in the county or if the debtor refuses to cooperate, the officer could make the designation.

Part (b) addresses the additional issue of value. If all of the debtor's property falls within the numbers reflected in the laundry list, i.e., two firearms, etc., but the aggregate value with other eligible property exceeds the $50,000/ $100,000 aggregate limitation, the debtor may designate the items to be levied on. While Part (b) does not specifically provide that the court request comes after a failure to respond to a request by the levying officer, this would be a reasonable interpretation. If the debtor fails to make the designation within a reasonable time after a court's request to do so or if the debtor contests the exemption, the court makes the designation. This provision will be a useful procedure for valuation and exempt status determination on personal property.

Courts go both ways on whether exemptions should be liberally or restrictively construed. In Segraves v. Weitzel, 734 S.W.2d 773, (Tex. App.--Fort Worth 1987, writ ref'd n.r.e.) the court held that Texas law holds a restrictive view on exempting business-related property of a professional from seizure to satisfy a judgment and that to be exempt from seizure the tool or apparatus must be peculiarly essential [but see In Re Erwin discussed below] to the use of its owner's trade or profession, finding that desks, chairs, a lamp, a file cabinet, a clock, and storage bins of an architect were not exempt. In Stephenson v. Wixom, 727 S.W.2d 747 (Tex. App.--Fort Worth 1987, no writ) the court exempted a pickup with attached camper as a recreational vehicle, rejecting the argument that it was a motor home not included in the personal property laundry list. See also, Cobbs v. Coleman, 14 Tex. 594 (1855); Hickman v. Hickman, 149 Tex. 439, 234 S.W.2d 410 (1950) (diamond rings held to be exempt as wearing apparel). Boats have been held to be non-exempt, not falling under the exemption for athletic and sporting equipment in In Re: Gibson, Bkrptcy. N.D. Tex. 1987, 69 B.R. 534. The court in In Re Erwin 199 B.R.628 (Bkrtcy.S.D.Tex. 1996) held that the "peculiarly adapted" requirement has been somewhat deferred by the 1991 amendment to the statute and instead focused on whether the item is fairly belonging to or usable in the debtor's trade and whether the item is used with sufficient regularity to indicate an actual use by the debtor. Caution: Since the laundry list was largely revamped effective May 24, 1991, case law arising prior to that time should be reviewed with consideration of the pre- and post-amendment laundry list. Broad claims of exemptions of personal property may be worth challenging and a debtor could be put to the test to itemize the property, value it and specify the particular exemption claimed. Kornman v. Faulkner, Cause No. 05-12-01641-CV (Tex. App. Dallas 2014, no pet.) (mem.op.).

5. Property Subject to Security Interest or Mortgage. When the judgment debtor points out property on which the officer is to levy, he cannot point out property that he has sold, mortgaged or conveyed in trust. Tex. R. Civ. P. 638. However, property that has been pledged, assigned, or mortgaged as security for a debt or contract can be levied upon and sold under execution against the person who mortgaged it. Tex. R. Civ. P. 643. If the purchaser, mortgagee, or trustee of property that the judgment debtor has sold, mortgaged, or conveyed in trust points out other property of the debtor in the county that is sufficient to satisfy the execution, then the property sold, mortgaged, or conveyed in trust may not be seized in execution. Tex. Civ. Prac. & Rem. Code Ann. § 34.004 (Vernon 1986).

The officer can sell only that interest owned by the judgment debtor. Tex. Civ. Prac. & Rem. Code Ann. § 34.045(a) (Vernon 1986). Prior to its complete revision effective July 1, 2001, Article 9 provided that the debtor's rights in the collateral could be sold under execution even if the security agreement prohibits transfer by the debtor. Tex. Bus. & Com. Code Ann. § 9.311 (Vernon Supp. 1987). So, mortgaged property could be sold, but the buyer will purchase it subject to the mortgaged debt or security interest. Liquid Carbonic Co. v. Logan, 79 S.W.2d 632 (Tex. Civ. App.--Austin 1935, no writ). The secured party may try to stop the sale. The value of the debtor's equity reduced by expenses of sale may not be worth the trouble of a levy. Usually the sales value will be reduced further when the buyer contemplates having to satisfy or continue carrying the security interest. In General Motors Acceptance Corporation v. Byrd, 707 S.W.2d 292 (Tex. App.--Fort Worth 1986, no writ), General Motors Acceptance Corporation purchased its security at an execution sale by another judgment creditor for an amount in excess of the outstanding judgment and then sought to enjoin the sheriff from release of the proceeds to the judgment creditor and the overage to the judgment debtor. The court denied the relief finding that General Motors Acceptance Corporation failed to show irreparable harm and holding that a secured party is generally not entitled to enjoin an execution sale by a non-secured judgment creditor in the absence of a showing that the potential purchaser will probably waste, remove, destroy, or injure the collateral. Further, only when the collateral is no longer available for foreclosure is the secured party entitled to the proceeds of the execution sale.

Caution should be exercised when seized property is subject to a prior perfected security interest and the secured party demands possession of the property. In Grocers Supply v. Intercity Investment Properties, Inc., 795 S.W.2d 225 (Tex. App.--Houston [14th Dist.] 1990, no writ) the court held that a prior perfected security interest holder who has right to possession of the property (i.e., when the security agreement provides for

an event of default if the collateral is seized by judicial writ and the creditor has a right to repossess the collateral) has superior rights over a "mere" judgment creditor. The court ordered possession for the secured party and recovery of all of its costs. Note that the court only mentioned Rule 643 and then Tex. Bus. & Com. Code §9.311, but relied on case law from other states. The court did not even address Civ. Prac. & Rem. Code §34.004!

The revised Article 9, effective July 1, 2001, does not have a similar provision to old §9.311, which provided that collateral could be sold under execution even if a security agreement prohibited transfer by the debtor. Instead, the revised Article 9 simply provides in §9.401 that "whether a debtor's rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this chapter." The comments go on to say: "6. Rights of Lien Creditors: Difficult problems may arise with respect to attachment, levy, and other judicial procedures under which a debtor's creditors may reach collateral subject to a security interest. For example, an obligation may be secured by collateral worth many times the amount of the obligation. If a lien creditor has caused all or a portion of the collateral to be seized under judicial process, it may be difficult to determine the amount of the debtor's "equity" in the collateral that has been seized. The section leaves resolution of this problem to the courts. The doctrine of marshaling may be appropriate." The comments appear to leave open the possibility of seizure of property subject to security interests, with resolution in the courts. Perhaps the drafters of the revised Article 9 also overlooked Civ. Prac. & Rem. Code §34.004 as well.

The interest of a prior perfected secured creditor were addressed in Inwood National Bank v. Wells Fargo, 463 S.W.3d 228 (Tex.App. – Dallas 2015, no pet.) when a judgment creditor garnished a judgment debtor's investment account that had previously been pledged to a secured creditor. During the pendency of the garnishment the secured creditor renewed and extended the note representing the secured indebtedness but made no new advances to the debtor. The court noted that lien creditors are subordinate to a prior perfected security interest. Tex. Bus. & Com. Code §9.317 (a)(2)(A). However, §9.323(b) provides a narrow exception and subordinates the security interest to the rights of a person who becomes a lien creditor to the extent that the security interest secures an advance made more than 45 days after the person becomes a lien creditor unless the advance is made (1) without knowledge of the lien; or (2) pursuant to a commitment entered into without knowledge of the lien. The court discussed the purpose of this provision as stated in the Official Comments to Article 9: The purpose of section 9.323 (b) is to protect the judgment lien creditor who has successfully levied on a valuable equity subject to a security interest from being squeezed out by a later enlargement of the security interest by an additional advance. In Inwood the judgment lien creditor levied on the investment account by garnishment. Another example would be a judgment creditor's levy of execution on personal property with equity. It prevents the judgment creditor and its lender from making advances that would diminish the equity seized.

6. Entities "Protected" from Execution:

a. National Banks. While national banks are not entirely protected from execution, they enjoy the benefit of not being required to post a supersedeas bond. The United States Code provides that "no attachment, injunction, or execution shall be issued against such [national banking] association or its property before a final judgment in any suit, action, or proceeding, in any state, county, or municipal court." 12 U.S.C. § 91. The final judgment referred to in this statute has been interpreted to mean a judgment "from which no further appeal can be taken." Therefore, national banks are exempt from execution until all appellate remedies have been exhausted. United States v. MBank Abilene, N.A., et al., C.A. No. 1-86-143K, (N.D. Tex. 1987); related cites include Harry LeMaire, et al v. Mbank Abilene, N.A., 240th District Court, Fort Bend County, Texas, and United States v. LeMaire, 826 F.2d 387 (5th Cir. 1987), cert. denied, 56 U.S.L.W. 3647 (Mar. 21, 1988).

b. State Banks. The Texas Department of Banking sought to excuse state banks from the necessity of filing a supersedeas bond. See Tex. Const. Art. XVI, § 16(c) and 7 Tex. Admin. Code § 3.27; 12 Tex. Reg. 4169 (Nov. 10, 1987); 13 Tex. Reg. 54 (Jan. 1, 1988). However, Bank of East Texas v. Jones, 758 S.W.2d 293 (Tex. App.--Tyler 1988, Mand. overr.) held that the Banking Section of the Finance Commission was not entitled to promulgate rules and regulations which are inconsistent with statutes, citing its conflict with Rules 47 and 48 of the Texas Rules of Appellate Procedure. For an excellent discussion of the cases and statutes pertaining to executions against national and state banks see Enforcement of Final Judgments Against a Bank by Jess H. Hall, Jr., The University of Texas School of Law, Banking School for Directors: An Analysis of Bank Director & Lender Liability, 1988. This article was published prior to the Bank of East Texas opinion.

c. Political Subdivisions: Public policy exempts political subdivisions of the state performing governmental functions from execution or garnishment proceedings. City of Victoria v. Hoffman, 809 S.W.2d 603 (Tex. App.--Corpus Christi 1991, writ denied); Tex. Local Gov't Code Ann. §101.021, 101.023 (Vernon

1999) (regarding home-rule cities). Property Code Section 43.002 now specifically exempts real property of the state, its agencies and political subdivisions from attachment, execution and forced sale. Any purported judgment lien is void and unenforceable against that property.

However, the collection of judgments against political subdivision is not entirely prohibited. Mandamus is the proper remedy through which political subdivisions can be directed to levy and collect sufficient taxes to satisfy judgments outstanding against the entity when there are not sufficient funds on hand. Delta County Levee Improvement District v. Leonard, 516 S.W.2d 911 (Tex. 1974); Hawthorne v. La-Man Constructors, 672 S.W.2d 255 (Tex. App.--Beaumont 1984, no writ); Salvaggio v. Davis, 727 S.W.2d 329 (Tex. App.--Houston [1st Dist.] 1987, no writ). Mandamus may be denied if the judgment sought to be collected is the subject of a bill of review where the political subdivision is likely to prevail. City of Houston v. Hill, 792 S.W.2d 176 (Tex. App. --Houston [1st Dist.] 1990, writ dism. agr.).

7. Fraudulent Conveyances.

a. Fraudulent Conversion of Nonexempt Personal Property into Exempt Personal Property. Tex. Prop. Code Ann. § 42.004 (Vernon 1984) protects the creditor from the crafty debtor who fraudulently converts nonexempt personal property into exempt personal property, provides for a two year statute of limitations for this action, and creates a defense which excepts transfers in the ordinary course of business from the statute, as follows:

> Sec. 42.004. TRANSFER OF NON-EXEMPT PROPERTY.
>
> (a) If a person uses the property not exempt under this chapter to acquire, obtain an interest in, make improvement to, or pay an indebtedness on personal property which would be exempt under this chapter with the intent to defraud, delay, or hinder an interested person from obtaining that to which the interested person is or may be entitled, the property, interest or improvement acquired is not exempt from seizure for the satisfaction of liabilities. If the property, interest, or improvement is acquired by discharging an encumbrance held by a third person, a person defrauded, delayed, or hindered is subrogated to the rights of the third person.
>
> (b) A creditor may not assert a claim under this section more than two years after the transaction from which the claim arises. A person with a claim that is unliquidated or contingent at the time of the transaction may not assert a claim under this section more than one year after the claim is reduced to judgment.
>
> (c) It is a defense to a claim under this section that the transfer was made in the ordinary course of business by the person making the transfer.

b. Fraudulent Transfer. Texas adopted the Uniform Fraudulent Transfer Act as Tex. Bus. & Comm. Code Ann. § 24.001 et seq (Vernon 1987). Whereas, the former provisions pertaining to fraudulent transfers addressed fraudulent transfers as being void, the Act speaks in terms of remedies of creditors defrauded including avoidance of the transfer, attachment of the property and even injunctions and receivership. Judgment creditors, on court order, may levy execution on the assets transferred or its proceeds.

A thorough review of the Act is beyond the scope of this paper; however, a review of the Act is encouraged in that extensive definitions and criteria are included in new law which were absent in that repealed. See Laky, A Practical Guide to Recognizing Pleading and Proving Fraudulent Transfers, 1992 Collection Strategies, South Texas College of Law.

c. Disposition of Assets of Dissolved Corporation. Under certain circumstances, directors and shareholders have liability to creditors under the trust fund doctrine. Henry I. Siegel Co. v. Holliday, 663 S.W.2d 824 (Tex. 1984).

8. Community and Separate Property.

a. Availability of Community and Separate Property to Satisfy a Judgment. One spouse's separate property cannot be seized to satisfy a judgment against the other spouse unless both spouses are liable under another rule of law. Tex. Fam. Code Ann. § 3.202(a)(Vernon 1997).

Section 3.202(b)of the Family Code provides that unless both spouses are personally liable, the community property subject to one spouse's sole management, control, and disposition is not subject to liabilities that the other spouse incurred before marriage or to a non-tortious liability that the other spouse incurred during marriage.

Section 3.201 of the Family Code provides that a person is personally liable for the acts of the person's spouse only if: (1) the spouse acts as an agent for the person; or (2) the spouse incurs a debt for necessaries. A spouse does not act as an agent for the other spouse solely because of the marriage relationship. Tex. Fam. Code Ann. § 3.201(c)(Vernon 1997).

Sole-management community property is subject to liabilities incurred by that spouse before or during marriage, and joint management community property is subject to the liabilities of either spouse incurred before or during marriage. All community property is subject to tortious liability of either spouse incurred during marriage. Tex. Fam. Code Ann. § 3.202(b)(c) and (d)(Vernon 1997); Carlton v. Estate of Estes, 664 S.W.2d 322 (Tex. 1983) (joint-management community property).

Consequently, the creditor with a judgment against one spouse should try to locate:

(1) That spouse's separate property;

(2) Community property subject to that spouse's sole management, control and disposition; and

(3) Joint-management community property.

If the judgment is against both spouses for joint liability, all community property and both spouses' separate property can be reached. See Cockerham v. Cockerham, 527 S.W.2d 162 (Tex. 1975). Of course, a specific item of property might be exempt under some other rule of law, such as the general personal property exemption statutes.

b. Classification of Property as Community or Separate. Property possessed by either spouse during (or on dissolution of) marriage is presumed to be community property. Tex. Fam. Code Ann. § 3.003(a) (Vernon 1997); see Ray v. United States, 385 F. Supp. 372, 377 (S.D. Tex. 1974), aff'd, 538 F.2d 1228 (5th Cir. 1976). The degree of proof necessary to establish that property is separate property is clear and convincing evidence. Tex. Fam. Code Ann. § 3.003(b) (Vernon 1997). Sole-management community property is that community property that the spouse "would have owned if single, including:

(1) personal earnings;

(2) revenue from separate property;

(3) recoveries for personal injury; and

(4) the increases and mutations of, and the revenue from, all property subject to the spouse's sole management, control and disposition."

Tex. Fam. Code Ann. § 3.102(a)(Vernon 1997).

The spouses can agree in writing that other community property will be sole-management community property. Tex. Fam. Code Ann. § 3.102(c)(Vernon 1997). Unless otherwise provided, mixed community property is joint management community property. Tex. Fam. Code Ann. § 3.102(b) (Vernon 1997). Community property not included in one of these exceptions is joint-management community property. Tex. Fam. Code Ann. § 3.102(c)(Vernon 1997). Classification of the property can be done through post-judgment discovery or through motion practice. It has also been done by intervention in a divorce action by a judgment creditor seeking a turnover order and declaratory judgment. Owen v. Porter, 796 S.W.2d 265 (Tex. App.--San Antonio 1990, no writ). See Brooks v. Sherry Lane National Bank, 788 S.W.2d 874 (Tex. App.--Dallas 1990, no writ) wherein the Court affirmed a garnishment judgment in favor of husband's creditor awarding funds in two bank accounts in spite of husband and wife's testimony of their intent that both accounts be her separate property or special community property. The couple's "intent" was superseded by the opening of the accounts as joint accounts with joint right of control. See also Devoll v. Demonbreun, No. 04-11-00775-CV (Tex. App. – San Antonio, 2012, no pet.) (mem. opinion) where the wife intervening in a turnover proceeding failed to trace and clearly identify property claimed as separate property and was therefore subject to turnover.

Section 4.201 et seq of the Family Code allows spouses to agree to convert separate property to community property. While agreements such as these may be useful for estate planning purposes, they will increase the property subject to a judgment creditor's reach since community property is subject to seizure for more debts than is separate property.

c. Order in Which Property is Subject to Execution. Family Code Section 3.203 provides for judicial determination of the order in which property is subject to execution as follows:

> (a) A judge may determine, as deemed just and equitable, the order in which particular separate or community property is subject to execution and sale to satisfy a judgment, if the property subject to liability for a judgment includes any combination of:
>
> (1) a spouse's separate property;
>
> (2) community property subject to a spouse's sole management, control, and disposition;

(3) community property subject to the other spouse's sole management, control and disposition; and

(4) community property subject to the spouses' joint management, control, and disposition.

(b) In determining the order in which particular property will be subject to execution and sale, the judge shall consider the facts surrounding the transaction or occurrence on which the suit is based.

J. CONSIDERATIONS WHEN THE JUDGMENT CREDITOR WISHES TO PURCHASE AT EXECUTION.

The judgment creditor is often interested in bidding at the execution sale, especially if he is in the same business as the judgment debtor and can use some of the property seized in his own business. As his attorney, one must be prepared to offer cautions and suggestions.

1. Subject to all Liens. Tex. Civ. Prac. & Rem. Code Ann. § 34.045 (Vernon, 1986) provides that the purchaser at an execution sale only receives all the right, title, interest and claim that the defendant in execution had in the property. Therefore, the purchaser takes subject to any and all liens. If the judgment creditor is considering purchasing the property at execution he would be advised to run lien searches, including tax lien searches, to determine exactly what he is getting. Obtaining an owner and lien search from a title company before bidding at an execution sale is a wise investment.

The Uniform Federal Lien Registration Act at Texas Property Code § 14.002 provides that tax lien notices upon real property should be filed in the county in which the real property is located and lien notices upon personal property are filed against entities with their principal executive office in Texas in the office of the Secretary of State and against all others in the county where the taxpayer resides at time of filing. As stated above, the purchaser takes subject to pre-existing liens. An additional concern for the client who buys at an execution sale is the later filed federal tax lien. The best practice for a judgment creditor seeking to collect from a debtor owning real property is to file an abstract of judgment as soon as possible to establish a lien against the debtor's non-exempt property. If an IRS lien notice is filed after the judgment lien, it will be necessary to give the IRS notice of an execution sale if the federal lien notice was on file more than 30 days before the execution sale. This notice must be given at least 25 days before the sale. Otherwise the IRS's lien will survive the sale. Even with notice given, the IRS has a 120 day redemption period. See 26 U.S. Code § 7425 and 26 CFR 400.4-1.

While § 34.046 provides that purchasers at execution are considered purchasers without notice if the purchaser would have been considered an innocent purchaser without notice had the sale been made voluntarily and in person by the defendant, a judgment creditor does not enjoy that status. Nichols-Stewart v. Crosby, 87 Tex. 443, 29 S.W. 380 (1895). Excellent discussions of the forces of tax liens can be found at Phelan & Phelan, Status of Federal Tax Liens in Texas With a Consideration of the Subrogation Rights of Third Party Creditors, 51 Tex. B.J. 1000 (1987); Anderson & Warman, Tax Liens, 1989 Advanced Creditors' Rights Course. See also B & T Distributors v. White, 325 S.W.3d 786 (Tex. App.—El Paso 2010, no pet.) in which the court held that a lis pendens is sufficient to preserve the filing party's claim against real estate when filed prior to levy.

2. Credits to Judgment. Perhaps the judgment creditor is concerned about not having the cash to bid at execution? Judgment creditors who purchase at execution are not required to pay cash, but can merely credit their bid to the judgment. Blum v. Rogers, 71 Tex. 669, 9 S.W. 595 (1888). This allows the judgment creditor to obtain what may be the debtor's only property available to satisfy the judgment and at the same time not sustain additional out-of-pocket losses, only a reduction in the judgment amount. This procedure should be confirmed with the constable conducting the sale before the sale occurs. Even though the judgment creditor can purchase with credits to the judgment, there are costs that must be fronted for the execution process including the clerk's fee to issue the writ, the sheriff's or constable's fee for service and posting, as well as towing and storage costs for personal property in some instances, and publication costs associates with real property sales. Additionally, some sheriffs and constables collect a commission on the sale of the property at execution. See discussion of Fees at page 23 below.

3. Purchase of Real Estate. The judgment creditor wishing to purchase real estate must present the officer conducting the sale with a certificate from the county tax assessor-collector certifying that they owe no delinquent taxes, where applicable, in order for the officer to execute a deed to them. See discussion at p.9, supra, relating to sales of real estate at execution.

K. COURT OFFICERS.

1. Sheriffs and Constables. These officers of the court are charged with the duty of carrying out the court's orders and writs. Although statutory authority enables

both constables and sheriffs to carry out writs, local practice varies greatly.

2. Dealing with Officers. Instructions about a levy should be in writing whenever possible for use by whatever officer is handling the writ. Officers do not normally have access to easy ways to prepare documents. Help by providing forms of notice and of bill of sale or deed will usually be appreciated.

3. Officer's Liability. Occasionally the officer may have a personality conflict with the attorney, dislike the creditor, be a brother-in-law of the debtor, realize that the debtor votes in his precinct, or for some other reason be unwilling to properly handle the writ. Assistance can be found in Tex. Civ. Prac. & Rem. Code, Ch. 7, "Liability of Court Officers"; see also Tex. Civ. Prac. & Rem. Code. §§ 34.047, 34.061-.076 (Vernon 2007). Provisions regarding officer liabilities and duties, are also found in Tex. Local Gov't Code Ann. §§ 85.021, 86.021, and 86.024 (Vernon 1988).

Senate Bill 1209, effective September 1, 2007, made substantial changes to the remedies afforded judgment creditors who experience problems with sheriffs and constables who neglect or refuse to do their duties. The Bill Analysis provides:

> Large default judgments obtained under federal copyright law against judgment-proof individuals have become legal financial obligations for counties, individual constables, and sureties due to the recent finding of a legal loophole. This loophole provides for the judgment against the original defendant to be translated into a judgment against one or more of the aforementioned parties through a motion filed in the underlying suit, asserting a variety of failures on the constables charged with execution of the writ, without regard to the practical difficulties of collection in a given circumstance.
>
> S.B. 1269 provides explicit details relating to a constable's duties in executing a writ, and provides that damages are limited to actual damages.

Senate Bill 1269 amended Section 7.001 and 7.003 of the Civil Practices & Remedies Code to limit recovery against a clerk, sheriff or other officer who neglects or refuses to perform a duty under the Texas Rules of Civil Procedure or the Code to actual damages or contempt. The officer is not liable if he "in good faith executes or attempts to execute the writ." The Bill also revises the duties and liabilities of sheriffs and constables handling writs of execution as more fully discussed below.

a. Duty of Officer to Levy. When an officer receives a writ of execution, he is required to "proceed without delay" to levy on the defendant's nonexempt property found in his county, unless directed otherwise by the plaintiff or his agent or attorney. Tex. R. Civ. P. 637. "Without delay" is somewhat tempered by the new Tex. Civ. Prac. & Rem. Code § 34.072. A statute also imposes on sheriffs the duty to "execute all process and precepts directed to him by legal authority, and make return thereof to the proper court." See Tex. Local Gov't Code Ann. §§ 85.021 (Vernon 1988). If the officer receives more than one execution on the same day against the same person, he shall number them as received. Tex. R. Civ. P. 636. Failure to do so results in liability of the officer for actual damages. Tex. Civ. Prac. & Rem. Code Ann. § 34.063 (Vernon 2007). Previously the plaintiff could recover damages, plus 20% of the amount of execution on a motion with three days notice.

b. Failure to Levy. For failure to levy or sell any property subject to execution, the officer and his sureties will be liable to the judgment creditor for actual damages, with additional burdens of proof. The court must find that "the judgment creditor specifically informed the officer that the property was owned by the judgment debtor and was subject to execution and that the creditor directed the officer to levy on the property." Tex. Civ. Prac. & Rem. Code § 34.065 (Vernon 2007). Previously the judgment creditor could recover the full amount of the debt plus interest and costs, by a motion to the court from which the execution issued after five days' notice to the officer and his sureties. An excellent discussion of the procedures and defenses under the former remedy is found in Nueces County Sheriff James T. Hickey v. Couchman, 797 S.W.2d 103 (Tex. App.--Corpus Christi 1990, writ denied). Section 34.065 goes on to provide that actual damages is the amount of money the property would have sold for at a constable or sheriff's auction, minus cost of sale, commissions, and additional expenses of sale.

The same attorney who sued the Nueces County Sheriff under the prior procedures also sued the Nueces County Sheriff (new sheriff years later) as reflected in Condit v. Kaelin, No. 13-11-00327-CV (Tex.App. – Corpus 2012, pet. denied) and Crago v. Kaelin, No. 13-15-00055-CV (Tex.App. – Corpus 2015, no pet.). In the 2012 case Condit was the judgment creditor. He directed the sheriff's office to levy on certain real estate, which the sheriff's office refused to do because a homestead designation was on file with Nueces CAD. The court affirmed the lower court's finding that the property was

not subject to execution and noted that evidence of abandonment of the homestead had not been provided to the sheriff until after the fact. In the 2015 case, the sheriff's office again refused to levy on property designated as homestead in the Nueces CAD records. The judgment creditor's attorney had advised the sheriff's office in his letter requesting seizure of the property that the homestead designation had attached after the abstract of judgment had been filed and was therefore not exempt. The creditor's attorney furnished copies of the applicable instruments. The appeals court reversed the trial court's summary judgment in favor of the sheriff and found there was some evidence that the property, though subject to a homestead designation, was subject to execution. On remand the trial court awarded damages to the judgment creditor for the actual damages suffered being the amount of money the property would have sold for at a Sheriff's sale minus costs. Generously, the trial court based its award on fair market value. The Sheriff offered no controverting evidence or objections. Kaelin v. Crago, No. 13-16-00226-CV (Tex. App. – Corpus 2017, petition filed, No. 17-0470)(mem.op.). Based on this author's experience, properties don't typically sell for fair market value at a Sheriff's sale. Lesson learned: when property is subject to a homestead designation, but you have a basis to levy, provide the sheriff or constable as much information as possible with your levy request. Or have the trial court make a determination via a turnover proceeding that the property is subject to execution and should be turned over to the sheriff for sale at execution.

c. Failure to Return Execution. The sanction against the officer who neglects or refuses to return an execution or makes a false return is now contempt, after notice and opportunity to file or amend. Tex. Civ. Prac. & Rem. Code Ann. § 34.064 (Vernon 2007). Previously, the sanction was the same as for failure to levy or sell.

d. Failure to Give Notice of Sale. If the officer sells property without giving notice as required by the Texas Rules of Civil Procedure, or sells property in a manner other than as prescribed by the statutes and rules governing such sales, the officer is liable for actual damages. Tex. Civ. Prac. & Rem. Code Ann. § 34.066 (Vernon 2007). Previously the officer was liable to the injured party for not less than ten dollars nor more than two hundred dollars plus any other damages.

e. Failure to Deliver Money Collected. The officer is required to pay over money collected by execution to the judgment creditor "at the earliest opportunity," and failure to do so is ground for the creditor to recover from the officer and his sureties the amount collected, plus "damages at a rate of one percent a month on that amount," if proven by the injured party. Tex. Civ. Prac. & Rem. Code Ann. § 34.067 (Vernon 2007). Previously it was five percent per month on the amount, plus interests and costs, by a motion to the court from which the execution is issued after five days' notice to the officer and his sureties.

f. Failure to Execute Process Generally. For failing to execute all process directed to him by legal authority or for making a false return, a sheriff will be liable to the injured party for all damages sustained and can be fined for contempt for up to $100.00 by the court to which the process is returnable. See Tex. Local Gov't Code Ann. § 85.021 (Vernon 1988). Oddly enough, this was untouched by S.B. 1269! Existence of prior liens on property does not justify failure to levy writ. Rankin v. Belvin, 507 S.W.2d 908 (Tex. Civ. App.--Houston [14th Dist.] 1974, writ ref'd n.r.e.). For failing to execute and return any process lawfully directed and delivered to him, a constable can be fined for contempt by the court that issued the process for $10-$100.00 and costs, for the benefit of the injured party, on motion of the injured party with ten days' notice to the constable. S.B. 1269 modified this remedy to say it is inapplicable to action brought or which could have been brought under Chapter 34. See Tex. Local Gov't Code Ann. § 86.024 (Vernon 2007). Further, an officer commits a class A misdemeanor if, with intent to obtain a benefit or with intent to harm another, he intentionally or knowingly violates a law relating to his office or employment. Tex. Penal Code Ann. § 39.01 (Vernon Supp. 1987).

g. Indemnity Bond and Officer's Liability. An officer must execute a writ issued by a Texas court without requiring that bond be posted for indemnification to the officer. Tex. Civ. Prac. & Rem. Code Ann. § 7.003 (Vernon 1986). In the past, it was a common practice for the officer to refuse to levy on a writ of execution unless the judgment creditor provided an indemnity bond. Now, an officer is not liable for damages resulting from the execution of a writ issued by a Texas court if the officer in good faith executes, or attempts to execute, the writ as provided by law and by the Texas Rules of Civil Procedure, except as provided by § 34.061. Tex. Civ. Proc. & Rem. Code Ann. § 7.003(a) (Vernon 2007). Richardson v. Parker, 903 S.W.2d 801 (Tex. App.--Dallas, 1995, no writ).

h. Claim for Damages. As reflected in the text of S.B. 1269, the former Chapter 34 provisions for recoveries against sheriffs and constables relied on motions filed by the court that issued the writ on three or five day's notice. The Bill added Sections 34.068-34.070 to the Texas Civil Practices & Remedies Code, which now require that a suit be brought in the county where the officer holds office within one year of the injury.

i. Duties of Executing Officer. Perhaps the most problematic additions to Chapter 34 by S.B. 1269 are in Sections 34.071 and 34.072. They provide that the constable does not have a duty to search for property belonging to the judgment defendant, determine its ownership, evaluate if it is subject to execution, check for liens or make multiple levies for cash or at the same location. While some of this information has traditionally been provided by diligent collection attorneys and constables often utilized their resources to search for property and made multiple levies without complaint, a very valuable partnership may have been lost by this statutory license to "do little" to execute the writ.

4. Fees of Sheriffs and Constables. The Commissioners Court sets fees charged for services of the offices of the Sheriff and Constable under the authority of the Local Government Code Section 118.131. Fees for handling a writ of execution can vary from county to county ranging from as little as $60 to as much as $200. Similarly, some sheriffs and constables do not charge a commission on execution sale proceeds, while other charge a sliding scale based on the amount received, and still others will charge a fee if a sale is cancelled after posting. Therefore, in order to evaluate going forward with an execution one must check with the proposed officer who will handle the writ to determine estimated charges.

L. PROCESS SERVERS. Writs of execution are addressed to "any sheriff or any constable" under Tex. R. Civ. P. Rule 629, just as Tex. R. Civ. P. Rule 663 references the sheriff or constable "receiving the writ of garnishment." However, effective July 1, 2005, Tex. R. Civ. P. Rules 103 and 536(a) were amended to provide that a person other than a sheriff or constable can serve a writ that "requires the actual taking of possession of a person, property or thing" by written court order. The comments to the amendments indicate that such orders are to be used in "rare" circumstances. Experts differ on whether process servers can serve writs of garnishment without the referenced court order; however, this author believes that, since the rules of garnishment contemplate a continued participation of the officer who levied [see Rule 664 which provides for the officer who levied the writ to approve the replevy bond], an order would be necessary. It remains to be seen whether courts will readily sign orders providing for service of writs of garnishment and writs of execution by process servers.

M. WRONGFUL EXECUTION: "A WRIT DON'T MAKE IT RIGHT!". A cause of action for wrongful execution will arise for the benefit of parties injured thereby in a number of instances including, but not limited to,

1. a levy to enforce a judgment that has been satisfied,
2. a levy on exempt property,
3. an excessive levy,
4. a levy on property not owned by the judgment debtor, or
5. a levy to enforce a judgment that has been superseded by an appeal.

The action inures to the benefit of the party injured and will lie against those causing the injury. Damages are recoverable from:

1. a judgment creditor who directs and/or participates in the wrongful execution,
2. the judgment creditor's attorney who advises and directs the wrongful execution, or
3. the officer conducting the levy if the officer did not act in good faith. See Tex. Civ. Prac. & Rem. Code § 7.003(a) and § 34.061(b) (Vernon 2007) for officer liability. **NOTE THAT THE CHANGES TO CHAPTERS 7 AND 34 OF TEX. CIV. PRAC. & REM. CODE WILL SEVERELY LIMIT RECOVERY AGAINST SHERIFFS AND CONSTABLES.**

Cases discussing wrongful execution include Visage v. Marshall, 763 S.W.2d 17 (Tex. App.--Tyler 1988, no writ) (levy on property not subject to execution); Southwestern Bell Telephone v. Wilson, 768 S.W.2d 755 (Tex. App.--Corpus Christi 1988, writ denied) (intentional torts result in wrongful execution); and Donovan v. Rankin, 768 S.W.2d 443 (Tex. App.--Houston [1st Dist.] 1989, writ denied) (seizure of property owned by a third party).

In Visage the court found that a judgment of a court is not property subject to a levy and in a declaratory judgment nullified the levy. No actual damages or gross negligence were found so the appeals court reversed the award of exemplary damages. Although the turnover statute was not addressed, the facts of the case may have warranted the use of the turnover statute to properly seize the intangible property right.

In Southwestern Bell Telephone, almost 2.5 Million Dollars of an over 5.0 Million Dollar verdict was affirmed in a suit for tortious collection efforts, including wrongful execution, on the collection of a $9,500.00

agreed judgment. The facts were highly contested concerning the actions taken by the constable and creditor's attorneys at the scene of the levy. However, the court found that the alleged intentional torts of the attorneys were committed in furtherance of the collection efforts for Bell's benefit and held Bell liable therefor. Similarly, Bell was held liable for the acts of the constables because they were acting under the direction of the attorneys who were Bell's agents. The court overturned an award of exemplary damages finding that neither the constables nor the attorneys were acting in a managerial capacity and that Bell did not ratify their acts. The published Donavan opinion is one written on a second motion for rehearing. The case for wrongful execution arose out of a levy to satisfy a judgment against a corporation. At the time of levy the individual shareholders of the corporation claimed that the property sought to be levied on was their individual property and not the property of the corporation. The constable did not seize the property but instead received funds from a third party paid on behalf of the individuals. The trial court denied relief and on the second motion for rehearing the appeals court affirmed. It found that the individuals had attempted to dissolve the corporation a year before the agreed judgment against the corporation and had failed to do so properly. It found that, as a matter of law, the corporation owned the assets or, if a valid transfer was made, the individuals were holding the assets in trust for the benefit of the corporation's creditors. The opinion on the first motion for rehearing would have held the judgment creditor and his attorney jointly liable for actual and punitive damages. It may be advisable to resolve doubt as to the ownership of property arising at the time of execution in a court hearing, i.e., a turnover action, rather than in the heat of the moment. The court might have stopped with its opinion on the first motion for rehearing!

N. PRACTICAL TIPS.

1. Asset discovery prior to levying the writ will aid the constable in the levy;

2. To assist the constable in locating real property, consult the local tax assessor's tax rolls and provide this information to the officer serving the writ; and

3. When selling personal property at execution you will multiply your bidders by placing a classified ad describing the property for sale even though publication is not required by law.

4. When forwarding a writ to the appropriate officer for levy, make clear to the officer that he is not to contact the debtor prior to his appearing at the debtor's home or business for levy (or else the debtor and his property may disappear), he is not to negotiate a payment agreement with the debtor, he is not to believe the debtor who says he has worked it out with the judgment creditor (unless he confirms this with the judgment creditor's attorney before leaving the premises), and if he believes the property to be seized is not worth the cost of transportation and storage, to call the creditor's attorney before having hauling it away to confirm whether to proceed.

5. If the bids by third parties are not enough to make the sale worth completing and the property has value that could be realized under other sale conditions, remember the judgment creditor's right to bid credit to the judgment. See discussion at Section III, K., 3. b., supra.

IV. GARNISHMENT.

A. PURPOSE. The post-judgment garnishment is a procedure available to a judgment creditor by which he can inquire into the relationship between some third party and the judgment debtor to determine if there are any funds or property owed to the judgment debtor by the third party. If there are funds or property owed to the debtor, the judgment creditor (garnishor) can obtain a garnishment judgment ordering the third party (garnishee) to pay funds to him rather than to the judgment debtor.

B. APPLICABLE STATUTES AND RULES. Statutes providing remedy - Tex. Civ. Prac. & Rem. Code Ann. §§ 63.001-.008 (Vernon 1986); Finance Code §59.001(2),§59.008, §201.102, §201.103, 276.002 (Vernon 2005) Procedural Rules - Tex. R. Civ. P. 657-79.

C. AVAILABILITY OF POST-JUDGMENT GARNISHMENT.

1. Requirements to Issue. Garnishment is available after judgment only if the following conditions exist:

a. The creditor has a valid and subsisting judgment against the debtor. Tex. Civ. Prac. & Rem. Code Ann. § 63.001(3) (Vernon 1986). For this purpose, the judgment is final and subsisting from the date of rendition. Tex. R. Civ. P. 657. See also, Taylor v. Trans Continental Properties, 670 S.W.2d 417 (Tex. App.--Tyler 1984) rev'd on other grounds, 717 S.W.2d 890

(1986). The garnishor must also establish ownership of the judgment. Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Allied Bank, 704 S.W.2d 919 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.).

b. The debtor has not filed an approved supersedeas bond to suspend execution on the judgment. Tex. R. Civ. P. 657.

c. The creditor swears that, to his knowledge, the judgment debtor does not have in his possession in Texas sufficient property subject to execution to satisfy the judgment. Tex. Civ. Prac. & Rem. Code Ann. § 63.001(2)(B) (Vernon 1986). Note that it is not necessary to have had a writ of execution returned "nulla bona" to utilize garnishment. Cantwell v. Wilson, 241 S.W.2d 366 (Tex. Civ. App.--Austin 1951, no writ).

2. Procedure for Securing Issuance.

a. Jurisdiction and parties. A post-judgment garnishment action is a separate suit from the main cause whose judgment it is meant to enforce. The garnishment action, being ancillary to the main suit, should be brought against the third party garnishee as defendant. Tex. R. Civ. P. 659. It should be filed in the same court which rendered the judgment to be collected (i.e., if the original suit is filed in the 153rd judicial district court, then the application for post-judgment garnishment should also be filed in the 153rd), but under a different cause number. See Townsend v. Fleming, 64 S.W. 1006 (Tex. Civ. App. 1901, no writ); Kelly v. Gibbs, 19 S.W. 563 (1892); Buie-Crawford v. Cleburne National Bank, 111 S.W.2d 830 (Tex. Civ. App.--Waco, 1938, no writ); and Harvey v. Wichita National Bank, 113 S.W.2d 1022 (Tex. Civ. App.--Fort Worth, 1938, no writ).

Note however, that a case interpreting the Fair Debt Collections Practices Act has found the venue provision of the action requiring legal actions on debts be brought in the judicial district where the consumer signed the contract or resides at the commencement of the action to apply to post-judgment enforcement proceedings. Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507 (9th Cir. 1994, no writ). The Fox suit involved a post-judgment garnishment action brought in the same county where the judgment was rendered, which was not the county where the contract was signed or where the debtors resided at the time of the garnishment action. The court did not address whether Arizona law made the filing of the garnishment action in the same court a jurisdictional issue, as it is in Texas. What are we to do in Texas when the initial suit is brought in the county where the debtor resides, but not where the contract was signed? If the debtor moves after judgment, the Fox holding would appear to require enforcement actions to follow the debtor or to be brought where the contract was signed. Are our hands tied in this instance? Maybe. Remember, the Fair Debt Collection Practices Act only applies to consumer debt.

In BankOne Texas, N.A. v. Sunbelt Savings, F.S.B., 824 S.W.2d 557 (Tex. 1992) the Court examined the duty of the garnishee bank to freeze funds held in the name of a third party if alleged to be the funds of the judgment debtor. The garnishor pleaded the commingling of the debtor's funds in the account of the third party but did not ask the Court to name the third party as a judgment debtor. The writ incorporated the application but did not name the third party as a judgment debtor. The Court excused the garnishee's paying out the funds to the third party holding that the garnishor would need to seek a writ naming the nominal owner (the third party) in order to put the bank on notice to freeze the funds. The Court did not make it clear how to "name" the third party as a "judgment debtor". Perhaps it would be necessary to make the third party a party to the garnishment action. This author's experience has been that garnishees who are served with an application containing allegations that funds in the third party's account are funds of the debtor will freeze the account and take the position of a stakeholder. See also discussion at Section IV, F, 4. See also, Newsome v. Charter Bank Colonial, 940 S.W.2d 157 (Tex.App.--Houston [14th Dist] 1996, no writ); Overton Bank and Trust vs. Painewebber, Inc., 922 S.W.2d 311 (Tex.App.--Fort Worth, 1996, no writ).

b. Service of the writ of garnishment/notice to judgment debtor. The writ of garnishment is to be served on the garnishee. Tex. R. Civ. P. 659. The judgment defendant is not a necessary party to the garnishment action; however, he must be served with a copy of the writ of garnishment, the application, accompanying affidavits, and orders of the court as soon as practical after service of the writ on the garnishee. This can be service in any manner prescribed for service of citation or as provided in Rule 21a. Tex. R. Civ. P. 663a. To insure notice by Rule 21a, copies should be sent by certified mail, return receipt requested, and by regular mail. This rule further requires that the copy of the writ served upon the defendant include, in ten point type and in a manner calculated to advise a reasonably attentive person of its contents, the following statement:

> TO _____, Defendant:
> You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:
>
> "YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A

RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT."

Tex. R. Civ. P. 663a. Some court clerks provide additional copies of the writs with the notice language thereon. Others do not, in which case it is necessary to photocopy the writ and type the notice language on the face of the copy before service on the judgment debtor. Failure to give notice pursuant to Rule 663a is fatal to the garnishment judgment even though the judgment debtor receives actual notice from the garnishee. Hering v. Norbanco Austin I, Ltd., 735 S.W.2d 638 (Tex. App.--Austin 1987, writ denied). And, even if the judgment debtor voluntarily appears in the garnishment action. Walnut Equip. Leasing v. J-V Dirt & Loam, 907 S.W.2d 912 (Tex. App.--Austin 1995, writ denied). Failure to give the judgment debtor property notice renders any judgment, other than one dissolving the writ, void. Zeecon v. American Bank, 305 S.W.3d 813 (Tex.App.-Austin 2010, no pet.). Raising the issue of garnishor's failure to give the judgment debtor notice may be limited to instances where the judgment debtor suffers the loss. In Sherry Lane National Bank v. Bank of Evergreen, 715 S.W.2d 148 (Tex. App.--Dallas 1986, writ ref'd n.r.e.) the court held that the right to notice can only be raised by the judgment debtor and cannot be asserted as a basis for voiding a judgment against a defaulting garnishee. Note, that the garnishee is under no duty to notify the judgment debtor of the garnishment proceedings. Westerman v. Comerica Bank-Texas, 928 S.W.2d 679 (Tex.App.--San Antonio 1996, writ denied).

The rule requires that the judgment debtor be given notice "as soon as practicable following service of the writ" on the garnishee. Tex. R. Civ. P. 663a. In Lease Finance v. Childers, 310 S.W.3d 120 (Tex. App.-Ft. Worth 2010, no pet.) the record was unclear when or if the judgment debtor was served with notice and reflected only an undated fax enclosed with a letter to the judgment debtor's attorney sent the day before an agreed judgment that was agreed to by the judgment creditor and garnishee was signed by the court. In this case the garnishee was served September 19th and the agreed judgment was signed by the court October 9th. The court didn't offer guidance on the number of days it considered "as soon as practicable" but found the record lacking of any evidence of a date of service. The completion, filing and Rule 21a service of the form included as Attachment 5 could provide a 'record' of service, but care should be made to include all the referenced attachments.

c. Banks as Garnishees. Writs of garnishment served on garnishee banks have been traditionally served on bank presidents and vice presidents. With the advent of branch banking, banks have attempted to better control the handling of these writs by designating a specific bank location in the city for accepting service of these writs. Civil Procedure and Remedies Code Section 63.008, now provides that service of a writ of garnishment on a financial institution is governed by Section 59.008 of the Finance Code. The same bill enacting §63.008 made similar provision for service of orders appointing receivers in turnover proceedings, service of writs of attachment for personal property, notices of receivership and restraining orders and injunctions affecting a customer of the financial institution.

Finance Code Section 59.008 provides that a claim against a customer, defined in Section 59.001(2) to include writs of garnishment and notices of receivership among other actions, shall be delivered to the address designated as the address of the registered agent of the financial institution in its registration statement filed with the Secretary of State pursuant to Section 201.102 or 201.103 of the Finance Code. Section 201.102 provides that out-of-state financial institutions must file an application for registration with the secretary of state by complying with the laws of this state for foreign corporations doing business in this state, i.e. designating an agent for process. Section 201.103 provides that Texas financial institutions may file a statement with the Secretary of State appointing an agent for process.

Section 59.008 goes on to provide that if a financial institution complies with Section 201.102 or 201.103, a claim against a customer of the financial institutions, i.e. a writ of garnishment, is not effective if served or delivered to an address other than the address designated. Section 59.008 goes on to provide that it is the financial institution's customer who bears the burden of preventing or limiting a financial institution's compliance with or response to a claim subject to Section 59.008. It appears then that a financial institution complying with the provisions regarding designation of a registered agent can elect to declare the claim against its customers ineffective if the claimant fails to comply with service. And, further, if the financial institution slips up and honors a claim against its customer that is incorrectly served, it appears to have no exposure to its customer, who has the burden to prevent or suspend the financial institution's response to the claim.

Paragraph (d) of Section 59.008 provides that, if the financial institution does not comply with Section 201.102 or 201.103, the financial institution is subject to service of claims against its customers as otherwise provided by law.

Tex. Civ. Prac. & Rem. Code's provisions for service on a financial institution were clarified by SB. No. 422

effective September 1, 2013. Perhaps so that service on financial institutions of claims against its customers be found in a more logical place, subsection (f) was added to Section 17.028 to direct readers to Finance Code 59.008 for service of claims against customers.

Before garnishing a judgment debtor's bank account, one must check with the Secretary of State to determine if a registered agent and registered office have been designated. If so, the writ of garnishment should be served per the designation. If no designation is made, service should be made as otherwise provided by law.

Additional legislation particular to banks as garnishees is discussed at p. 31 relating to default judgments in garnishment actions.

d. The Writ. The contents of the writ itself are described in Tex. R. Civ. P. 661. Although a bond is required for garnishment prior to judgment, the rules do not require the plaintiff to post a bond for post-judgment garnishment. See Tex. R. Civ. P. 658-58a.

e. Amendments. Tex. R. Civ. P. 679 allows amendment of the affidavit, bond, writ, or officer's return upon application in writing to the judge or justice of the court and after notice to the opponent in the event such an amendment is in furtherance of justice.

f. Officer's Return. The officer who executes a writ of garnishment is to make a return "as of other citations." Tex. R. Civ. P. 663. The plaintiff's attorney should inspect the return before obtaining a garnishment judgment, especially if it is a default judgment. Returns in garnishment proceedings are governed by the rules for citations generally. Returns have been held fatally defective for failing to show the manner of service on a corporate garnishee and for failing to show the place of service. See Jacksboro National Bank v. Signal Oil & Gas Co., 482 S.W.2d 339 (Tex. Civ. App.--Tyler 1972, no writ); United National Bank v. Travel Music of San Antonio, 737 S.W.2d 30 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.) (failure to deliver to addressee in service by certified mail, failed to confer jurisdiction).

g. Forms and Practical Procedure. Once a bank account or other debt to the judgment debtor subject to garnishment is located and it is determined that sufficient funds are involved so as to make it cost effective (see the section on Practical Tips regarding locating funds and determining optimum time for service of writ), the following steps are suggested:

(1) Application. Attached as Attachments Nos. 2 - 4 are suggested forms for the application and supporting affidavit. The letter forwarding same for filing is Attachment No. 12. If the judgment creditor's attorney is to sign the affidavit the combination Attachment No. 2 is all that is needed. This proves most efficient in that it allows immediate preparation and filing without paper shuffling between the attorney and client. Information needed for the application includes:

a. Original suit and judgment information, including credits to the judgment;

b. proper garnishee name, officers for service and address for service; and

c. account names and numbers if available.

The form for the application for writ of garnishment came under scrutiny by the Texas Supreme Court in El Periodico, Inc. v. Parks Oil Company, 917 S.W. 2d 777 (Tex. 1996). The Court reversed and remanded a garnishment judgment rendered in favor of a garnishor in a summary judgment proceeding based on the insufficiency of the application. The summary judgment had been granted by the trial court based on the garnishee's failure to file a verified answer. The Court of Appeals affirmed the trial court (and in dicta even stated that a default judgment could have been rendered in Garnishor's favor because the answer was not proper) and found that the unsworn answer did not controvert the prima facie case made by the sworn application. The Supreme Court found that the Garnishor was not entitled to summary judgment because there was nothing in the record to support the calculation of the garnishment judgment, even if it assumed the trial court took judicial notice of the underlying judgment. The Court declined to comment on whether it would be permissible to consider the application for purposes of the calculation. The Court also found the statement in the affidavit that garnishor's attorney "has reason to believe, and does believe, that the said Garnishee is indebted to the Judgment Defendant or has effects belonging to the Judgment Defendant" inadequate because it was made on the belief of counsel and the grounds of such belief were not specifically stated. Until this case came out, this author's forms made the same recitation, as do a number of accepted form books. The inclusion of the statement of affiant's "belief" that the garnishee is indebted to the judgment debtor or has effects belonging to the judgment debtor may well be irrelevant. It is not a ground for garnishment, Tex. Civ. Prac. & Rem. Code Ann. § 63.001 (Vernon 1986), and is not required under the rules for garnishment, Tex. R. Civ. P. 657, et. seq. In fact, the requirement for this allegation was deleted from Tex. R. Civ. P. 658 when the rule was amended effective January 1, 1978. So why did the Supreme Court even address it? Maybe because the judgment creditor was seeking to collect a $77,893.89

judgment, the garnishee filed an unsworn denial stating it only owed the judgment debtor $750.00, and, without more clarification in the record regarding calculation of the balance due on the underlying judgment, the trial court had rendered judgment against the garnishee for $198,979.43! Did the Supreme Court, by addressing this statement regarding the garnishee's indebtedness to the judgment debtor, impliedly hold that it was required and that the basis for the belief be stated in the application? Maybe, but maybe not. The forms attached to this paper have been modified to include the statement on an option basis. It is likely irrelevant even in light of the Court's reference to it in El Periodico. (This author routinely includes bank account styles and numbers as an aid to the garnishee banks.) **Lesson to be learned**: If the Garnishor is to rely on the sworn application for a default or summary judgment in a garnishment action, the application must contain all the facts on which the trial court will base its judgment. The Garnishor can cure the application's ills by supplementing with evidence at the default hearing or by supplementing the Motion for Summary Judgment with additional facts contained in proper affidavits. **Another lesson to be learned**: Bad facts make bad (confusing maybe?) law.

(2) Filing and Service. The application is filed in the same court but under a different cause number and requires a filing fee. See discussion of the Fox case at pg. P-28, supra. The writ should be reviewed for accuracy before service if possible.

The court in Lawyers Civil Process, Inc. v. State of Texas, 690 S.W.2d 939 (Tex. App.--Dallas, 1985, no writ) held that the writ must be served by a sheriff or constable and not by private process, the writ not being a mere citation or other notice. However, a court order may be obtained for service by someone other than a sheriff or constable under Rules 103 and 536(a), Tex. R. Civ. P. See discussion at p. 23.

(3) Notice to Judgment Debtor. After service of the writ on the garnishee, notice to the judgment debtor is sent. Attachment No. 5 is a form used AS A COVER SHEET ONLY AND NOT AS A SUBSTITUTE to the writ with notice language included thereon. It serves as a reminder of the documents which must be forwarded to the judgment debtor and a record of the date, place, and manner of service of the notice. This cover sheet need not be filed with the clerk but this author's practice is to do so in order to provide documentation of service of notice in the court's record. It is also this author's practice to forward the notice package to the judgment debtor by certified mail, return receipt requested and by regular mail.

(4) Judgment. Attached hereto as Attachment No. 6 is a form for an agreed judgment in garnishment. By and large garnishment actions can be resolved by agreement, the most common problem point of negotiation being the garnishee's claim for attorney's fees (a problem for the judgment creditor because it means less dollars for him!). The judgment for the garnishor will likely be for a sum equal to the amount garnished less the attorney's fees awarded the garnishee. The judgment will also provide for recovery to the garnishee of his attorney fees. Upon filing the judgment and furnishing the garnishee with a conformed copy of same, the garnishee will issue a check for the recovery. (If the fund garnished has a zero balance or one so small that it doesn't cover garnishee's attorney fees then it is the garnishor who writes the check!). The above procedures are those taken in a case where the garnishment goes smoothly. The action can turn into a full-blown lawsuit if the garnishor must traverse the garnishee's answer as provided by Tex. R. Civ. P. Rule 673 or if the judgment debtor should get involved.

D. PROPERTY SUBJECT TO AND EXEMPT FROM GARNISHMENT.

1. Property Subject to Garnishment.

Generally, all debts owed to the judgment debtor by the garnishee and all nonexempt personal property of the judgment debtor held by the garnishee may be reached by the judgment creditor through post-judgment garnishment. To be garnished, traditionally courts have held that a debt must be absolute and not subject to any contingency. Clapper v. Petrucci, 497 S.W.2d 120 (Tex. Civ. App.--Austin 1973, writ ref'd n.r.e.); Waples-Platter Grocer Co. v. Texas & P.Ry. Co., 68 S.W. 265 (1902). But see Industrial Indemnity Company v. Texas American Bank-Riverside, 784 S.W.2d 114 (Tex. App.--Fort Worth, 1990, no writ), wherein the court found that the garnishment writ reached a judgment in favor of a judgment debtor even though the judgment was on appeal, holding that the appeal did not render the judgment unliquidated. The court went on to say that the obligation, whether treated as a liquidated or an unliquidated claim, was captured by the writ. It pointed to the (post-Waples) 1978 amendment to Tex. R. Civ. P. 661 which added the following sentence to the form of the writ: "You are further commanded NOT to pay to defendant any debt or to deliver to him any effects, pending further order of this Court," and found that the amendment would require the garnishee to preserve even unliquidated claims for determination and further order of the Court issuing the writ. For a discussion of property subject to garnishment, see Miller, The Garnishment Process, 5 St. Mary's L.J. 719, 722 (1974).

Some commonly sought debts subject to garnishment are noted here:

a. Bank Account. A bank account is the most commonly garnished debt. See discussion of banks as garnishees at p. 22, infra. Bank deposits can be reached regardless of the account name if the funds are owed to the judgment debtor. Frankfurt's Texas Investment Corp. v. Trinity Sav. & Loan Ass'n, 414 S.W.2d 190, 195 (Tex. Civ. App.--Dallas 1967, writ ref'd n.r.e.). Community funds likewise can be reached. Tatum State Bank v. Gibson, 24 S.W.2d 506 (Tex. Civ. App.--Texarkana 1930, no writ); Brooks v. Sherry Lane National Bank, 788 S.W.2d 874 (Tex. App.--Dallas 1990, no writ). The issue of alter ego has been tried in the garnishment of corporate accounts seeking to collect from an individual judgment debtor in Valley Mechanical Contractors v. Gonzales, 894 S.W.2d 832 (Tex. App.--Corpus Christi 1995, no writ). The issue of fraudulent transfer may also be tried in a garnishment action if properly pleaded. See Englert v. Englert, 881 S.W.2d 517 (Tex. App.--Amarillo 1994, no writ), which specifically recognized the ability of a garnishor to attack transactions between debtors and garnishees in a garnishment proceeding. See also discussion of when garnishee has duty to freeze accounts in name of third parties at p. 23, supra.

b. Safety Deposit Box. The bank can be sued in garnishment to reach the contents of a safety deposit box holding the judgment debtor's property, even if the bank does not know what the box contains. Blanks v. Radford, 188 S.W.2d 879 (Tex. Civ. App.--Eastland 1945, writ ref'd w.o.m.).

c. Shares of Stock. Stock has been made expressly subject to garnishment under Tex. R. Civ. P. 669.

d. Promissory Note. A past-due note can be garnished. Thompson v. Gainesville National Bank, 66 Tex. 156, 18 S.W. 350 (1886); Davis v. First National Bank, 135 S.W.2d 259 (Tex. Civ. App.--Waco 1939, no writ). So can a non-negotiable note. Saenger v. Proske, 232 S.W.2d 106 (Tex. Civ. App.--Austin 1950, writ ref'd). A negotiable instrument cannot be garnished before its maturity. Inglehart v. Moore, 21 Tex. 501 (1858).

e. Trust Fund. Revenue from a trust fund can be subjected to payment of the beneficiary's debts if the trust instrument "contains no express words of restraint and nothing on its face (declares) that the purpose thereof is to provide a support for the beneficiary and to furnish him with the comforts of life and where it requires that the revenue arising from such trust shall be paid directly to the beneficiary without any discretion concerning its application and without any discretion being vested in the trustee as to the time or amount of such payments or the purpose to which they will be applied . . . ." Nunn v. Titche-Goettinger Co., 245 S.W. 421 (Tex. Comm'n. App. 1922, jdgmt adopted). Even spendthrift trusts can be garnished for child support. First City National Bank of Beaumont v. Phelan, 718 S.W.2d 402 (Tex. App.--Beaumont 1986, writ ref'd n.r.e.).

2. Property Exempt from Garnishment. Exempt property is discussed generally in Executions, supra. Some of the more important exemptions relating to garnishment are noted here:

a. Real property. Realty cannot be garnished. Fitzgerald v. Brown, Smith & Marsch Bros., 283 S.W. 576 (Tex. Civ. App.--Texarkana 1926, writ dism'd). Further, the proceeds of a voluntary sale of a homestead are exempt from garnishment for six months. Tex. Prop. Code Ann. § 41.001(b) (Vernon 1987).

b. Wages and Certain Commissions. Except as otherwise provided by state or federal law, current wages are exempt. Tex. Const. art. XVI, § 28; Tex. Civ. Prac. & Rem. Code Ann. § 63.004 (Vernon, Supp. 1997); Tex. Prop. Code Ann. §42.001(b)(1) (Vernon Supp. 1993). As are certain commissions. Tex. Prop. Code Ann. § 42.001(d) (Vernon Supp. 1993). Wages cease to be current and are no longer exempt immediately upon their being paid to and received by the wage earner – thus making them subject to a garnishment upon deposit in a judgment debtor's bank account. Fitzpatrick v. Leasecomm Corporation, No. 12-07-00487-CV (Tex. App. – Tyler 2008, pet. denied) (mem.op.). Note also, compensation due an independent contractor is not exempt. Campbell v. Stucki, 220 S.W.3d 562 (Tex. App.-Tyler 2007, no pet.) (in this case a commissioned sales person admitted he was an independent contractor, his contract with the insurance company provided so, and the Court found that compensation due him was not exempt.).

c. Worker's Compensation. Death and personal injury benefits paid under worker's compensation laws are exempt from garnishment. Tex. Labor Code § 408.201.

d. Government Employees' Retirement Benefits. Pensions, annuities, and retirement benefits of government employees are usually exempt. Check the applicable statute. See Tex. Rev. Civ. Stat. Ann. Title 110B, § 21.005 (Vernon 1987) (retirement and annuity benefits of state employees); § 31.005 (Vernon 1987) (payments by Teacher's Retirement System); Dyer v. Investors Life Insurance Company of North America, 728 S.W.2d 478 (Tex. App.--Ft. Worth 1987, writ ref'd n.r.e.) (all state sponsored retirement funds considered "spendthrift trusts").

e. Welfare and Social Security Benefits. Most state welfare benefits paid or payable are exempt from garnishment. See, e.g., Tex. Hum. Res. Code Ann. § 31.040 (Vernon 1980) (aid to families with dependent children); § 32.036 (medical assistance) (1980). Federal social security benefits are likewise exempt. 42 U.S.C.A. § 407 (West 1983).

f. Insurance Benefits. Certain life, health and accident insurance benefits are exempt. Tex. Ins. Code Ann. §1108.051, et seq (Vernon 2001). See p. 16.

g. Trust or Other Funds in Debtor's Name Belonging to a Third Party; Multi-Party Accounts. Neither trust funds nor funds of another deposited in defendant's name are subject to garnishment by defendant's creditors. Failure of the garnishee to raise this defense may subject the garnishee to liability to the defendant. Southwest Bank & Trust Co. v. Calmark Asset Management, 694 S.W.2d 199 (Tex. App.--Dallas 1985, writ ref'd n.r.e.). Ownership of convenience accounts and other multi-party bank accounts are governed by Chapter 113 of the Tex. Estates Code. Bechem v. Reliant Energy, et al, 441 S.W.3d 839 (Tex.App.-Houston [14th Dist.] 2014, no pet.) (judgment debtor's assertion of convenience account put in issue ownership of account).

h. Additional Exemptions for Retirement Plan. See discussion of Property Code § 42.0021 exempting certain retirement plans or portions thereof, supra.

i. Money Due Original Contractors and Subcontractors. Property Code Section 53.151 provides that creditors of original contractors may not garnish money due the original contractor or the contractor's surety from the owner, and a creditor of a subcontractor may not garnish money due the subcontractor, to the prejudice of the subcontractors, mechanics, laborers, materialmen, or their sureties.

j. Tax and Insurance Escrow. While not "exempt" property, the reserve fund for taxes and insurance paid to a lender is not subject to garnishment because the debtor no longer "owns" the money in the account and cannot insist it be returned. Aetna Finance Co. v. First Federal Savings and Loan Assn., 607 S.W.2d 312 (Tex.Civ.App. – Austin 1980).

k. Funds on Deposit with Attorney. Whether funds on deposit with an attorney are a "true" retainer and thus non-refundable can determine whether a deposit in the attorney's trust account is reachable by turnover. In the Interest of CHC and SMC, 290 S.W.3d 929 (Tex.App. – Dallas 2009, no pet.). The same analysis would be made regarding garnishment of the account.

3. Garnishee and Sovereign Immunity: If the state or agency of the state owes money to the judgment debtor and the funds are not otherwise already exempt from legal process for satisfaction of debt, sovereign immunity can be another stumbling block. In Morris v. Texas Department of Corrections, 762 S.W.2d 667 (Tex. App.--Tyler 1988, no writ) one inmate recovered judgment against another inmate then garnished his inmate's trust fund held by the Texas Department of Corrections by suing the Department. The court affirmed a dismissal of his application for writ of garnishment on the basis that the Texas Department of Corrections is an agency of the state and that the suit commenced by the application subjects the Texas Department of Corrections to liability and impairs its lawful exercise of a governmental function. Section 63.007 of the Civil Practice and Remedies Code now specifically waives sovereign immunity in garnishment actions against inmate trust funds.

4. Property In Custodia Legis: Property in custodia legis is not generally subject to levy and sale under execution or garnishment. Property is held in custodia legis when an arm or instrumentality of the court holds the property on behalf of the court. However, "when the court enters a decree of distribution, or where nothing more remains for the custodian to do but make delivery of the property or payment of the money, the reason for the doctrine of in custodia legis is satisfied, and the property becomes subject to levy under Texas law." Gonzales v. Daniel, 854 S.W.2d 253 (Tex. App.--Corpus Christi 1993, no writ). Keathley v. J.J. Investment Co. L.T.D., No. 06-14-0036-CV (Tex.App. – Texarkana 2015, no pet.).

E. LIABILITY FOR WRONGFUL GARNISHMENT.

The plaintiff can be liable for wrongful garnishment if in his affidavit for garnishment he makes an untrue allegation of a statutory ground for garnishment, possibly even though he had probable cause to believe the ground was true and did not act maliciously. Peerless Oil & Gas Co. v. Teas, 138 S.W.2d 637 (Tex. Civ. App.--San Antonio 1940), aff'd, 138 Tex. 301, 158 S.W.2d 758 (1942). Thus, if the plaintiff knows that the debtor actually has property within the state subject to execution sufficient to satisfy the debt, wrongful garnishment can occur when the plaintiff alleges in his affidavit that within his knowledge the debtor does not have such property. See King v. Tom, 352 S.W.2d 910 (Tex. Civ. App.--El Paso 1961, no writ); Griffin v. Cawthon, 77 S.W.2d 700 (Tex. Civ. App.--Fort Worth 1934, writ ref'd). The creditor has a duty to make a reasonable inquiry whether such property exists. Massachusetts v. Davis, 160 S.W.2d 543, 554 (Tex. Civ. App.--Austin, 1942), aff'd in part and rev'd in part on other grounds, 140 Tex. 398, 168 S.W.2d 216 (1942), cert. denied, 320 U.S. 210 (1943). Damages may be recovered for

wrongful garnishment. Peerless Oil, 158 S.W.2d 758. Beautel v. Paul, 741 S.W.2d 510 (Tex. App.--Houston [14th Dist.] 1987, no writ) (discusses measure of damages; actual damages or legal rate of interest for period of wrongful detention; no attorney fees). Additionally, exemplary damages can be recovered if the creditor acted maliciously and without probable cause. Biering v. First National Bank, 69 Tex. 599, 7 S.W. 90 (1888). A judgment which is valid, subsisting and not suspended supports a garnishment. The fact that it is later set aside does not by itself as a matter of law support an action for wrongful garnishment. Hobson & Associates, Inc. v. First Print, Inc., 798 S.W.2d 617 (Tex. App.--Amarillo 1990, no writ). See generally Comment, Creditor's Liability in Texas for Wrongful Attachment, Garnishment, or Execution, 41 Tex. L. Rev. 692, 704-07, 711-16 (1963). In action for wrongful garnishment, the attorneys for the garnishor were found not liable to the garnishee who successfully dissolved writ of garnishment because the attorneys' conduct was part of discharging their duties in representing their client. Renfroe v. Jones & Associates, 974 S.W.2d 285 (Tex, App.--Ft. Worth, 1997, writ denied). A garnishment is not wrongful when the clerk's error in issuance of writ caused third party's account to be frozen. Jamison v. National Loan Investors, 4 S.W.3d 465 (Tex. App. – Houston [1st] 1999, no writ).

F. THE GARNISHEE'S RESPONSE. The contents of the garnishee's answer are described in Tex. R. Civ. P. 665. Note, that the garnishee is under no duty to notify the judgment debtor of the garnishment proceedings. See Westerman v. Comerica Bank-Texas, supra.

1. Garnishee's Answer that He is Indebted to Defendant. If the garnishee answers that, at the time of his answer or at the time he was served with the writ of garnishment, he was indebted to the defendant (judgment debtor) in any amount, the court will enter a judgment for the plaintiff against the garnishee in the amount the garnishee admits he owes the defendant. The judgment in garnishment cannot exceed the amount of the judgment in the original cause plus interest and costs in both the original cause and garnishment proceeding. Tex. R. Civ. P. 668. The funds captured by the writ of garnishment are those held by the garnishee in the account of the judgment debtor on the date the writ is served, and any additional funds deposited through the date the garnishee is required to answer. Newsome v. Charter Bank Colonial, 940 S.W.2d 157 (Tex. App. – Houston [14th] 1996, writ denied). A garnishee filing its answer prior to the return day does not alter this period. First National Bank in Dallas v. Banco Longoria, S.A., 356 S.W.2d 192 (Tex. Civ. Ap. – San Antonio 1962, writ ref'd n.r.e.). Garnishors and garnishees routinely enter into agreed judgments to resolve garnishment proceedings. However, if a judgment debtor files a motion to dissolve the writ and puts ownership of the account in issue, the judgment debtor is entitled to a trial on the merits, so the judgment debtor would need to be included in any agreed judgment if an agreement can be reached. Bechem v. Reliant Energy, et al, 441 S.W.3d 839 (Tex.App.-Houston [14th Dist.] 2014, no pet.).

2. Garnishee's Answer that (1) He is Not Indebted to Defendant and (2) That He Knows No One Who Is. If the garnishee answers that he was not indebted to the defendant at the time of his answer or at the time he was served with the writ of garnishment, that he did not have any of the defendant's property at either time, and that he does not know of anyone who does, he is discharged based upon his answer. Tex. R. Civ. P. 666. However, the plaintiff may controvert the garnishee's answer.

3. No Answer. If the garnishee does not file an answer to the writ of garnishment by the answer date stated in the writ, the court can render a default judgment for the plaintiff against the garnishee.

a. Garnishees that are not Financial Institution. For garnishees that are not financial institutions, the default judgment is for the full amount of the judgment in the original cause plus all interest and costs in both the original cause and the garnishment action. Tex. R. Civ. P. 667. [Caution: In Falderbaum v. Lowe 964 S.W.2d 744 (Tex.App.--Austin 1998, no writ) the default garnishment judgment ordered the garnishee to pay the judgment creditor all property due to the judgment debtor that may come into her possession as a personal representative of an estate. This author contacted one of the parties involved in the suit about the unusual default judgment recovery. Although not reflected in the opinion, it was an unopposed default judgment with the form agreed to by the garnishee and included additional language that the recovery was "up to" the amount of the underlying judgment.] Before obtaining the default judgment, the plaintiff's attorney should make certain that the officer's return will support a default judgment if later attacked. United National Bank v. Travel Music of San Antonio, 737 S.W.2d 30 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.).

b. Garnishees that are Financial Institutions. Finance Code Section 276.002, effective September 1, 2005, provides that a default judgment against a financial institution can be rendered "solely as to the existence of liability and not as to the amount of damages" and that the garnishor has the burden to prove "the amount of actual damages proximately caused by the financial institution's default" and, for good cause shown, can recover reasonable attorney's fees incurred by the garnishor in establishing damages. In a case of first

impression the court in Regions Bank v. Centerpoint Apartments, 290 S.W.3d 510 (Tex. App.-Amarillo 2009, no pet.) upheld a default judgment in a garnishment action against a bank as to liability, but remanded due to the lack of evidence to support damages. The court found that Texas Finance Code Section 276.002(c) expressly places the burden of establishing the extent of the financial institution's indebtedness to the judgment debtor on the garnishor. The court declined to address the issue of whether a separate hearing on damages must be held by the trial court following entry of a default garnishment against a financial institution. However, this author believes that discovery from the bank would likely be needed to prove up the damages and this would necessarily precede a separate hearing to prove up damages. Further, since there is no default judgment as to the amount of damages a noticed hearing would be necessary. In Invesco v. Fidelity Deposit & Discount Bank, 355 S.W.3d 257 (Tex. App. Houston [1st] 2011, no pet.) the court applied the general definitions of the term "financial institution" and found that the garnishee Invesco, as a holder of the judgment debtor's investment accounts, qualifies as a financial institution under Section 276.002, citing Black's Law Dictionary. The court went on to say there was 'no evidence to support the damages portion of the default judgment'; however the statue is clear that the default can be solely as to liability. So, even if evidence had been presented at the default to support its damages there could still be no default as to damages as this author suggests above.

c. Defective Answer. Failure to answer whether the garnishee knows of any other person or entity is indebted to the judgment debtor is not grounds for default, but is merely a defect subject to objection and cure. Healy v. Wick Building Systems, 560 S.W.2d 713 (Tex. Civ. App.--Dallas 1971, writ ref'd n.r.e.) citing Capps v. Citizen's National Bank of Longview, 134 S.W.2d 808 (Tex. Civ. App.--Texarkana 1911, no writ). In BankOne, Texas, N.A. v. Moody, 830 S.W. 2d 81 (Tex. 1992), the Court of Appeals upheld an $83,000 default judgment in a garnishment action even though the bank officer had forwarded a check to the Court clerk for the amounts in the accounts garnished totaling $27.57. 800 S.W.2d 280. However, the Supreme Court reversed and remanded the case for a trial on the merits holding that BankOne had met the Craddock test for granting a new trial after default judgment. In BancTexas McKinney, N.A. v. Desalination Systems, Inc., 847 S.W.2d 301 (Tex. App.--Dallas 1992, no writ), the court denied a motion for new trial for failure to meet the Craddock test.

4. Garnishee as Stakeholder. If the garnishee is served with a writ and is unsure of whether the funds garnishor is attempting to seize with the writ are owned by the judgment debtor or a third party, the garnishee can assume the role of "stakeholder" and place the funds into the registry of the court. When this action is justified the garnishee thereby avoids liability to the garnishor for releasing the funds and avoids liability to the account holder for wrongfully freezing the funds. See, First Realty Bank v. Ehrle, 521 S.W.2d 295 (Tex. Civ. App.--Dallas 1975, no writ) (bank's fear of exposure to multiple liability was reasonable); Thompson v. Fulton Bag & Cotton Mills, 155 Tex. 365, 286 S.W.2d 411 (1956) (the scope of the inquiry in a writ of garnishment is broad enough to impound funds of the debtor held by the garnishee even though title thereto stands in name of third party); Texas Commerce Bank - New Braunfels, N.A. v. Townsend, 786 S.W.2d 53 (Tex. App.--Austin 1990, no writ) (scope of writ of garnishment was broad enough to allow freezing attorney's trust account labeled "escrow account.") When the garnishee's answer puts into doubt the debtor's ownership of the funds, the garnishor then has the burden of proof to show that the debtor owns the funds. Putman & Putman v. Capitol Warehouse, Inc., 775 S.W.2d 460 (Tex. App.--Austin 1989, writ denied).

See also discussion of BankOne, Texas, N.A. v. Sunbelt Savings, F.S.B. and Newsome v. Charter Bank Colonial, supra, on the issue of garnishment of funds held in the name of a third party.

5. Garnishee's Offset Rights. Locating a debtor's account for garnishment may be only half of the creditor's battle. In addition to the timing of withdrawals by the debtor, the creditor is faced with the prospect of offset by the debtor's bank if the debtor is indebted to his bank both before and in some instances after service of the writ of garnishment.

a. General Right of Offset. Generally when a depositor is indebted to a bank, a bank has a right to apply the deposit to the payment of the debt due it. Sears v. Continental Bank and Trust Co., 562 S.W.2d 843, 844 (Tex. 1977). Such right arises from the debtor and creditor relationship existing between the bank and the depositor where there exists mutual obligations. Note, no mutuality of obligations exists if, for example, the debt is owed by a corporation and the deposits are owned by an individual. A bank's right to offset is equitable in nature, and is thus not dependent upon statutory authority or the consent of the depositor. So. Cent. Livestock, Etc. v. SEC. State Bank, Etc., 551 F.2d 1346, 1351 [5th Cir. 1977].

A bank is authorized to resort to offset when (1) the depositor's indebtedness is a past-due obligation, or (2) when the depositor is insolvent. McCollum v. Parkdale State Bank, 566 S.W.2d 670 (Tex. Civ. App.--Corpus

Christi 1978, no writ); Elizarraras v. Bank of El Paso, 631 F.2d 366, 371 [5th Cir. 1980]. A bank's right of offset is not impaired by the fact that the debt is secured by collateral. A bank has the right to apply a deposit to a debt without first proceeding against the collateral. Harper v. First State Bank, 3 S.W.2d 552 (Tex. Civ. App.--Waco 1928, writ ref'd).

For purposes of setoff, a debtor is insolvent when he fails or refuses to pay his debts in the due course of business. McCollum, 566 S.W.2d at 673. It does not mean, however, the imminent absence of funds in the bank wishing an offset. Elizarraras, 631 F.2d at 371. Thus, a depositor's attempt to withdraw all his funds from a bank, even where he is a non-resident, cannot justify an offset not otherwise justifiable. Id. As the Elizarraras court stated, it is unclear under Texas law the number of debts that must be unpaid and the length of time they must be overdue in order for a debtor to be deemed insolvent for purposes of setoff. Id.

b. Right to Offset After Service of A Writ of Garnishment. Accounts can similarly be offset after service of a writ of garnishment in the event the debt is matured or the debtor is insolvent. But what if the debt has not been matured at the time of service? An excellent discussion of offset after garnishment is found in Soussan and Cooper-Hill, A Bank's Right to Offset After Service of Writ of Garnishment, 48 Tex. B. J. 638 (1985). The article discusses offset after service of the writ of garnishment in general and in light of the court's opinion in San Felipe National Bank v. Caton, 668 S.W.2d 804 (Tex. Civ. App.--Houston [14th Dist.] 1984, no writ). In Caton the court approved an offset after garnishment when the obligation was not in default based on a contractual provision in the contract giving the bank a lien on the depositor's account. See also Vaughan and Messer, A Bank's Right to Offset After Service of Writ of Garnishment - A Reconciliation of San Felipe National Bank v. Caton, 54 Tex. B. J. 368 (1991) (criticizing Caton and arguing that the garnishor is subrogated to the rights of the depositor immediately prior to service of the writ and that the bank cannot offset after service of the writ unless the depositor was previously in default or previously insolvent).

If the bank has a right to mature the indebtedness at the time the writ is served, it may take steps to accelerate and offset after service of the writ. This right may be due to a default in an installment payment, events of default defined in the note separate from non-payment (i.e., attachment of the account), or even an insecurity clause. The bottom line is to have done sufficient discovery prior to garnishment to know if the debtor is indebted to the garnishee and, if indebted, the terms of the indebtedness. See also Home Nat. Bank v. Barnes-Piazzek Co., 278 S.W. 299 (Tex. Civ. App.--Fort Worth 1925, writ ref'd.); Holt's Sporting Goods Co. of Lubbock v. American National Bank, 400 S.W.2d 943 (Tex. Civ. App.--Amarillo 1966, writ dism'd).

G. PLAINTIFF'S ANSWER TO GARNISHEE'S ANSWER. Tex. R. Civ. P. 673 provides that if the plaintiff is not satisfied with the garnishee's answer, he can file an affidavit stating that he has good reason to believe that the garnishee's answer is incorrect and what in particular he thinks is incorrect. The issues raised in such affidavit will be tried "as in other cases." Tex. R. Civ. P. 674, 676. Venue for the trial is in the county of the garnishee's residence. Tex. R. Civ. P. 674.

H. DEFENDANT'S RIGHT TO REPLEVY. A defendant may replevy garnished property if it has not yet been sold. If it has been sold, he may replevy the proceeds of the sale. The defendant will be required to post bond in order to replevy. Tex. R. Civ. P. 664.

I. DISSOLUTION OR MODIFICATION OF WRIT. A defendant or any intervening party may also seek dissolution or modification of the writ of garnishment under the provisions for motion and hearing under 664a. At the hearing on the motion to dissolve or modify, "the plaintiff shall prove the grounds relied upon for [the writ's] issuance." Tex. R. Civ. P. 664a. These grounds are set forth in Tex. Civ. Prac. & Rem. Ann. § 63.001(3) (Vernon 1986). The court may make a determination based on uncontroverted sworn evidence; otherwise the parties shall submit evidence. A record should be requested. Exterior Building Supply, Inc. v. Bank of America, 270 S.W.3d 769 (Tex.App.-Dallas,no writ).

Note that a motion to dissolve a writ of garnishment stays the garnishment until heard by the court. Rule 664. Wease v. Bank of America et al, 05-14-00867-CV (Tex.App. – Dallas 2015, no pet.). Often the garnishment action ends in an agreed judgment between the garnishor and garnishee. The agreed judgment in Wease was reversed and remanded because a motion to dissolve had been filed four days before the agreed judgment was signed by the court.

Practice Note: If the judgment debtor files a motion for dissolution or to quash pointing out problems with the application, writ or service, the judgment creditor can file a new application for garnishment and get a new writ issued and served, then proceed in the second garnishment action. Williamson v. State, Nos. 03-11-00786-CV, 03-12-00344-CV (Tex App – Austin 2013, pet. denied) (mem. op.).

J. GARNISHMENT JUDGMENT.

1. Generally. If the garnishee answers that he is indebted to the defendant (judgment debtor) in any amount (or was when the writ of garnishment was served on him) or if the court so finds, the garnishment judgment will be for the amount of the original judgment (against the defendant) plus interest and costs of both the original suit and the garnishment proceedings, except that the garnishment judgment shall not exceed the amount of the debt owed the defendant by the garnishee. Tex. R. Civ. P. 668. If the judgment is by default, the amount of the judgment is not limited to the debt owed the defendant by the garnishee. Tex. R. Civ. P. 667. If the answer or verdict was that the garnishee has in his possession (or did when the writ was served) any of the defendant's effects liable to execution, the decree will order the sale of the effects under execution to satisfy the plaintiff's original judgment and will direct the garnishee to deliver to the officer for sale so much of the effects as are necessary to satisfy the judgment when sold. Tex. R. Civ. P. 669. The garnishee will probably want the garnishment judgment to order his debt to the defendant discharged.

2. Enforcement. Normally the garnishee adjudged to be indebted to the defendant will pay the garnishment judgment on request. If the garnishee will not pay the judgment, execution can be used as in the case of other judgments. Tex. R. Civ. P. 668. See discussion in Baytown State Bank v. Nimmons, 904 S.W.2d 902 (Tex. App.--Houston [1st] 1995, writ denied) regarding finality and enforcement of garnishment judgments. See also Leslie Wm. Adams & Associates, No. 01-15-00879-CV (Tex. App.-Houston [1st] 2017, no pet.) regarding effect of debtor's bankruptcy discharge of underlying judgment on garnishment judgment. If the garnishee has any of the defendant's effects, the judgment should order them sold under execution and should order the garnishee to deliver the appropriate amount of effects to the officer to be sold in satisfaction of the judgment. Tex. R. Civ. P. 669, 672. If the garnishee does not deliver the effects to the officer on demand, the garnishee can be cited to show cause why he should not be attached for contempt of court and, failing to show cause, can be fined for contempt and imprisoned until he delivers the property. Tex. R. Civ. P. 670. The officer making a sale of personal property must execute a transfer of such property to the purchaser, with a brief recital of the judgment of the court under which the same was sold. Tex. R. Civ. P. 672.

3. Costs. If the garnishee's answer is not controverted and the plaintiff obtains a garnishment judgment against him, costs will be taxed against the defendant (judgment debtor) and included in the execution in garnishment. The garnishee's costs will be taken from the amount the garnishee owes the defendant, and the remainder will be applied to the plaintiff's judgment. If the answer is contested, "the costs shall abide the issue." If the garnishee is discharged on his answer, costs of the garnishment proceeding, including "a reasonable compensation to the garnishee," will be taxed against the plaintiff. Tex. R. Civ. P. 677.

4. Attorney's Fees. The successful plaintiff is not entitled to recover attorney's fees for prosecuting a post-judgment garnishment action, except in the event of a default judgment against a financial institution as discussed at p.27. Henry v. Insurance Company of North America, 879 S.W.2d 366 (Tex. App.--Houston [14th Dist.] 1994, no writ). The garnishee, however, can recover costs, which include attorney's fees. If the garnishee answers that he is indebted to the defendant (judgment debtor), the garnishee's costs, including attorney's fees will be deducted from the amount the garnishee owes the defendant. Pan American National Bank v. Ridgway, 475 S.W.2d 808 (Tex. Civ. App.--San Antonio 1972, writ ref'd n.r.e.). If the garnishee is discharged on his answer, his costs will be taxed against the plaintiff. Tex. R. Civ. P. 677. Those costs include attorney's fees. J.C. Hadsell & Co. v. Allstate Insurance Co., 516 S.W.2d 211 (Tex. Civ. App.--Texarkana 1974, writ dism'd). If the garnishee's answer is contested, "the costs shall abide the issue." Tex. R. Civ. P. 677. Where the garnishee paid a claim to a judgment debtor in disobedience of the writ, the prevailing garnishor was awarded attorney fees in Industrial Indemnity Company v. Texas American Bank - Riverside, 784 S.W.2d 114 (Tex. App.--Fort Worth 1990, no writ).

K. PRACTICAL TIPS.

1. Location of bank accounts may be determined from the debtor's credit applications in the client's files, post-judgment interrogatories, and depositions in aid of judgment.

2. When debtors are on a payout agreement it is a good idea to make copies of the checks with which he makes payment. This gives a backup to confirm funds received and also provides valuable account information if he ceases paying and post-judgment garnishment is available.

3. **Caution:** Bank account location services should be utilized with extreme caution. If the information has been gained by false pretenses, you could open yourself up to criminal penalties pursuant to the Fraudulent Access to Financial Information portion of the Gramm-Leach-Bliley Act, 15 U.S.C 6821, et seq.

4. It is advisable to examine the judgment debtor's bank statements closely to determine when paychecks are deposited and the debtor's pattern for paying bills.

Service of the writ can then be timed when the account balance is usually the highest so as to net the largest collection.

5. Determine if the judgment debtor owes the garnishee money. Remember garnishees' right to offset! See discussion at Section IV, F, 5, supra.

V. TURNOVER PROCEEDINGS

A. PURPOSE. The purpose of the turnover statute "is to aid the diligent judgment creditor in obtaining satisfaction of his or her judgment in a timely manner." Hittner, Texas Post-Judgment Turnover and Receivership Statutes, 45 Tex. B.J. 417 (1982). It allows the court to grant injunctive relief, order a turnover of property or appoint a receiver.

B. APPLICABLE STATUTES. The "turnover statute" is found at Tex. Civ. Prac. & Rem. Code Ann. §31.002, §31.0025 and §31.010 (Vernon 1986 and Supp. 2017) [Article 3827a codified]. The statute provides:

SEC. 31.002. COLLECTION OF JUDGMENT THROUGH COURT PROCEEDING

(a) A judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.

(b) The Court may:

(1) Order the judgment debtor to turn over non-exempt property that is in the debtor's possession or is subject to the debtor's control, together with all documents or records related to the property, to a designated sheriff or constable for execution;

(2) Otherwise apply the property to the satisfaction of the judgment; or

(3) Appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.

(c) The court may enforce the order by contempt proceedings or by other appropriate means in the event of refusal or disobedience.

(d) The judgment creditor may move for the court's assistance under this section in the same proceeding in which the judgment is rendered or in an independent proceeding.

(e) The judgment creditor is entitled to recover reasonable costs, including attorney's fees.

(f) A court may not enter or enforce an order under this section that requires the turnover of the proceeds of, or the disbursement of, property exempt under any statute, including Section 42.0021, Property Code. This subsection does not apply to the enforcement of a child support obligation or a judgment for past due child support.

(g) With respect to turnover of property held by a financial institution in the name of or on behalf of the judgment debtor as customer of the financial institution, the rights of a receiver appointed under Subsection (b)(3) do not attach until the financial institution receives service of a certified copy of the order of receivership in the manner specified by Section 59.008, Finance Code.

(h) A court may enter or enforce an order under this section that requires the turnover of nonexempt property without identifying in the order the specific property subject to turnover.

Please note that the amendment to the statute adding section (f) was effective June 15, 1989. It specifically applied to the collection of any judgments regardless of when the judgment was rendered. It was adopted when the turnover of paychecks was the "hot" remedy. The effectiveness of Section (f) to protect paychecks was quickly questioned. See Caulley v. Caulley, infra. It's application to the protection of distributions from spendthrift trusts is discussed in Burns v. Miller, Hiersche, Martens & Hayward, P.C. 948 S.W.2d 317 (Tex.App.--Dallas, 1997, writ denied). In Fitzgerald v. Cadle Company, No. 12-16-00338-CV (Tex. App.-Tyler 2017, no pet.) (mem. op.). the court found royalty payments from a mineral lease or a homestead to be exempt from turnover as proceeds of the exempt homestead.

In another of its efforts to protect paychecks, the Legislature added Section 31.0025 to amend the turnover procedure to specifically prohibit turnover of wages for personal service not yet paid to the debtor. It was effective August 26, 1991, and was likewise made applicable to all judgments regardless of when the judgment was rendered. It reads as follows:

Sec. 31.0025. AUTHORITY OF COURT TO ORDER TURNOVER OF WAGES.

(a) Notwithstanding any other law, a court may not, at any time before a judgment debtor is paid wages for personal services performed by the debtor, enter or enforce an order that requires the debtor or any other person to turn over the wages for the satisfaction of the judgment.

(b) This section applies to wages in any form, including paycheck, cash, or property.

(c) This section does not apply to the enforcement of a child support obligation or a judgment for past due child support.

Subsection (g), effective September 1, 1999, may be in response to the practice of turnover receivers presenting their order of appointment and making in person demands on banks for customer funds on deposit. The service provisions of Section 59.008 also apply to service of writs of garnishment discussed at p. 29, infra. The bank lobby obtained further protections for financial institutions, much in the tradition of a garnishee, when served with an order for turnover relief. Also, effective September 1, 1999, the following provision was added to the growing turnover statute:

SECTION 31.010. TURNOVER BY FINANCIAL INSTITUTION.

(a) A financial institution that receives a request to turn over assets or financial information of a judgment debtor to a judgment creditor or a receiver under a turnover order or receivership under Section 31.002 shall be provided and may rely on:

(1) a certified copy of the order or injunction of the court; or

(2) a certified copy of the order of appointment of a receiver under Section 64.001, including a certified copy of:

A. any document establishing the qualification of the receiver under Section 64.021;

B. the sworn affidavit under Section 64.022; and

C. the bond under Section 64.023.

(b) A financial institution that complies with this section is not liable for compliance with a court order, injunction, or receivership authorized by Section 31.002 to:

(1) the judgment debtor;
(2) a party claiming through the judgment debtor;
(3) a co-depositor with the judgment debtor; or
(4) a co-borrower with the judgment debtor.

(c) A financial institution that complies with this section is entitled to recover reasonable costs, including copying costs, research costs, and, if there is a contest, reasonable attorney's fees.

(d) In this section, "financial institution" means a state or national bank, state or federal savings and loan association, state or federal savings bank, state or federal credit union, foreign bank, foreign bank agency, or trust company.

A practice has evolved in which receivers merely fax demands to banks with plain copies of their order of appointment attached, thereby ignoring the requirement that a certified copy of the order be served in the manner provided in Section 59.008 of the Finance Code. In Davis v. West, et al, 317 S.W.3d 301 (Tex. App.-Houston 1st 2009, no pet.) the court upheld a summary judgment in favor of a bank that did not require a certified copy of a turnover order be served at its registered address, because of the failure of its customer to show damages caused by that failure. The court also pointed out that Section 59.008 places the burden on a customer of a financial institution to prevent a financial institution from complying with such an order.

Subsection (h) was added with an effective date of May 17, 2005. It appears to sanction broad form turnover orders of non-exempt property without designating the property in the order. The provision may go beyond the stated Legislative intent, which appeared to complain about identifying specific assets in the application for turnover relief, which gave the debtor a heads up on the property sought to be turned over and thus allowed the debtor time to dispose of the property before the turnover hearing. See discussion of turnover orders beginning at p. 44.

Subsection (a) was amended effective June 15, 2017 by eliminating the requirement that the property "cannot readily be attached or levied on by ordinary legal process". The change applies to the collection of any judgment, regardless of whether the judgment was entered before, on, or after the effective date of the amendment. See H.B. 1066. The Bill Analysis states that "H.B. 1066 removes any impediment to a receiver's selling real property, clarifies reinforces that a court may enter or enforce an order that requires the turnover of nonexempt property without identifying the specific

property subject to turnover." While it eliminates the need to prove that the debtor's non-exempt property "cannot readily be attached or levied on by ordinary legal process", it remains to be seen if the amendment goes as far as purported in the Bill Analysis.

The foregoing sections of the Civil Practice and Remedies Code as well as interpretive case law provide the "rules" for turnover proceedings.

C. LEGISLATIVE HISTORY. For an excellent discussion of the historical background of the statute and the statute itself, see Toben, Article 3827A and the Maturation of the Creditor's Bill Remedy in Texas, 37 Baylor L.Rev. 587 (1985). Briefly, the legislative history set out in the Texas House and Senate Subcommittee Report includes the following:

> [The] traditional methods of reaching property of a judgment debtor to satisfy a judgment have been found inadequate in cases where the judgment debtor has property outside the State of Texas, where the judgment debtor owns property interest in such items as contract rights receivable, accounts receivable, commissions receivable, and similar acts to property or rights to receive money at a future date. Additionally, there are inadequacies in existing procedures where negotiable instruments, corporate stocks, corporate securities and the like are owned by the judgment debtor, but secreted by the judgment debtor in such a fashion that they cannot be found for execution by a levying officer.
>
> [Article 3827a] makes significant changes in the ability of the judgment creditor to enforce judgment against his debtor. The changes which [the Act] makes are open ended in that they allow a judgment creditor to get aid in collection from the Court in the form of an order which requires the debtor to bring to the Court all documents or property used to satisfy a judgment. The actual effect of the bill is to require the burden of production of property which is subject to execution to be placed with the debtor instead of a creditor attempting to satisfy his judgment. [The Act] will allow this to be effective against all property and future rights to property which the debtor might own.

D. AVAILABILITY OF TURNOVER. In a turnover proceeding, the court's jurisdiction is limited to property of the judgment debtor that is not exempt from attachment, execution, or seizure for the satisfaction of liabilities. Tex. Civ. Prac. & Rem. Code Ann. § 31.002(a) (Vernon 2017); see Hennigan v. Hennigan, 666 S.W.2d 322 (Tex. App.--Houston [14th Dist.] 1984), writ ref'd n.r.e. per curium, 677 S.W.2d 495 (Tex. 1984); Pace v. McEwen, 617 S.W.2d 816 (Tex. Civ. App.--Houston [14th Dist.] 1981, no writ). **Caution: The body of case law prior to the 2017 amendment has numerous cases that base their holding on the previous requirement that the property "cannot readily be attached or levied on by ordinary process". It is no longer good law.**

It is appropriate to use § 31.002 relief when writs of execution and other post-judgment attempts to satisfy a judgment have been unsuccessful. See Arndt v. National Supply Co., 650 S.W.2d 547, 549 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.). However, the statute does not require that a judgment creditor first exhaust legal remedies such as attachment, execution, and garnishment, before seeking § 31.002 relief. Hennigan v. Hennigan, supra. See also caution regarding pre-2017 cases as well. The remedies provided by § 31.002 are cumulative of other lawful remedies available to a judgment creditor for collection of his judgment. Matrix, Inc. v. Provident American Insurance Co., 658 S.W.2d 665, 668 (Tex. App.--Dallas 1983, no writ). Note, however, that historically some judges required that a writ of execution be returned nulla bona before they would entertain a turnover application. Perhaps with the 2017 amendment they will not.

The use of the remedy has become a matter of routine practice in many jurisdictions in Texas with some judgment creditors making no attempt to collect their judgments other than proceeding directly to the appointment of a receiver with broad form orders and broad powers, including the receiver's appointment as a master in chancery. In Suttles v. Vestin, 317 S.W.3d 412 (Tex. App. – Houston [1st] 2010 no pet.) the judgment creditor obtained appointment of a receiver as to a large number of tracts of real estate owned by the judgment debtors in Texas. The Court of Appeals reversed the turnover order finding that there was no showing that the properties "cannot be readily attached or levied on by ordinary legal process". The court also found lack of support that the judgment debtors owned certain interests in businesses citing the evidence from the Texas Secretary of State that they were officers of the entities not equating to evidence of ownership. Finally the court overturned the appointment of the receiver as a master in chancery as well finding the case not to be one so complex as to require a master. Suttles would be decided differently, at least in part, with the 2017 amendment.

E. TURNOVER OF WAGES/INCOME.

Although "current wages" are exempt from garnishment, the turnover procedure at one time was artfully applied to seize paychecks once they were in the hands of the employee and ceased to be current. Amendments to the turnover statute have closed the door on turnover of paychecks.

Section 31.0025 specifically provides that the turnover procedure cannot be used to reach wages before they are paid to the judgment debtor. Section 42.001(b)(1) of the Property Code takes current wages for personal service out of the aggregate personal property limitations and wholeheartedly exempts them, except for child support obligations; and commissioned employees get some relief from Section 42.001(d) of the Property Code which exempts "unpaid commissions for personal services not to exceed 25 percent of the aggregate limitations." However, if the unpaid commissions are claimed as exempt the amount claimed is "included in the aggregate." Unpaid commissions could be included in the debtor's aggregate limitation for up to $12,500 for single persons and $25,000 for families. In Massachusetts Mutual Life Insurance Company v. Shoemaker, 849 F. Supp. 30 (S. D Tex. 1994) the court, in a turnover proceeding, held that the exemption in this statute applied to each commission payment due at any given point, rather than being applicable to commissions in aggregate. The agreement under which a commissioned person operates should be examined. Commissions must be for personal service. In Campbell vs. Stucki 220 S.W. 3d 562 (Tex. App. -- Tyler 2007, no pet.) the contract between the sales person and the company specifically stated he was an independent contractor and the Court held the commissions to be non-exempt because "wages for personal service" exclude compensation due on independent contractor.

What "income" is not exempt? Maybe income from a business (recall Hennigan v. Hennigan, supra, income from the judgment debtor's law practice) or funds due to an independent contractor are still fair game for the turnover proceeding. See Campbell vs. Stucki, Supra. See also, Ross v. 3D Tower Limited, 824 S.W.2d 270 (Tex. App.--Houston [14th Dist.] 1992, writ denied) (turnover of attorney's accounts receivable); Schultz v. Cadle Company, 825 S.W.2d 151 (Tex. App.--Dallas 1992, granted, order withdrawn, per curium, 852 S.W.2d 499) (doctor's paycheck lost exempt status when he directed his professional association to transfer the checks into the account of a limited partnership which was purportedly established for estate and tax planning purposes and from which the debtor and his wife wrote checks); Devore v. Central Bank & Trust, 908 S.W.2d 605 (Tex. App.--Ft. Worth 1995, no writ) (employment agreement found to be a sham; attorney was independent contractor making income subject to turnover order); and Karlseng v. Wells Fargo, Cause No. 05-13-01734-CV (Tex. App.-Dallas 2014, pet. for review denied) (mem.op.) ("W-2" income paid to attorney by LLC owned by him [and possibly two other members] was subject to turnover since there was no showing that LLC had 'right to control' the manner and means by which a person performs his services.) Note, that the party seeking such relief should present some evidence that there are non-exempt funds existing in excess of the debtor's reasonable and necessary living expenses in anticipation of the abuse of discretion review. Brink v. Ayre, 855 S.W.2d 44 (Tex.App.--Houston [14th Dist.] 1993, no writ); Devore, supra. And, care must be taken to identify in the order the specific non-exempt property or rights thereto that the judgment debtor possesses or controls that will enable him to comply with the order. An order to pay "$500 per month" was found to be unenforceable. Ex Parte Prado, 911 S.W.2d 849 (Tex. App.--Austin 1995, orig. proceeding). But see discussion of turnover orders in light of the addition of subsection (h) to section 31.002 at p. 38.

F. APPLICATIONS OF THE TURNOVER PROCEEDING.

1. Judicial Method of Determining if Property is Exempt or Available to Satisfy the Debts to be Collected. In the Pace v. McEwen case, supra, the court held that the trial court had jurisdiction to determine whether or not property ordered to be turned over to the sheriff for sale under writ of execution was exempt as homestead. By using the turnover statute, the creditor's attorney was able to ascertain whether or not the property was exempt without running the risk of a possible wrongful execution or being faced with a suit brought to enjoin the execution. The court clearly held that the burden of proof of the homestead status existed on the one claiming the homestead. The turnover proceeding was similarly used and approved by the Supreme Court in Caulley v. Caulley, see discussion supra. But see, Steenland v. Texas Commerce Bank Nat'l Ass'n., 648 S.W.2d 387 (Tex. App.--Tyler 1983, writ ref'd n.r.e.)

Once there has been a finding that the property is "exempt" the turnover statute will not be applied. In a finding that deferred compensation was "current wages," the court refused to allow the statute's use. Sloan v. Douglass, 713 S.W.2d 436 (Tex. App.--Fort Worth 1986, writ ref'd n.r.e.). See also Driver v. Conley, 320 S.W.3d 516 (Tex. App.—Texarkana 2010, pet. denied) (after determination that property was homestead turnover denied).

Judgment creditors can intervene in divorce proceedings and by way of application for turnover and for declaratory judgment can have a judicial determination

of whether the property is sole management or joint management community property. Owen v. Porter, 796 S.W.2d 265 (Tex. App.--San Antonio 1990, no writ).

2. Property Located Outside Texas. A judgment debtor residing within the State of Texas and amenable to the jurisdiction of a Texas court may own property outside Texas, beyond the reach of a Texas execution. Rather than having to domesticate the judgment in the jurisdiction where the property is located, the creditor may be able to reach the out-of-state assets through a turnover proceeding. This saves the expense and delay of domesticating a judgment in another state.

In Reeves v. Federal Savings and Loan Insurance Corp., 732 S.W.2d 380 (Tex. App.--Dallas 1987, no writ), the court upheld the use of a turnover order to require a debtor in Texas to turn over to a receiver all his indicia of ownership in and to certain real property in Portugal in satisfaction of a judgment obtained in Maryland. The turnover order did not compel the judgment debtor to make a conveyance however, although the Court of Appeals recognized that the court could compel a person, over whom it has jurisdiction, to turn over realty located outside the State of Texas, citing Miller v. Miller, 715 S.W.2d 786 (Tex. App.--Austin 1986, writ ref'd n.r.e.). See also Lozano v. Lozano 975 S.W.2d 63 (Tex. App--Houston [14th] 1998, no writ).

In Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223 (Tex. 1991) the trial court ordered the turnover of funds held by respondent's company located in the Cayman Islands. Over a rigorous dissent, the Court of Appeals reversed the trial court's turnover order on the basis that the existence of the asset which was the subject of the turnover order was not proven. The Supreme Court reversed the Court of Appeals' judgment and affirmed the judgment of the trial court.

3. Intangible Property. Intangible property owned by a debtor is often the most valuable property but may not be subject to execution. Discovery of appropriate parties to garnish is not always effective.

The judgment creditor can be ordered to turn over accounts receivable or royalties. Receivers appointed over accounts receivable and personal bank accounts were approved in Arndt v. National Supply Co. and Hennigan v. Hennigan, supra.

In Matrix, Inc. v. Provident American Ins. Co., supra and Schliemann v. Garcia, 685 S.W.2d 690 (Tex. App.--San Antonio 1984, orig. proceeding), orders were upheld which required the debtor to turn over promissory notes and funds borrowed to pay the judgment. See also Harrison v. Wells Fargo, No. 13-14-00185-CV (Tex.App. – Corpus 2015, no pet.) (Note and Deed of Trust subject to turnover).

Insurance policies issued to the judgment debtor providing coverage as relative to the judgment creditor's judgment may also be the subject of a turnover order. D&M Marine v. Turner, 409 S.W.3rd 853 (Tex. App. – Fort Worth 2013, no pet.)(judgment debtor was out of business; turnover of rights in liability policy allowed judgment creditor to pursue debtor's insurance company for indemnity; judgment debtor failed to preserve for appeal its complaint of the direct turnover of the rights to the judgment creditor). In Goggans v. Ford, No. 05-15-00052-CV (Tex.App. – Dallas 2016, pet. denied) (mem.op.) the court followed D&M in upholding turnover of a Stowers claim to the judgment creditor. The opinion did not even mention the impropriety of the court's order that the cause of action be turned over directly to the judgment creditor.

A judgment debtor may even be ordered to assign a cause of action to a judgment creditor, as a cause of action is a property interest which is subject to turnover. Renger Memorial Hospital v. State, 674 S.W.2d 828 (Tex. App.--Austin 1984, no writ) (the court was careful to point out that the respondent did not complain of the manner in which the court exercised its power under the turnover statute; perhaps the court was hinting that the turnover of the cause of action directly to the judgment creditor should have been challenged). The creative use of the turnover proceeding to reach intangibles may not be without limits. In Commerce Savings Association v. Welsh, 783 S.W.2d 668 (Tex. App.--San Antonio 1989, no writ), the court found no abuse of discretion in the denial of a turnover of a judgment debtor's cause of action. In Commerce the judgment debtor had entered into a sizeable agreed judgment with a third party. Commerce Savings was a defendant in a suit by the judgment debtor involving substantial contested and unliquidated claims. Commerce Savings purchased the judgment from the third party then proceeded, now as a judgment creditor, to request a turnover of the judgment debtor's cause of action against Commerce and a dismissal of the action. The Court of Appeals affirmed the trial court's denial of the turnover. It did not hold the strategy to be precluded as a matter of law, but it found no authority to support the use of the proceeding to extinguish a cause of action against oneself.

Since Commerce, two courts have found constitutional reasons to prohibit turnovers of causes of action against oneself. In Criswell v. Ginsberg & Foreman, 843 S.W.2d 304 (Tex. App.--Dallas 1992, no writ), the trial court ordered a judgment debtor to turn over his cause of action against an individual to the sheriff for levy and satisfaction of a judgment held by a partnership in which

the individual was a partner. The Court of Appeals found the use of the turnover statute to extinguish a cause of action against oneself to be an unreasonable and arbitrary restriction of the judgment debtor's common law cause of action and thus is violative of the open courts doctrine established by Article I, Section 13 of the Texas Constitution. Similarly, in Associated Ready Mix, Inc. v. Douglas, 843 S.W.2d 758 (Tex. App.--Waco 1992, orig. proceeding), the Court of Appeals found the trial court abused its discretion in ordering the turnover of a cause of action against the judgment creditor holding that the extinguishing of a cause of action does not accomplish the purpose of the statute. The court also mentioned that the order had the effect of denying the judgment debtor the right to a jury trial on its cause of action, citing Article I, Section 15 of the Texas Constitution.

Assignments of legal malpractice claims have been held invalid in Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313 (Tex. App.--San Antonio 1994, writ refused) and McLaughlin v. Martin, 940 S.W.2d 261 (Tex.App.--Houston [14th Dist.] 1997, no writ). It would appear that turnover of the malpractice cause of actions would likewise be barred. In fact, the court in Charles v. Tamez, 878 S.W.2d 201 (Tex. App.--Corpus Christi 1994, writ denied) held just that, although it limited the prohibition holding that "unasserted, denied causes of action for legal malpractice for failure to settle under the Stowers doctrine are not assets subject to turnover." The Charles court went on to state that they explicitly did not reach the question of whether "asserted or ignored claims for legal malpractice may be turned over." So, can they or can't they be turned over?

4. Secreted Property. If the property is hidden or that is located where the constable cannot gain access (behind a locked gate), a turnover order will reach these assets to satisfy a judgment. Similarly, nonexempt property held by a third party is subject to turnover if it is owned by the judgment debtor and subject to his possession or control. Norsul Oil & Mining Ltd. v. Commercial Equipment Leasing Co., 703 S.W.2d 345, 349 (Tex. App.--San Antonio 1985, no writ) (See, however, discussion below at p. 44 regarding third party turnover orders). In Detox Industries v. Gullett, 770 S.W.2d 954 (Tex.App.--Houston [1st Dist.] 1989, no writ), neither the stock certificates owned by the judgment debtor nor the judgment debtor could be found. The judgment creditor obtained a turnover order ordering the third-party corporation to cancel the certificates and reissue them in the name of the receiver so they could be sold at execution. The court reversed the turnover order because the corporation was not the judgment debtor, nor was it in possession of the stock certificate, citing also Tex. Bus. & Comm. Code Ann. §8.317 (Vernon Supp. 1989) which has been interpreted as providing no right to the issuance of a new certificate when the old one cannot be reached.

5. Small Amounts of Property. Accounts receivable may be too small to justify garnishment or may not be ascertainable, e.g., the identity of an attorney's clients may be privileged. An order to turn over all or some designated percentage may provide a method to collect an otherwise uncollectible judgment. One successful technique here is to order all accounts paid to a receiver who pays the creditor a percentage and returns the balance to the debtor.

6. Trust Assets (limited). The courts have further upheld the statute's applicability in the collection of a judgment for child support against a spendthrift trust. First City National Bank v. Phelan, 718 S.W.2d 402 (Tex. App.--Beaumont 1986, writ ref'd n.r.e.).

7. Sole Shareholder's Shares and Corporate Receipts. Shares of stock are not among property exempt by the constitution or statutes. A "trick" of a number of judgment debtors who were sole proprietors and who wished to avoid turnover of their income was to incorporate their business and draw a salary from the corporation. This was particularly prevalent among licensed professionals who believed that judgment creditors would not seize their shares in the professional corporations due to a statutory prohibition against unlicensed shareholders in professional corporations. Tex.Rev Civ.Stat.Ann. Art. 1528e, §12 (West 1980 & Supp. 1996). In Newman v. Toy, 926 S.W.2d 629 (Tex.App.--Austin 1996, writ denied) the judgment debtor, a podiatrist, incorporated his practice immediately after rendition of a sizable judgment against him and then drew a salary from the corporation. The trial court ordered appointment of a receiver and ordered: (1) the turnover to the receiver of the judgment debtor's stock in the professional corporation, the corporation's monthly receipts and a monthly accounting of the judgment debtor's monthly income and expenses, (2) that the receiver pay the corporation's expenses and deliver any balance to the judgment creditor to satisfy her judgment, and (3) that the receiver sell the shares of stock if able to do so and retain the proceeds for distribution as ordered by the Court. The Court of Appeals determined that since the judgment debtor, as sole shareholder, might deal with the corporation's monthly receipts and any of its other property, upon transfer of the shares to the receiver, the receiver succeeds to the judgment debtor's rights and powers as sole shareholder except as limited by the terms of the Court order or receivership statute. The Court went on to find that the statutory requirement that shareholders in the professional corporation hold a professional license

does not restrict the Court's power in receivership proceedings authorized by the turnover statute.

8. Partnership Distributions. While the charging order may be the sole means of reaching a partner's 'partnership interest', once distributions are in the hands of the partner they are subject to turnover. See Stanley v. Reef Securities, Inc. 314 S.W.3d 659 (Tex. App. – Dallas 2010, no pet.) and discussion of charging orders at p. 52.

9. Domain Names. Domain names are not exempt as tools of trade and can be the subject of a turnover order. Restrepo v. Alliance Riggers & Constructors, Ltd., No. 08-16-00032-CV (Tex. App.-El Paso, 2017, no pet.).

G. PROCEDURES FOR TURNOVER. The statute does not provide guidance for specific procedures for implementation of the turnover remedy and the Supreme Court has not promulgated rules of procedure on point. Case law and some commentary generally followed provide the suggested procedure.

1. Notice and Hearing.

a. Filed in Original Suit. A turnover application in the original suit is a post-judgment discovery device. Cook, Post Judgment Remedies, II Advance Family Law Course, 1983, V-47. While most courts may require notice, the statute does not. See the discussions in Hittner, Texas Post-Judgment Turnover and Receivership Statutes 45 Tex. B.J. 417 (1982) at 422; and Pearson, Texas Post-Judgment Turnover: An Update, 22 Houston Lawyer 30 (March 1985). However, the court is more likely to grant the relief sought if notice is given to the judgment debtor of the hearing on the application.

The Supreme Court has not specifically ruled on the constitutionality of a case involving an ex parte order. In Ex parte Johnson, 654 S.W.2d 415 (Tex. 1983), the debtor received notice on the morning of the hearing and was represented by counsel. The court indicated that the three-day notice requirement for pre-trial motions in Rule 21 does not apply. The court stated:

> We do not decide whether Article 3827a is constitutionally infirm absent a requirement of notice and hearing prior to issuance of a turnover order.

Ex parte Johnson, 654 S.W.2d at 418.

The United States Supreme Court has upheld ex parte, post-judgment collection efforts. Endicott-Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924).

Note, however, that if a temporary restraining order is requested, Tex. R. Civ. P. 680 requires notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice and hearing can be had. Rule 680 also sets forth specific matters that must be contained in an ex parte temporary restraining order and provides subsequent notice and hearing requirements. A temporary injunction may not be issued without notice to the adverse party. Tex. R. Civ. P. 681. See also Schliemann v. Garcia, supra (debtor's ex parte modification of a turnover order enjoining execution proceedings held improper). For conflicting views on notice where a receiver is appointed see Morris v. North Fort Worth State Bank, 300 S.W.2d 314 (Tex. Civ. App.--Fort Worth 1957, no writ); Childre v. Great Southwest Life Insurance Co., 700 S.W.2d 284 (Tex. App.--Dallas 1985, no writ).

b. Filed in New Suit. If a creditor elects to bring his turnover action in a new and independent suit, service should be obtained on the debtor to give that court personal jurisdiction over the judgment debtor. If ex parte relief is called for in a new suit, a temporary restraining order should be sought.

c. Caution Regarding Consumer Debt. A case interpreting the Fair Debt Collection Practices Act has found the venue provision of the action requiring legal actions on debts be brought in the judicial district where the consumer signed the contract or resides at the commencement of the action to apply to post-judgment enforcement proceedings. Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507 (9th Cir. 1994, no writ). The Fox case involved a garnishment action. It may not have an effect on a turnover proceeding brought as a post-judgment motion but may need to be considered if the application is filed as a new suit.

2. Time for Filing. A turnover order should be available as soon as a judgment is signed. Pearson, Texas Post-Judgment Turnover: An Update, 22 Houston Lawyer 30 (March 1985). The statute does not speak directly to time for filing.

The turnover statute has been used in conjunction with receiverships and injunctions requiring corporate stock be turned over in satisfaction of a judgment. Childre v. Great Southwest Life Ins. Co., 700 S.W.2d at 287. The court went on to say that a creditor was not required to wait for the expiration of 30 days after the judgment or overruling a Motion for New Trial before utilizing this remedy when the turnover is in the nature of an attachment, the court analogizing the situation to that involving a post-judgment writ of garnishment where no

waiting period is required. The court went on to approve a bond of $1,000.00 and set guidelines for the appointment of a receiver. However, if a motion for new trial is granted or the judgment is otherwise satisfied, the turnover order becomes a nullity, Schell v. Alfaro, 406 S.W.3d 216 (Tex. App. – San Antonio 2013, pet. denied).

The trial court can entertain turnover applications even when the judgment is on appeal if a supersedeas bond has not been filed. Anderson v. Lykes, 761 S.W.2d 831 (Tex.App--Dallas 1988, orig. proceeding).

3. Who may be Ordered. The trial court has jurisdiction over the property of the judgment debtor only, not over property owned by third parties. The statute appears to limit the court's remedies to (1) ordering the judgment debtor to turn over property, (2) otherwise applying the property to satisfying the judgment, and/or (3) appointment of a receiver. Authority is divided on whether third party turnover actions are authorized by the statute.

a. Third Party Turnovers Sanctioned. Courts have sanctioned "third-party" turnover orders when those third parties had control over the judgment debtor's property. See Beaumont v. Buller, supra (although case contained language that third party turnovers are not appropriate, court approved turnover action against executor of estate for turnover of estate assets to satisfy judgment against the deceased debtor); Schultz v. The Fifth Judicial District Court of Appeals, 810 S.W.2d 738 (Tex. 1991, orig. proceeding) (general discussion of the turnover remedy stating that the action can be brought "against one or more parties other than the judgment debtor"); International Paper Company v. Garza, 872 S.W.2d 18 (Tex. App.--Corpus Christi 1994, orig. proceeding) (approving third-party turnovers); Norsul Oil & Mining Ltd. v. Commercial Equipment Leasing Co., supra (non-exempt property owned by judgment debtor in hands of third-party and subject to debtor's control can be reached in third party turnover action); Dale v. Finance America Corporation, 929 S.W.2d 495 (Tex.App.--Ft. Worth 1996, no writ) (wherein the judgment creditors traced the assets listed in turnover order back to the judgment debtor and demonstrated that the items were subject to his control, including those held by third parties); Ross v. National Center for Employment of the Disabled, 170 S.W.3d 635 (Tex. App. El Paso-2005 reversed when the Supreme Court granted the judgment debtor's bill of review on underlying judgment, 201 S.W.3d 694(Tex.2006)). (use of turnover proceeding to obtain turn over of assets of corporation wholly owned by judgment debtor after previous order to turn over stock in the company; citing Dale). Caution: if one chooses to seek application of the turnover remedy to third party holding the judgment debtor's property, care should be taken to obtain jurisdiction over the person with proper citation. And see Ex Parte Swate, 922 S.W. 2d 122 (Tex. 1996), where the Supreme Court's majority opinion did not address the propriety of the third-party turnover order at issue, but released the contemnor on the basis of the commitment order. The concurring opinion, however, included a discussion of the propriety of third-party turnovers. The concurring opinion provided confusing food for thought, first by stating that "it is clear that the statute authorizes turnover orders enforceable by contempt only against the judgment debtor or to those who possess property subject to the control of the judgment debtor" and then states that "a creditor may not seek a turnover order against third parties without other initial proceedings," i.e., by joining them in the suit. The opinion also expressed concern based on the usual practice of turnover orders issuing without service of citation when the third-party is a stranger to the suit. See also Bay City Plastics, Inc. v. McEntire, 106 S.W 3rd 321 (Tex. App.-Houston [1st Dist.] 2003) recognizing exception to general rule of no third party turnovers, unless separate proceedings are initiated against the third party.)

b. Third Party Turnovers Denied. In Republic Insurance Company v. Millard, 825 S.W.2d 780 (Tex. App.--Houston [14th Dist.] 1992, orig. proceeding) the Court held that a third party may not be included as a party defendant for the first time in a post-judgment turnover petition (the turnover order went well beyond a turnover of the judgment debtor's assets and sought to force a third party to litigate a substantive issue, in this case certain bad faith claims). Moreover, turnover proceedings cannot be used to adjudicate rights of third parties. Judgment creditors seeking property held by third parties may be better served by filing a fraudulent transfer suit. Cadle Company v. Wilson, 136 S.W.3d 345 (Tex. App.-Austin 2004, no writ) (case focuses on the discovery rule for fraudulent transfers, but the facts support the proposition for proceeding with a fraudulent transfer action when third parties are involved); Parks v. Parker 957 S.W.2d 666 (Tex.App--Austin 1997, no writ) (individual judgment debtor could not be subject to turnover order in his representative capacity).

Corporations owned by the judgment debtor may not be named in a turnover application, relying only on the alter ego theory; a separate suit must be filed to establish alter ego. United Bank Metro v. Plains Overseas Group, Inc., 670 S.W.2d 281 (Tex. App.--Houston [1st Dist.] 1983, no writ). And turnover proceedings cannot be used to reach the proper parties when a judgment is taken against a wrong party. Cross, Kieschnick & Company v. Johnston, 892 S.W.2d 435 (Tex. App.--San Antonio 1994, no writ).

c. Others Considered Judgment Debtors. The sureties on a supersedeas bond named in an appellate court mandate are judgment debtors and are subject to a turnover order. Schliemann v. Garcia, 685 S.W.2d at 692.

Trustees of an estate have been ordered to turnover trust income. First City National Bank of Beaumont v. Phelan, 718 S.W.2d 405 (Tex. App.--Beaumont 1984, no writ).

d. Third party intervention.
Third parties may choose to intervene in a turnover proceeding to protect their interest in property of the debtor that is the subject of the turnover proceeding. Breazeale v. Casteel, 4 S.W.3d 434 (Tex. App.—Austin 1999, no writ). If third parties intervene, they will find themselves bound by the order. Cre8 International, LLC v. Rice, No. 05-14-00377-CV (Tex.App. – Dallas 2015, no pet.) (mem. op.); Mitchell and TCSM v. Turbine and In Re Mitchell and TCSM, No. 14-15-00417-CV (Tex. App.-Houston [14th] pet. denied) (party who intervenes is bound by the turnover order). Cre8 was disapproved in Alexander Dubose Jefferson & Townsend v. Chevron Phillips Chemical Company, No. 16-1018 (Tex. 2018), however the Supreme Court declined to "delineate the appropriate mechanism for resolving competing substantive claims to property sought in a turnover application".

Another practice of third party intervention has evolved when the first judgment creditor obtains a turnover receivership order to take possession of a judgment debtor's assets. Since this puts all assets in custodia legis, a 2nd or 3rd judgment creditor may be out of luck to collect, at least until the first receivership is complete. The subsequent creditors, in an attempt to "get in line", or to persuade the court to allow them to share in the original receivership efforts, will intervene in the pre-existing receivership. In Re Abira Medical Laboratories, No. 14-17-00841-CV (Tex. App.-Houston [14th], orig. proc.) (mem. op.) two judgment creditors intervened in a receivership and a secured creditor of the judgment debtor also intervened claiming priority of its security interest in certain property subject to the receivership. The secured creditor sought to strike the intervention of the 2nd and 3rd judgment creditors claiming that they intervened after the trial court lost its plenary jurisdiction and did not qualify for the exception in Breazeale, which allows intervention for the purpose of protecting its interest in property. The Court of Appeals conditionally granted the petition agreeing with the secured creditor and also agreeing that the judgment creditors's claims exceeded the county court at law's subject matter jurisdiction. The Supreme Court in Alexander Dubose Jefferson & Townsend v. Chevron Phillips Chemical Company pointed out that "unlike plenary power, which generally only lasts for thirty days after final judgment, a trial court's post-judgment enforcement powers "can last until the judgment is satisfied". But, does that include allowing unrelated judgment creditors to intervene? If not, what is their remedy?

4. To Whom Should the Property be Turned Over.

a. Constable. The court may order property turned over "to a designated sheriff or constable for execution." The property is posted for sheriff's sale as any other execution sale. Tex. Civ. Prac. & Rem. Code Ann. § 31.002 (Vernon 1986). If the constable will be receiving funds pursuant to the order, the constable will account for the receipts, subtract the constable's fees, and disburse to the judgment creditor. The constable will usually require that he have a live writ of execution in hand to give him authority to receive and disburse the funds or property.

b. Otherwise Applied or to a Receiver. The court may order property be delivered into the registry of the court, In re Brecheisen, 665 S.W.2d 191 (Tex. App.--Dallas 1984, writ ref'd n.r.e.), or to the receiver, Arndt v. National Supply Co., 650 S.W.2d 547 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.). A court appointed receiver acting within the scope of his authority is entitled to derived judicial immunity. Davis v. West, et al, 317 S.W.3d 301 (Tex. App.-Houston lst 2009, no pet.).

If a receiver is appointed over the debtor's property, it is held in custodia legis, meaning in the custody of the law. Any action related to the property must be by approval of the court appointing the receiver. In Pratt v. Amrex, 354 S.W.3d 502 (Tex.App. – San Antonio 2011, pet. denied), the court found that a first lien holder on real estate had no authority to foreclose on its real property that was held by a turnover receiver because the property was 'in custodia legis'. The court held that the 1st lien holder would need permission to foreclose from the court that appointed the receiver, citing First S. Props., Inc. v. Vallone, 533 S.W.2d 339 (Tex. 1976). In Pratt, the receiver had executed a special warranty deed conveying the property into the receivership estate; however, notice of the receivership doesn't appear to be required, nor is a transfer document to the receiver - other than the order appointing the receiver.

Without Rules of Civil Procedure and without statutory guidance in the turnover statute, case law [often based on practices of creative receivers] has provided the framework for procedures used by turnover receivers. Oddly enough, turnover receivership practice has evolved to include some of the processes found in Tex. Civ. Prac. & Rem. Code Chapter 64 receiverships, even

though chapter 64 does not apply to turnover receiverships. See, for example, court approval of receiver sales. Salaymeh v. Plaza Centre, LLC, 258 S.W.3d 236 (Tex. App. – Houston [1st Dist] 2008, no pet.). For a good overview of the use of turnover receivership see: " Nuts and Bolts of Turnover Receiverships" by Michael Bernstein, 15th Annual Collections and Creditors' Rights Course, State Bar of Texas, 2017.

c. Not Directly to Creditor. The Supreme Court has held that the turnover order may not order the debtor to deliver the property directly to the creditor, stating that the "potential for error or abuse where turnover is ordered directly to judgment creditors is obvious, considering that the statute allows ex parte entry of the order without notice and hearing." Ex Parte Johnson, 654 S.W.2d at 418. In Bear, Stearns & Co., Inc. v. Amad, 919 F.2d 920 (5th Cir. 1990), the trial court ordered the judgment creditor to execute a satisfaction of judgment upon tender by the judgment debtor of a sum of money plus a conveyance of certain real property owned by the judgment debtor and ordered to be turned over. On appeal the order was reversed and remanded because the statute does not authorize direct transfers of property to the judgment creditor. See also Lozano v. Lozano, 975 S.W.2d 63 (Tex.App--Houston [14th] 1998, no writ). One sees opinions in which the Court casually mentions turnover of property to the judgment creditor, but in those cases the judgment debtor has failed to complain or properly preserve error.

5. Costs and Attorney Fees. The turnover statute states that the "judgment creditor is entitled to recover reasonable costs, including attorney's fees."

a. Prevailing Party. The creditor must prevail in order to recover attorney's fees. Ortiz v. M & M Sales Co., 656 S.W.2d 554 (Tex. App.--Corpus Christi 1983, writ ref'd n.r.e.); and Dallas Power & Light v. Loomis, 672 S.W.2d 309 (Tex. App.--Dallas 1984, writ ref'd n.r.e.).

b. Determination. The initial turnover order may include attorney's fees involved in presenting the application. However, if further orders are necessary, such as in proceedings directing turnover to the registry or a receiver, the attorney's fees can be awarded in the final order.

6. Forms and Practical Procedures. Once it is determined that the judgment debtor owns property that is not exempt, the following steps are suggested:

a. Application: Attached as Attachment No. 7 is a suggested form for the Application of Turnover Relief. Included in the Application are allegations that the applicant is a judgment creditor, that the judgment debtor owns certain property that is not exempt, and a request that the property be turned over to a third party.

b. Filing. The Application is filed among the papers of the cause wherein the judgment was rendered as is any other motion or pleading. There is no need to file it in a separate suit, although you can if, for example the debtor lives in a different county than where the judgment was taken and you expect the need to hold the debtor in contempt. It is often difficult or impossible to obtain cooperation from local law enforcement to attach and transfer a civil contemnor across county lines. See discussions of contempt at p. 49.

c. Notice to Judgment Debtor. Because of the various proof requirements and because the court is more likely to grant the relief requested if notice is given, this author generally gives notice of the hearing on the Application to the judgment debtor as in any other motion hearing. If the judgment creditor anticipates a problem with a loss of the property, he may consider an ex parte hearing, especially if a temporary restraining order is warranted.

d. Hearing. At the hearing on the Application the judgment creditor must prove the allegations set forth in paragraphs II and III of the Application, although the burden of proof lies with the judgment debtor who seeks to defend the proceeding on the basis that the property sought to be turned over is exempt. Evidence must be presented at the hearing, because mere presentation of the motion and argument will not withstand an abuse of discretion review. Clayton v. Wisener, 169 S.W.3d 682 (Tex. App.-Tyler, no writ). In Tanner v. McCarthy, 274 S.W.3d 311 (Tex.App.-Houston, 1st, no pet.) the court overturned a turnover order in which no evidence was produced to show the grounds set forth in Section 31.002(a), in fact there was no record of any evidence being produced, only arguments. But see Henderson v. Chrisman, No. 05-14-01507-CV (Tex.App. – Dallas, 2016, no pet.) (mem.op.) wherein the court found 'evidence' attached to the motion for turnover, along with some stipulations of the parties, supported the turnover ordered and went on to say "A hearing is not required under section 31.002, and we find no support for the conclusion that a motion, with attached evidence, becomes worthless if a party decides to have a hearing." In Great Northern Energy, Inc. v. Circle Ridge Production, Inc., No. 06-16-00029-CV (Tex.App. – Texarkana 2016, no pet.) (mem.op.) the court found no evidence to support a temporary injunction issued in connection with a turnover order, since neither the documents attached to the motion, nor any testimony supporting them, were introduced into evidence. It found representations by the judgment debtor's counsel to be "judicial admissions" that supported some of the

turnover relief. In Gillett v. Zupt, LLC, Cause No. 14-15-01033-CV (Tex.App. – Houston [14th] 2017, no pet.), the judgment creditor did not present evidence of any non-exempt assets belonging to the judgment debtor, but the court upheld the turnover order only as to the turnover of the judgment debtor's LLC interest and the judgment debtor's competing judgment [the case involved arbitration awards by both parties that in turn resulted in judgments against each in the same action confirming the awards] based on judicial notice of the judgment and the LLC interest in the case. The prudent practice would be to make a formal record and introduce supporting evidence. See discussion at section 7. below regarding appeal of final orders.

In Schulze v. Cap Collection, No. 03-03-00390-CV (Tex. App.-Austin 2004, pet. dismissed) (mem.op.) the court found that the debtor had no right to a jury trial in a turnover proceeding.

For injunctive relief under the turnover statute the judgment creditor needs only to prove that "the judgment debtor is likely to dissipate or transfer its assets to avoid satisfaction of the judgment", Miga v. Jensen, No. 02-11-00074-CV (Tex. App. – Fort Worth 2013, no pet.) (mem.op.) citing Emeritus Corp. v. Ofczarzak 198 S.W.3d 222 (Tex. Ap. – San Antonio 2006, no pet.)

e. Constable, Receiver or Registry of the Court. The nature of the property to be turned over and local practice will dictate to whom the property is ordered delivered. This author's practice is to work with the constable's office. This relieves the necessity of posting bond for a receiver and paying a receiver's fee. (Although, see discussion below that a receiver's bond may not be necessary). Instead, the constable's office holds the property under a writ of execution and then levies on the property as in the case of an ordinary execution. If the constable holds funds, the funds are paid over to the judgment creditor pursuant to the writ. In either instance, the constable may retain a commission depending on local practice.

In the case of a receiver or payment into the registry of the Court, an additional court order may be required. See discussion below at g.

f. Order. Attached as Attachment No. 8 is a suggested form for the Order for Turnover Relief. Historically the order had to be tailored to the particular property to be turned over and be specific in order for it to be enforceable by contempt proceedings and to allow it to stand on appeal. Bergman v. Bergman, 828 S.W.2d 555 (Tex.App.--El Paso 1992, no writ). Moyer v. Moyer, 183 S.W. 3rd 48 (Tex. App.--Austin 2005, no pet.). In Roebuck v. Horn, 74 S.W.3rd 160 (Tex. App.-Beaumont 2002, no writ) on appeal the court found that it was an abuse of discretion to order property turned over in a broad form order with a laundry list of possible assets, even though evidence at the hearing was specific as to assets the judgment creditor sought to have turned over. The form of the order in Roebuck is one that has grown in use as the turnover procedure has evolved and the judgment creditors have obtained broad powers for receivers.

The addition of subsection (h) to section 31.002 may sanction broad form turnover orders, although this author is concerned about the problem of their enforcement.

In Gerdes v. Kennamer, 155 S.W.3d 541 (Tex. App.-Corpus Christi-Edinburg 2004, no writ) the Court approved an order requiring the judgment debtor to sign documents drafted by the judgment creditor's attorney to effectuate an issuance of stock and transfer to the sheriff's office, that the judgment debtor obtain his wife's signature and that the documents be delivered to the sheriff's office. The Court found that there was nothing in the evidence that the judgment debtor could not comply with the order. In Fitzgerald v. Cadle Company, No. 12-16-00338-CV (Tex. App.-Tyler 2017, no pet.)(mem.op.) the court expressly approved the practice that has evolved in turnover order language to require the judgment debtor to disclose property and provide an accounting of his property in order to effectuate other provisions of the turnover order.

g. Additional Orders. Orders appointing receivers are often not the only or last order that is signed in a turnover receivership proceeding. Receivers often obtain court approval of receivership sales. Salaymeh v. Plaza Centre, LLC, 258 S.W. 3d 236 (Tex.App – Houston [1st Dist] 2008, no pet.). They may find it necessary to ask the court to broaden or clarify their powers as well. And although some orders provide for recovery of receivership fees on a percentage basis, for example 25%, or even on an hourly basis, for example $300 per hour, courts have held that the receiver should still have to submit a request and obtain court approval for fees in order to be paid. Blunck v. Blunck, No. 03-15-00128-CV (Tex. App – Austin 2016, pet. denied) (mem. opinion) (hourly fee of $300 not an abuse of discretion; but must still submit request for approval of fees); Moyer v. Moyer, 183 S.W. 3d 48 (Tex. App – Austin 2005, no pet.) (25% fee in order still requires a showing of reasonableness of fee based on results); Evans v. Frost, No. 05-12-01491-CV (Tex. App. – Dallas, no pet.) (the court held an evidentiary hearing at the time of the sale of the property and heard evidence to determine whether the 10% fee from the results of the sale was fair, reasonable, or necessary).

7. Appeal; Mandamus. The Supreme Court in Schultz v. Fifth Judicial District Court of Appeals, 810 S.W.2d 738 (Tex. 1991) held that a turnover order that resolves the property issues and acts as a mandatory injunction is appealable. See also, Alexander Dubose Jefferson & Townsend v. Chevron Phillips Chemical Company, No. 16-1018 (Tex. 2018); Burns v. Miller, 909 S.W.2d 505 (Tex. 1995); Bahar v. Lyon Financial Services, Inc. 330 S.W.3d 379 (Tex. App.-Austin 2010, pet. denied). If the turnover order requires further orders of the court, it is interlocutory and may not be appealed until a final order is signed. An order to deliver property to the registry of the court has been held interlocutory because a further order to disburse the funds to the creditor is necessary. In re Brecheisen, 665 S.W.2d 191 at 192 (Tex.App. – Dallas 1984, writ ref'd n.r.e.). In that instance, the judgment debtor may have been entitled to mandamus relief if the judgment debtor could show that the action of the trial judge is an abuse of discretion or that the action violates a clear duty under law, and that there is no adequate remedy by appeal. Texas Employers' Ins. Ass'n v. Engelke, 790 S.W.2d 93 (Tex.App.--Houston [1st Dist.] 1990, orig. proceeding); see Republic Insurance v. Millard, 825 S.W.2d 780 (Tex. App.--Houston [14th Dist.] 1992, orig. proceeding) (mandamus action); International Paper Company v. Garza, 872 S.W.2d 18 (Tex. App.--Corpus Christi 1994, orig. proceeding) (mandamus denied because of right to appeal).

Review of a final appealable turnover order is whether the trial court abused its discretion. Barlow v. Lane, supra. Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223 (Tex. 1991). Whether the property to be turned over is exempt or not is also a matter of proof. The burden lies on the one claiming the exemption. See Pace v. McEwen, discussed at Section F, 1, supra. See also Irizarry v. Moron, 850 S.W.2d 718 (Tex. App.--Corpus Christi 1993, no writ), wherein the Court of Appeals reversed and remanded a turnover order on the basis of "no evidence" of any income or property either owned or anticipated to be owned by the judgment debtor, whether exempt or not. The trial court had merely granted the motion based on the pleadings. As pointed by the Supreme Court in Beaumont v. Buller, the standard of review is abuse of discretion and whether there was no evidence to support the order would be relevant in determining if the trial court abused its discretion in issuing the order.

In Enis v. Smith, 883 S.W.2d 662 (Tex. 1994) the Supreme Court conditionally granted mandamus relief to vacate a turnover order after the foreign judgment on which it was based was declared void. Mandamus was the only remedy available because the appellate timetables had run on the turnover order before the foreign judgment was declared void. Also, in Matthiessen v. Schaefer, 915 S.W.2d 479 (Tex. 1995), the Court reversed a turnover order after the underlying judgment was reversed on appeal.

The court in Fischer v. Ramsey, No. 01-14-00743-CV (Tex.App. – Houston [1st] 2016, no pet.) (mem. opinion) determined that the court's order confirming a receiver's sale was an appealable order since it adjudicated a particular tract to be non-homestead and thus subject to sale – at the same time stating "with only the final closing of a specific sale subject to approval". Language such as this makes it difficult to determine which turnover orders are actually appealable. The order in the Fischer case was the second in the course of the receivership and even a third order was anticipated to approve the final sale.

Because whether a turnover order is subject to appeal or attackable only by mandamus can be a tricky question, some file dual proceedings as in In re Great Northern Energy, Inc., 493 S.W.3d 283 (Tex.App. – Dallas 2016) (orig. proceeding) and Great Northern Energy, Inc. v. Circle Ridge Production, Inc., No. 06-16-00029-CV (Tex.App. – Texarkana 2016, no pet.) (mem.op.), the appeal filed April 20, 2016 and the mandamus on April 21, 2016. The Texarkana court granted some relief to the judgment debtor under each proceeding. Staying enforcement of a turnover order during appeal or a mandamus proceeding also encourages a dual approach. In FE Express v. Contreras, Nos. 04-16-00723-CV, 04-16-00738-CV (Tex.App. – San Antonio 2016; opinion on temporary stay; appeal dismissed on agreement of the parties), the Court of Appeals granted Appellant's "Emergency Motion for Immediate Stay of Turnover Order" pending the court's consideration of the merits of their appeal of a turnover order. A dissenting opinion challenged the ruling, pointing out that the proper means to stay enforcement of a turnover order pending appeal would be to post a supersedeas bond. FE Express is a consolidated proceeding of an appeal and a petition for mandamus. Temporary orders may be issued by the Court of Appeals to prevent undue prejudice pending an original proceeding. TR Ap. 52.10(a). Therefore, the stay in FE Express was available under the rules.

8. Enforcement. The trial court may enforce the turnover order "by contempt or otherwise in case of refusal or disobedience." Note, however, that the trial court loses its jurisdiction to do so once the turnover order is appealed and jurisdiction will then lie in the court of appeals. Schultz v. Fifth Judicial District Court of Appeals at Dallas, 810 S.W.2d 738 (Tex. 1991); Roosth v. Daggett, 869 S.W.2d 634 (Tex. App.--Houston [14th Dist.] 1994, orig.proceeding). The Supreme Court re-examined the trial court's authority to enforce a turnover order by contempt while on appeal if the order was not

superseded. Although not a turnover case, the court in In Re Sheshtaway, 154 S.W.3rd 114 (Tex. 2004), indicated that the trial court could enforce an unsuperseded order on appeal.

If the debtor refuses to comply, a show cause hearing should be set as in any other case of "constructive criminal contempt." When "the alleged contemptuous act has taken place outside the presence of the court," the respondent to the contempt charge should be present. This right is constitutionally guaranteed unless there is an affirmative finding that the right is waived. Ex Parte Johnson, 654 S.W.2d at 421. Note also that the Motion for Contempt must give notice to the judgment debtor when, how and by what means the judgment debtor is guilty of the alleged contempt. In re Capoche, No. 01-12-01063-CV (Tex. App. – Houston [1st] 2012, no pet.) (mem.op.)

If an individual fails to appear at a show cause hearing where he is cited for criminal contempt, "the proper procedure is to bring the individual into court under a capias or writ of attachment." Ex Parte Johnson, 654 S.W.2d at 422.

The contemnor may not be confined without a valid order of commitment. In Ex Parte Wilson, 797 S.W.2d 6 (Tex. 1990, orig.proceeding) the court held that "when punishment for contempt is suspended conditioned on compliance, the contemnor may not be imprisoned without a second unconditional commitment order, and in some circumstances, a hearing to determine whether there has been compliance." In Ex Parte Swate, 39 Tex.Sup.Ct.J. 579, 1996, the Court found that a commitment order which enhanced the punishment beyond the original contempt order without notice or opportunity to be heard was void.

Holding the debtor in contempt for violation of a turnover order does not constitute unconstitutional "imprisonment for debt." Ex Parte Buller, 834 S.W.2d 622 (Tex. App.--Beaumont 1992, orig. proceeding). But, see dissents in Davis v. Raborn and Beaumont v. Buller. In Ex Parte Roan, 887 S.W.2d 462 (Tex. App.—Dallas 1994, org.proceeding), a contempt judgment was challenged as unconstitutional. In Roan, the judgment debtor violated a turnover order which provided that he turn over property in the form of income received to the registry of the court for the benefit of the judgment creditor. The exact language of the turnover order regarding this provision is not quoted in the court's opinion. The turnover order also provided that the judgment creditor recover $500 in attorney's fees. In a contempt proceeding the court found that the judgment debtor was guilty of violating several provisions of the turnover order including failure to pay the attorney's fees. The court ordered the judgment debtor confined for a period of fifteen (15) days and thereafter until he purged himself of contempt by paying the sum of $10,000.00 into the registry of the court. In the habeas corpus proceeding, the Court of Appeals found that the Texas Constitution does not allow the collection of attorney's fees by contempt. It further found that since the trial court had assessed one punishment (15 days in jail plus payment of $10,000.00) for more than one contemptuous act, and since one of the acts is not punishable by contempt, the entire contempt judgment was void. The court did acknowledge that a trail court may enforce its turnover orders by contempt proceedings. However, the court went on to find that the order to pay $10,000.00 is in effect an order for a partial payment of the money judgment and therefore it was void under the Texas Constitution's provisions against imprisonment for debt. A quick reading of this opinion may give one the impression that the courts impliedly held that a turnover order requiring the turnover of sums of money and/or income would not be enforceable by contempt because it would constitute imprisonment for debt. However, upon a closer look at the opinion, the court's comments appear to be directed to the terms of the contempt judgment ordering the judgment debtor to pay $10,000.00, rather than the original turnover order requiring the judgment debtor to turn over income. The court did not go so far as to find that turnover orders cannot be enforceable if there is a provision for the turnover of identifiable cash assets, non-wage income and/or unprotected commission income. If the judgment creditor, in enforcing the turnover order by contempt, had shown that identifiable sums subject to the turnover order had been received by the judgment debtor and not paid over pursuant to the terms of the turnover order, and if the contempt judgment had made the judgment debtor's purging himself of contempt conditioned on the payment or the turning over by him of those identifiable sums (without any punishment for failure to pay the attorney fees), then perhaps the result of the Roan habeas corpus proceeding would have been different. For additional cases on enforcement of turnover orders by contempt, see Ex Parte Carney, 903 S.W.2d 345 (Tex. 1995); and Ex Parte Prado, 911 S.W.2d 849 (Tex. App.--Austin 1995, orig. proceeding) (which unfortunately contains language which could be construed to limit turnover of future interests and language which would support the argument that turnover of funds could not be enforced by contempt based on it being an unconstitutional imprisonment for debt).

9. Bond. No bond is required of a receiver under the turnover statute. Schultz v. Cadle Company, 825 S.W.2d 151 (Tex. App.--Dallas), writ denied per curium, 852 S.W.2d 499 (Tex. 1993) (bond requirements of rule 695a do not apply to post judgment receivers; bond only in

judge's discretion). The standard practice is not to require a receiver's bond. However, a bond is required if the order provides for injunctive relief. Provisions concerning the court's duty to fix bond in an order granting any temporary restraining order or temporary injunction and concerning the applicant's duty to execute and file the bond before issuance of the order are contained in Tex. R. Civ. P. 684. For a discussion of the extent of the bond amount, see Childre v. Great Southwest Life Ins. Co., 700 S.W.2d 284 (Tex.App.-Dallas 1985, no writ).

H. DEBTOR'S REMEDIES. To avoid the turnover order, a debtor may (1) pay the judgment, (2) be able to seek an injunction against the sheriff's sale if the property turned over does not belong to the debtor, (3) seek to quash the execution if there are defects as to the form of the writ or (4) move to modify the turnover order. Hittner, Texas Post-Judgment Turnover at 420.

The Court of Appeals in Schliemann v. Garcia, 685 S.W.2d 690 (Tex.App.-San Antonio 1984, orig. proceeding) found the debtor's motion to modify improper where the motion to modify was used to give the debtor an offset against the judgment.

I. PRACTICAL TIPS .While not required by the statute, success in obtaining the relief requested is more likely if the judgment debtor is given notice of hearing on the application.

Keep in mind the following assets which may be reachable by turnover:

1. accounts receivable;
2. notes receivable;
3. tax refunds;
4. causes of action;
5. money to be received from any source including but not limited to: contracts, payments under bankruptcy plans;
6. certain income;
7. secreted property;
8. property outside of the state; and/or
9. rents.

Always ask in post-judgment discovery: Are you receiving or about to receive any money from any source; and, does anyone owe you money?

VI. POST-JUDGMENT RELIEF UNDER THE DTPA

The Deceptive Trade Practices Act provides for an additional post-judgment remedy in the form of a receivership. Tex. Bus. & Com. Code §17.59 (Vernon 1987). The section provides as follows:

(a) If a money judgment entered under this subchapter is unsatisfied 30 days after it becomes final and if the prevailing party has made a good faith attempt to obtain satisfaction of the judgment, the following presumptions exist with respect to the party against whom the judgment was entered:

(1) that the defendant is insolvent or in danger of becoming insolvent; and

(2) that the defendant's property is in danger of being lost, removed, or otherwise exempted from collection on the judgment; and

(3) that the prevailing party will be materially injured unless a receiver is appointed over the defendant's business; and

(4) that there is no adequate remedy other than receivership available to the prevailing party.

(b) Subject to the provisions of Subsection (a) of this section, a prevailing party may move that the defendant show cause why a receiver should not be appointed. Upon adequate notice and hearing, the court shall appoint a receiver over the defendant's business unless the defendant proves that all of the presumptions set forth in Subsection (a) of this section are not applicable.

(c) The order appointing a receiver must clearly state whether the receiver will have general power to manage and operate the defendant's business or have power to manage only a defendant's finances. The order shall limit the duration of the receivership to such time as the judgment or judgments awarded under this subchapter are paid in full. Where there are judgments against a defendant which have

> been awarded to more than one plaintiff, the court shall have discretion to take any action necessary to efficiently operate a receivership in order to accomplish the purpose of collecting the judgments.

The unique feature of the remedy is entitlement of the prevailing party to various presumptions which must be rebutted by the judgment debtor, including the presumption that there is no adequate remedy other than receivership available to the prevailing party. This is a departure from the placement of the burden of proof in other receivership provisions which place the burden on the creditor. See Tex. Bus. Org. Code §11.401 et seq (Vernon 2011). General provisions regarding appointment of receivers are found in Tex. Civ. Prac. & Rem. Code Ann. §64.01 et seq (Vernon 1986).

There is only one case actually interpreting the D.T.P.A. receivership provision. In Dudley v. E. W. Hable & Sons, Inc., 683 S.W.2d 102 (Tex. App.-- Tyler 1984, no writ), the trial court denied a judgment creditor, who had obtained relief under the Deceptive Trade Practices Act, an order for appointment of receiver under Section 17.59. In reviewing the testimony from the hearing, the Court of Appeals pointed out that the Defendant had testified that he had not made any payments on the Judgment. Further, the counsel for the prevailing plaintiff testified that good faith attempts had been made to satisfy the judgment and that attempts to execute on the judgment had been unsuccessful. The judgment was signed in March of 1982. The motion to show cause why a receiver should not be appointed was filed in October of 1983. The Court of Appeals found nothing in the record to indicate that the judgment debtor had made an attempt to disprove the presumptions set forth in subsection (a) of Section 17.59, except that he testified that he was not insolvent or in danger of becoming insolvent. The Court found that while appointment of receivers under the predecessor statute to Tex. Civ. Prac. & Rem. Code Ann. §64.01 et seq (Vernon 1986) provided that the appointment of a receiver was within the sound discretion of the court, the language in §17.59 is mandatory unless the defendant proves that all of the presumptions set forth in subsection (a) are not applicable. Accordingly, the conditions of §17.59 had been met for the appointment of a receiver and the judgment creditor was entitled to the appointment.

In Wells, What Hath the Legislature Wrought?, A Critique of the Deceptive Trade Practices Act as Amended in 1977, 29 Baylor Law Review 525 (1977), the author reviews amendments to Section 17.59 which resulted in the statute as it reads today. The commentary indicates that the consumer must prove that the judgment has become final, that thirty (30) days or more have passed without satisfaction of the judgment, and that he has made a good faith effort to collect the judgment. The good faith effort, according to Legislative history cited in the comment, may be demonstrated by the judgment creditor showing he has levied execution with a nulla bona return. In the show cause hearing, once the consumer has proved the foregoing elements, the burden of proof shifts to the judgment debtor to prove that all of the presumptions enumerated in Subsection (a) are inapplicable. If the judgment debtor fails to sustain this burden, the judge must appoint a receiver. The receiver would manage the judgment debtor's entire business or only his finances. The receivership would last until the judgment based on a recovery under the DTPA is paid in full. The commentary further points out that the wording of the amendment and Legislative history does not indicate that the amendment would dispense with the necessity of posting a bond for the receiver. See Tex. R. Civ. P. 695 and 695a.

The number of cases arising under the current Section 17.59 and its predecessor may indicate the frequency of its use in the collection of judgments based on recoveries under the Deceptive Trade Practices Act. As a practical matter, it may be difficult to find a receiver who would be qualified to take over a judgment debtor's business, or even his finances. Further, costs are involved, not only in the posting of the bond for the receiver, but also in the cost of paying the receiver for services rendered. Perhaps the mere threat that a receiver might be appointed is of some use in collecting judgments based on the DTPA. As an alternative to this remedy, a turnover order may be structured in such a way that funds can be tapped for purposes of satisfying the judgment without the necessity of a full-blown receivership. While a receiver may be appointed in the turnover context, the receiver in the turnover context would merely receive and disburse funds rather than actually running the business or finances of the judgment debtor.

VII. OTHER STUFF

A. MASTER IN CHANCERY. Other post-judgment remedies or tactics include appointment of a Master in Chancery. Texas Rules of Civil Procedure, Rule 171, provides for appointment of a master "in exceptional cases." The master's authority is governed by the court order appointing the master. The most common use of a master is in family matters, but the process would appear useful in complex collection matters. In Tanner v. McCarthy, 274 S.W.3d 311 (Tex.App.-Houston, 1st, no pet.) the court declined a challenge on appeal to a mater in chancery and held that an appointment should be challenged by mandamus.

A practice has evolved of giving receivers the additional powers of a master in chancery in turnover orders. While the court declined to address the dual appointment or extent of the powers granted, the court in Suttles v. Vestin Realty Mortgage, 317 S.W.3d 412 (Tex. App. – Houston [1st] 2010, no pet.) overturned the appointment of a master in chancery in a turnover proceeding finding the case fell short of the complexity required for appointment.

B. CHARGING ORDERS. Another remedy not commonly used is the charging order. Partnership interests in general partnerships and limited partnerships are not exempt and are therefore available to satisfy the judgment debtor's debts.

1. Prior Case Law and Statutes. Under prior case law a charging order allowed a judgment creditor to reach a debtor's interest in a partnership by ordering payment to the creditor out of the debtor's interest in the partnership. It had been held to be the sole means by which a judgment creditor can reach an individual debtor's partnership interest. Dispensa v. University State Bank, 951 S.W.2d 797 (Tex.App.--Texarkana 1997, no writ). The court could appoint a receiver to enforce the claim against the debtor's interest in the partnership. The debtor partner's interest may be redeemed before sale, or may be purchased with separate property of another partner or with partnership property with the consent of all nondebtor partners. Tex. Rev. Civ. Stat. Ann. art. 6132b, § 28 (Vernon 1970) (Texas Uniform Partnership Act); Tex. Rev. Civ. Stat. art. 6132a-1, § 7.03 (Vernon Supp. 1997) (Texas Revised Limited Partnership Act).

2. Charging Orders now Available for General Partnership Interests. The Texas Uniform Partnership Act was superseded entirely by the Texas Revised Partnership Act effective January 1, 1999 (and effective until January 1, 2010). The Texas Revised Partnership Act already applied to partnerships created on or after January 1, 1994, and partnerships created before January 1, 1994 who elected to be governed by it. Tex. Rev. Civ. Stat. art 6132b-11.03. Charging orders were not available to creditors of partners under the Texas Revised Partnership Act. Similarly, the Business Organization Code did not provide for charging orders on general partnership interests until amended by Senate Bill 748 effective September 1, 2011 adding Section 152.308. The Code now includes identical provisions for a charging order on general partnership interests as those for limited liability companies and limited partnerships discussed at 3. below.

3. Charging Orders to Reach Limited Partnership and Membership Interests. The charging order remedy remained virtually unchanged and was carried forward in the Texas Limited Liability Company Act, Art. 1528n, Tex. Rev. Civ. Statutes to charge member interests and continued to be applicable to limited partnership interests under the Texas Revised Limited Partnership Act. It is also included in the Business Organization Code at Section 101.112 (relating to Limited Liability Companies) and Section 153.256 (relating to Limited Partnerships). The Business Organization Code was effective January 1, 2006 and applies to entities formed after the effective date and those formed before the effective date who elected to be governed by it.

The charging order provisions under these Acts and Code were largely identical. On application of a judgment creditor the interest of the judgment debtor could be charged with payment of a judgment, thereby acquiring the rights of an assignee. The charging order provisions related to limited partnership interests also provided for appointment of a receiver, foreclosure, and court ordered sale.

House Bill 1737, effective September 1, 2007, amended the charging order provisions of these Acts and Code. The amendments apply only to the rights of a judgment creditor of a judgment rendered on or after September 1, 2007. Under the Amendments, on application to a court having jurisdiction, the interest of the judgment debtor may be charged to satisfy the judgment debtor's interests, but the judgment creditor only gets the "right to receive any distribution to which the judgment debtor would otherwise be entitled." It constitutes a lien on the judgment debtor's interest and is the exclusive remedy by which a judgment creditor may satisfy a judgment out of a judgment debtor's interest. It also specifically provides that the judgment creditor has no right to obtain possession of or rights to the property of the entity. The prior right (as to limited partnership interests) to appointment of a receiver, foreclosure and court ordered sale was eliminated. Thereafter Senate Bill 1442, effective September 1, 2009 amended the charging order provisions to specifically provide "The charging order lien may not be foreclosed on under this code or any other law", Tex. Bus. Org. Code §101.112 (c) and §153.256(c). Unlike the 2007 amendments, the 2009 amendments did not except from their applicability any rights of judgment creditors existing before September 1, 2009. Although largely academic, note that the Business Organizations Code in Section 402.014 provides that the code does not apply to an action or proceeding commenced before the mandatory application date and that prior law applies to the action or proceeding. So, perhaps charging order proceedings commenced before January 1, 2010 are governed by the law in effect at the time of the action or proceeding.

4. Exclusive Remedy (?).

The "exclusive remedy" provisions of Tex. Bus. Orgs. Code Ann. § 153.256 (Vernon 2009) were addressed by the court in Stanley v. Reef Securities, Inc. 314 S.W.3d 659 (Tex. App. – Dallas 2010, no pet.) when the judgment creditor sought a turnover of the judgment debtor's distribution from a limited liability company. The judgment debtor argued that a charging order was the exclusive means to reach the debtor's distributions. The court held that "once a partnership distribution has been made to a partner it ceases to be the 'partnership interest' (i.e. the partner's right to receive his share of the profits) and becomes the partner's personal property and thus reachable by the turnover process. The court went on to say that "nothing in the plain language of section 153.256 precludes a judgment creditor from seeking the turnover of proceeds from a partnership distribution after the distribution has been made and is in the debtor's possession." See also Henderson v. Chrisman, Cause No. 05-14-01507-CV (Tex. App. – Dallas 2016, no pet.) (mem.op.) (citing Stanley and approving turnover of distributions if and when such a distribution is made and in the judgment debtor's possession.) The Court in Schell v. Alfaro, 406 S.W.3d. 216 (Tex. App. – San Antonio 2013, pet. denied) sanctioned the creditor's attorney under Rule 13 for seeking the sale of the judgment debtor's interest in numerous LLC's through a turnover receivership, although the creditor's attorney's overall conduct in that case was pretty outrageous. Another way "around" the sole remedy may be an examination of payments made to members and partners. If income is earned by a member of an LLC (and perhaps a partner in a limited partnership or general partner), it may be possible to reach that income via a turnover order. Karlseng v. Wells Fargo, Cause No. 05-13-01734-CV (Tex. App. – Dallas 2014, pet. denied) (mem.op.). ("W-2" income paid to attorney by LLC owned by him [and possibly two other members] was subject to turnover since there was no showing that LLC had 'right to control' the manner and means by which a person performs his services.) In Gillet v. Zupt, LLC, No. 14-15-01033-CV (Tex.App. – Houston [14th] 2017, no pet.) the court approved a turnover of a judgment debtor's interest in an LLC; however, this was a very unique set of facts. Both parties sought relief in an arbitration wherein a member of the LLC sought to require a buyout of his interest in the LLC and the entity in turn sought damages for breach of fiduciary duty. Part of the award and confirming judgment required the member to surrender his membership interest to the LLC for payment of a sum certain and the LLC in turn received an even larger damages award. When the LLC sought a turnover and appointment of receiver, the trial court appointed a receiver to collect non-exempt property to satisfy both judgments! The court approved the turnover of the judgment debtor's interest in the LLC, in part because the case involved "an explicit award of the membership interest itself from one party to the other as part of the judgment."

In a case of first impression, the court in Heckert v. Heckert, No. 02-16-00213-CV (Tex. App.-Ft. Worth 2017, no pet.) (mem. op.) the court approved the turnover of a judgment debtor's interests in an LLC and a limited partnership, rejecting the application of the "exclusive remedy" language of the Texas Business Organizations Code. The ex-wife sued her ex-husband (filed as part of the parties' divorce, but severed) for personal injury. The ex-husband formed a limited partnership and an LLC, the LLC being the general partner of the limited partnership. He was the sole member of the LLC and the sole limited partner. He was ordered to turn over his interests in the LLC and limited partnership. Even though one of the ex-husband's stock accounts was transferred to the limited partnership, the court ordered it turned over to the receiver as well and the court of appeals approved the order because "there is no evidence that the account contained anything other than non-exempt stock". Citing Henderson, Stanley and Gillet discussed above, the court of appeals found that "courts have held that there are some exceptions to this rule" of exclusivity. The court, citing Stanley's discussion of the development of the charging order "to prevent a judgment creditor's disruption of an entity's business by forcing an execution sale of the partner's or member's entity interest to satisfy a debt of the individual partner", found that the ex-husband's entities were formed for the purpose of taking ownership of non-exempt assets awarded to him in the divorce and so no other party's interest would be "disrupted" by the turnover of those interests.

5. Charging Order Creates Lien. Very little case law exists on charging orders, but interesting dicta is found in TCAP Corporation v. Gervin, No. 320 S.W.3d 549 (Tex. App.-Dallas 2010, no pet.). The case involved a Texas judgment domesticated in Washington and a related charging order obtained in Washington. An agreed order in the debtor's later filed bankruptcy provided that the "judgment is dischargeable…, but it is secured by its judgment lien which survives the bankruptcy." A distribution was made by the partnership and paid into the registry of the Washington court, but was ultimately paid over to the judgment debtor. The details of why the funds were released to the judgment debtor are not reflected in the opinion. The judgment creditor in the Texas case sought a turnover of the sums paid to the judgment debtor. The judgment creditor then switched horses and sought a charging order in the same proceeding (or at least argued for one). The court denied turnover relief and the Court of Appeals concluded this

action was proper because the judgment had been discharged in the debtor's bankruptcy. The court discussed whether the creditor was seeking a turnover order or charging order in the Texas case or whether it was seeking to enforce "the judgment lien created by the 1996[Washington] charging order." The language of the opinion appeared to say (without quoting a statute) that a charging order creates a judgment lien on the judgment debtor's partnership interest. The Business Organizations Code expressly provides that the charging order creates a lien on the judgment debtor's partnership interest(or membership interest in LLCs), hence a judgment lien. Tex. Bus. Org. Code §101.112 (c), §152.308(c) and §153.256(c).

6. Procedure. Applications for charging order are usually filed in the court from which the judgment being collected was obtained. The Texas Business Organizations Code does not provide rules of procedure, nor are there any in the Texas Rules of Civil Procedure. Generally, in order to obtain jurisdiction over the LLC, for example, one should have the entity served to bring it within the court's jurisdiction. However, in Spates and Prodigy, LLC v. Office of the Attorney General, 485 S.W.3d 546 (Tex. App. – Houston [14th] 2016, no pet.) the Office of the Attorney General intervened and filed child support lien notices in a case involving an LLC whose sole member was the obligor on the liens. The case settled in favor of the LLC and the OAG filed an application for charging order. Once funds became available to settle the LLC's claims and were placed in the registry of the court, the OAG asserted the application for charging order and it was granted. Because the Family Code has special provisions for allowing a child support lien to be filed in a case in which an obligor may have a right to proceeds, the practitioner should not read this case as allowing interventions in lawsuits generally. The Spates case includes a discussion of when charging orders are appealable.

One would anticipate the need for an evidentiary hearing to establish the judgment debtor's interest in the entity to be charged, which would entitle the judgment creditor with an unsatisfied judgment to have the interest charged.

A sample Application for Charging Order and proposed Order from the Texas Collections Manual are attached as Attachments 18 and 19.

7. Combining Charging Orders with other remedies. The protection afforded property held in general partnerships, LLC's and Limited Partnerships by limiting a creditor's right to assert a lien against a judgment debtor's interest in the entity encourages asset protection planning that may give rise to a fraudulent transfer claim. In some instances, the judgment debtor may form an LLC or Limited Partnership and transfer an otherwise non-exempt asset to the entity for purposes of putting it beyond the reach of creditors. In other instances, the partnership interest itself may be fraudulently transferred. In Devoll v. Demonbreun Cause No. 04-14-00331-CV (Tex.App. – San Antonio 2016, August 31, 2016, opinion withdrawn after parties settled and filed a joint motion to dismiss), the court examined the interplay of TUFTA and charging orders and approved a temporary injunction against transfer or encumbrance of partnership assets pending a fraudulent transfer suit.

A double-barreled approach to reaching distributions from partnerships and limited liability companies was approved in Goodman v. Compass Bank, Cause No. 05-15-00812-CV (Tex.App. – Dallas 2016, no pet.) (mem.op.), wherein the judgment creditor sought both a turnover of proceeds from any of the judgment debtor's interests in any limited partnerships, LLC's or other entity in which he had an interest, as well as a laundry list of other 'present and future rights' to bank account, receivables, stocks and other named property. The turnover order ultimately required the judgment debtor to deliver the property every other Wednesday to a particular constable's office along with an accounting to the creditor's attorney of amounts of the referenced property received by the judgment debtor and then turned over to the constable. The turnover order also ordered the delivery of bank statements within 5 days of receipt on an ongoing basis. The court also entered a charging order as a post judgment order in the same action. The appeals court found nothing in the Business Organization's Code to require that a charging order be brought in a separate action. The court did not address whether the entity would need to be served with citation or other notice of the application for charging order.

In Pajooh v. Royal West Investments LLC, Series E, 518 S.W.3d 557 (Tex. App.-Houston [1st Dist.] 2017, no pet.) the court approved appointment of a turnover receiver "to monitor partnership distributions and effectuate a charging order." The Pajooh court enforced the exclusivity provisions of the charging order even though one judgment debtor was the 99% limited partner and the other judgment debtor was the 1% general partner of a limited partnership that owned commercial properties, vehicles, rugs, paintings, furniture, and other investments.

C. FRAUDULENT TRANSFERS. Fraudulent transfers are discussed very briefly under the discussion of exempt property. Often in the course of post-judgment discovery the creditor discovers that valuable non-exempt assets have been transferred from the debtor to third parties. The creditor is often tempted to dismiss the

transaction as a sham and attempt to seize the assets from the third party by execution, garnishment, or turnover. These remedies should not be utilized to try the issue of fraudulent transfer because the creditor could risk giving basis for a claim for wrongful garnishment, wrongful execution or abuse of process. The burden of filing an additional suit is not as great as defending a suit by the debtor or third party. Most often the fraudulent transfer is achingly apparent and the mere disclosure of an intent to sue can bring the debtor around.

ATTACHMENT 1

> > > ABSTRACT OF JUDGMENT < < <

THE STATE OF TEXAS

COUNTY OF TRAVIS

I, **_____(1)-name___** attorney-of-record for Plaintiff, **_____(2)-name of Plaintiff___,** do hereby certify that, in a certain suit pending in the **_____(3)-choose County or District:___**County Court at Law No. **_____(3)___** of Travis County, Texas, the **_____(3)___** Judicial District Court of Travis County, Texas, wherein **_____(2)-Plaintiff's name in caps___** is Plaintiff and **_____(4)-Defendant's name in caps___** is Defendant in Cause No. **_____(5)___**, said Plaintiff, whose mailing address is **_____(2a)_____**, recovered judgment **_____put "jointly and severally" if more than one Defendant___**against said Defendant**_____add "s" if plural and do the service section separate for each Def.___**

_____OPTION A-USE IF ADDRESS SHOWN IN PLEADINGS___(whose address is **_____(6)-ADDRESS AS IT IS IN THE PLEADINGS (in caps)___**

_____OPTION A-1-USE IF ADDRESS NOT SHOWN IN PLEADINGS:___(who was served with citation by

_____DESCRIBE TYPE OF SERVICE:___
personal service
delivering the citation to its registered agent, ___, substitute service by delivering the citation to the Texas Secretary of State through its agent, **__name of agent___,** substitute service by _____
_____END OF CHOICES___

on the **_____(7)-date of service___** day of _____, 19_____, at **_____(6)-address in caps___**

_____OPTION B: IF DOB, DL# AND SSN # ARE NOT AVAILABLE: and whose birthdate and whose driver's license and whose social security number are unavailable) **__END OPTION B___**
_____OPTION B-1: IF DOB, DL# AND SSN # ARE AVAILABLE: and whose birthdate is **_____(8)-DOB___** and whose driver's license number ends in (last 3 digits) **_____(8) DL**#___, _____ and whose social security number ends in (last 3 digits) **___ END OPTION B-1___**

on the **_____(9)-DATE OF JUDGMENT___** day of **_____(9)___,** 19___ for the sum of **_____(10)-AMOUNT OF JUDGMENT IN CAPS___** DOLLARS (**$_____**) with interest at **_____(11)-PERCENTAGE ON JUDGMENT___**% per annum,

from the **_____(9)___** day of **_____(9)___**, 19____ and **$___(13)-AMOUNT OR "all":___** costs of suit. Said judgment is entitled to the following credits:

_____(14)-AMOUNT OF CREDIT:___NONE

There is now still due on said judgment the amounts hereinabove set out with interest on said amounts as hereinabove set out and costs of suit as hereinabove set out.

_____
_____(1)_____

BEFORE ME, a notary public, on this day personally appeared _____(1)_____, known to me to the person whose name is subscribed to the foregoing document and being by me duly sworn, declared that the statements therein contained are true and correct. Given under my hand and seal of office this ____ day of _____, 20____.

_____
NOTARY PUBLIC, STATE OF TEXAS

After recording, return to:

_____(1)_____
ATTORNEY'S FIRM
FIRM ADDRESS

[**NOTE**: Form adapted for use by Plaintiff recovering judgment from Defendant]

ATTACHMENT NO. 2

NO. _____

_____	§	IN THE _____ COURT
	§	
	§	OF TRAVIS COUNTY, TEXAS
VS.	§	AT LAW NO. _____ OF
	§	
	§	_____ JUDICIAL DISTRICT
_____	§	TRAVIS COUNTY, TEXAS

APPLICATION FOR WRIT OF GARNISHMENT AFTER JUDGMENT

1. Parties. Plaintiff in Garnishment is ____1_____, whose address is _____, Garnishee is ____2_____, who may be served by delivering the writ to **[OPTION 1,** if registered agent and office designated by the bank with the Secretary of State pursuant to Finance Code §201.102 or 201.103) **]** its registered agent, _____, at its registered office _____ . **[OPTION 2,** if none designated by the bank pursuant to Finance Code §201.102 or 201.103, then**]** its President, ____3_____, or its Vice President, ____4_____, at ____5_____. **[OPTION 3** if garnishee not a bank, then serve as you would the person or entity as with any citation**]**.

2. Affidavit for Garnishment. In Cause No. ____6_____ on the docket of this Court, styled "____7_____," the Plaintiff obtained a judgment against such Defendant (hereinafter referred to as "Defendant") on the ____8_____ day of ____8_____, 19_____, for the sum of $____9_____, together with interest from date of judgment at the rate of ___10__ percent (___%) per annum, and for all costs of suit of $_____11_____. Said judgment is valid and subsisting and remains unsatisfied. **OR, ____$option___**, save and except payments of **____$option___** made by Defendant on **____option-date_____**. Defendant does not possess, within affiant's knowledge, property in Texas subject to execution sufficient to satisfy said judgment. The garnishment applied for is not sued out to injure either the Defendant or the Garnishee. *** Optional Sentences: [**Affiant has reason to believe, and does believe, that the said Garnishee is indebted to the Defendant by reason of one or more bank accounts ____ including Account No. _____ in the name of _____, or has effects belonging to the Defendant. Said belief is based on ___state facts supporting the belief___ **___end optional sentences____.]** The Affiant further says that he/she is authorized to make this affidavit and Application and that he/she has read this affidavit and that the statements contained in this affidavit are within her personal knowledge and are true and correct.

_____

attorney in firm signing

THE STATE OF TEXAS	§	
	§	
COUNTY OF _____	§	

SWORN TO AND SUBSCRIBED BEFORE ME by the said ____12_____, attorney of record for the Plaintiff in the above-styled and numbered cause, on this the ____ day of _____, 20_____, to certify which witness my hand and seal of office.

_____

NOTARY PUBLIC, STATE OF TEXAS

* Option - See discussion of El Periodico, Inc. v. Parks Oil Company, supra at page 24.

3. Request for Writ. Plaintiff asks that a Writ of Garnishment issue and be served upon the said Garnishee.

Respectfully submitted

ATTORNEY'S FIRM
FIRM ADDRESS

By_____
12
Bar No. _____
Attorneys for Plaintiff

ATTACHMENT NO. 3

NO. _____

_____	§	IN THE _____ COURT
	§	
	§	OF TRAVIS COUNTY, TEXAS
VS.	§	AT LAW NO. _____ OF
	§	
_____	§	_____ JUDICIAL DISTRICT
	§	TRAVIS COUNTY, TEXAS

APPLICATION FOR
WRIT OF GARNISHMENT AFTER JUDGMENT

1. Parties. Plaintiff in Garnishment is ____1_____, whose address is _____, Garnishee is ____2_____, who may be served by delivering the writ **[OPTION 1,** if registered agent and office designated by the bank with the Secretary of State pursuant to Finance Code §201.102 or 201.103) **]** its registered agent, _____, at its registered office _____ .] **[OPTION 2,** if none designated by the bank pursuant to Finance Code §201.102 or 201.103, then**]** its President, ____3_____, or its Vice President, ____4_____, at ____5_____.] **[OPTION 3** if garnishment not a bank, then serve as you would the person or entity as with any citation**]**.

2. Facts. In Cause No. ____6_____ on the docket of this Court, styled "____7_____," the Plaintiff obtained a judgment against such Defendant (hereinafter referred to as "Defendant") on the ____8_____ day of ____8_____, 19_____, for the sum of $____9_____, together with interest from date of judgment at the rate of _____10_____ percent (___%) per annum provided, and for all costs of suit of $_____11_____. Said judgment is valid and subsisting and remains unsatisfied. **OR Option:**, save and except payments of $_____ made by Defendant on _____. Defendant does not possess, within Plaintiff's knowledge, property in Texas subject to execution sufficient to satisfy said judgment. The garnishment applied for is not sued out to injury either the Defendant or the Garnishee. *** Option:** [Plaintiff has reason to believe, and does believe, that the said Garnishee is indebted to the Defendant by reason of one or more bank accounts including Account No. _____ in the name of _____, or has effects belonging to the Defendant. Said belief is based on ____state facts supporting the belief_____.]**end Option.**

3. Affidavit. Plaintiff is entitled to the issuance of a writ of garnishment on the grounds stated in the attached affidavit. The affidavit is incorporated into this Application by reference as if copied herein verbatim.

* Option - See discussion of El Periodico, Inc. v. Parks Oil Company, supra at page 24.

PRAYER

Plaintiff prays that a writ of garnishment be issued and served upon the said Garnishee.

Respectfully submitted

ATTORNEY'S FIRM
FIRM ADDRESS

By_____
____12_____
Bar No. _____
Attorneys for Plaintiff

[**NOTE:** This form requires attachment of a supporting Affidavit- see Attachment No. 4]

ATTACHMENT NO. 4

STYLE OF CASE

AFFIDAVIT FOR WRIT OF GARNISHMENT AFTER JUDGMENT

THE STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared ____1_____, who, being by me duly sworn, on oath stated:

"I am **____1-name_____**, **____2-title and business name___**, in this cause. I have personal knowledge of the facts stated in this Affidavit, and they are true and correct. I am authorized to make this Affidavit and Application for a writ of garnishment.

"In Cause No. ____3_____ on the docket of this Court, styled "____4_____ vs. ____4_____," the Plaintiff obtained a judgment against such Defendant (hereinafter referred to as "Defendant") on the ____5_____ day of ____5_____, 20_____, for the sum of $____6_____, together with interest from the date of judgment at the rate of ____7____ percent (___%) per annum provided, and for all costs of suit of $_____8_____. Said judgment is valid and subsisting and remains unsatisfied. **OR:**, save and except payments of $_____ made by Defendant on ___date____, **____end option___**.

"Within my knowledge, Defendant does not possess property within this state that is subject to execution and that is sufficient to satisfy the judgment. This garnishment is not sued out to injure either Defendant or Garnishee. *** OPTION:** ["I have reason to believe and do believe that Garnishee has property belonging to Defendant or is indebted to Defendant by reason of one or more bank accounts, including Account No. _____ in the name of _____. Said belief is based on ___state facts supporting the belief._____]" **END OPTION.**

_____
____1_____

SIGNED AND SWORN TO BEFORE ME on this the ____ day of _____, 20_____, to certify which witness my hand and seal of office.

_____
NOTARY PUBLIC, STATE OF TEXAS

* Option - See discussion of El Periodico, Inc. v. Parks Oil Company, supra at page 24.

ATTACHMENT NO. 5

STYLE OF CASE

NOTICE OF GARNISHMENT

TO: ____1_____:

You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:

> "YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT."

Respectfully submitted

ATTORNEY'S FIRM
FIRM ADDRESS

By_____
____2_____
Bar No. _____
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Garnishment, Application for Writ of Garnishment, accompanying affidavits, and the Writ of Garnishment with notice language thereon were mailed to ____1_____ by regular mail, on _____, 20_____.

_____
____2_____

____THE NOTICE LANGUAGE MUST BE TYPED ON THE FACE OF THE WRIT AS WELL.

ATTACHMENT NO. 6

STYLE OF CASE

AGREED JUDGMENT ON GARNISHMENT ACTION

Came on to be heard the above-styled and numbered cause. The attorneys for Plaintiff and Garnishee announced to the Court that Plaintiff and Garnishee have agreed that judgment should be rendered for Plaintiff; that such Garnishee is indebted to the Judgment Defendant, ____1_____, in the sum of $____2_____; that in Cause No. ____3_____, styled "____4_____ v. _____4_____" upon the docket of this Court, the Plaintiff, on ____5_____, 19_____, recovered judgment against such Defendant in the sum of $____6_____, with interest thereon from date of judgment at the rate of ____7_____ percent (_____%) per annum until paid and for costs of court, and that such judgment is still unsatisfied except for a partial payment credit in the amount of $____8_____.

It is, therefore, ORDERED, ADJUDGED and DECREED that:

1. Plaintiff have judgment against Garnishee, **__DEFENDANT'S NAME IN THIS CASE_____**, in the amount of $____9_____, the balance of the amount admitted by the Garnishee in its pleadings in this cause to be owing heretofore to the Judgment Defendant, which amount does not exceed Plaintiff's judgment against the Judgment Defendant, inclusive of interest thereon and costs of court; and

2. Reasonable attorney's fees for the attorney of the Garnishee in the amount of $_____10_____, to be paid from the sums in its possession belonging to Judgment Defendant, ____1_____; and

3. That Garnishee is hereby discharged of all liability to Judgment Defendant to the extent of the sums above ordered; and

4. That costs of court are taxed against Judgment Defendant. This judgment finally disposes of all parties and all claims and is appealable.

SIGNED this the ____ day of _____, 20_____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

ATTORNEY'S FIRM
FIRM ADDRESS

By_____
Bar No. _____
Attorneys for Garnishee

ATTORNEY'S FIRM
FIRM ADDRESS

By_____
Bar No. _____
Attorneys for Plaintiff

ATTACHMENT NO. 7

STYLE OF CASE

APPLICATION FOR TURNOVER RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

I.

PARTIES. Applicant is ____1_____, Plaintiff and Judgment Creditor in the above-entitled and numbered cause, who requests that the Court grant this Application for Turnover Relief against ____2_____, Defendant and Judgment Debtor, under Tex. Civ. Prac. & Rem. Code Ann. § 31.002 (Vernon 1986).

II.

JUDGMENT. As shown by the records of this Court, Plaintiff recovered judgment against Defendant, ____2_____, on ____3_____, 19_____ in the above-referenced cause. The judgment remains unsatisfied.

III.

PROPERTY SUBJECT TO TURNOVER. Plaintiff would show the Court that Defendant is the owner of property described as ____4 [description of property]_____. This property owned by Defendant is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.

IV.

Plaintiff moves the Court to order Defendant to turn over said property, with true and correct copies of all documents or records related to the property, to the _____ County Constable of Precinct ____5_____, at ____6_____, on or before ____7_____, 19_____. Plaintiff further requests that, to the extent that the property that is the subject of this Application for Turnover is continuous or repetitive in its benefits to Defendant, Defendant be ordered to turn over those continuing or repetitive benefits immediately upon receipt, along with any documentation of those benefits to the _____ County Constable, Precinct ____5_____. Plaintiff further requests that Defendant be required to give an accounting to Plaintiff, to be received by Plaintiff's attorney at the address shown below, no later than five (5) business days after each delivery of property by the Defendant to the Constable.

V.

ATTORNEY'S FEES. Pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 31.002(e), Plaintiff is entitled to recover reasonable attorney's fees and costs. A reasonable fee for attorney's services rendered and to be rendered in this matter is at least $500.00.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that:

1. the Court set this matter for hearing;
2. the orders requested herein be issued;
3. Plaintiff be granted at least $500.00 as a reasonable attorney's fee;
4. Plaintiff be granted reasonable expenses incurred in obtaining such orders;
5. Plaintiff be granted such other and further relief, special or general, legal or equitable, as may be shown that Plaintiff is justly entitled to receive.

Respectfully submitted

ATTORNEY'S FIRM
FIRM ADDRESS

By_____
_____
Bar No. _____
Attorneys for __1_____

NOTICE OF HEARING

Hearing on the foregoing Application for Turnover Relief is set for the ____8_____ day of ____8_____, 20_____, at ____9_____ o'clock _____.m., _____at _____**type of court**____.

CERTIFICATE OF SERVICE

I certify that on the ____ day of _____, 20_____, I served a true and correct copy of the foregoing by regular mail upon **___11-include name and address_____.**

_____
_____[attorney]_____

ATTACHMENT NO. 8

STYLE OF CASE

ORDER FOR TURNOVER RELIEF

On _____, 20_____, a hearing was held on Plaintiff's Application for Turnover Relief, and Plaintiff, ____1_____, having appeared **__option_**: ____in person_____ and by [his/its/her] attorney of record, and Defendant, ____2_____, **____Option{a blank line or this phrase:** having appeared in person and by [his/her/its] attorney of record, **End options** and the Court having considered the pleadings and official records on file in this cause, and the evidence and argument of counsel, finds that Defendant is the owner of ____3_____, that said property is not exempt from attachment, execution, or seizure.

It is therefore ORDERED that Defendant, ____2_____, turn over for levy to the _____ County Constable, Precinct _____4_____, at ___5-address_____ within five (5) business days of each receipt of said property, the following: _____6_____, with all documents or records related to the property. Defendant shall also, within five (5) days after each delivery of property to the Constable, be required to give a written accounting to Plaintiff's attorney, ____7_____, **insert attorney's firm and address**, of the amount of property received by Defendant, amount turned over to the Constable, and those respective dates of receipt and turn-over.

It is further ORDERED that Plaintiff have and recover from Defendant reasonable and necessary attorney's fees in the amount of $____8_____ and all costs of this proceeding.

SIGNED on this the ____ day of _____, 20_____.

_____
JUDGE PRESIDING

APPROVED FOR FORM:

attorney's firm name
and address

_____
_____
Attorney for Defendant

ATTORNEY'S FIRM
FIRM ADDRESS

By_____
_____
Bar No. _____
Attorneys for _____Plaintiff

ATTACHMENT NO. 9

VENDITIONI EXPONAS

VENDITIONI EXPONAS	§	
	§	TO ANY SHERIFF OR CONSTABLE IN
	§	THE STATE OF TEXAS
THE STATE OF TEXAS	§	

WHEREAS, in Cause No. _____1_____, styled "_____2_____ vs. _____3_____", Defendant, in the _____4_____ Court of Travis County, Texas, on the _____5_____ day of _____5_____, 19_____, _____2_____ recovered judgment against _____3_____ in the sum of _____6_____ Dollars ($_____6_____), with interest at the rate of _____7_____ percent (_____7_____%) per annum from the _____8_____ day of _____8_____, 20_____, and all costs of suit as per the Bill of Costs attached to the Writ of Execution;

AND WHEREAS, _____9_____, Constable, Precinct _____9____, Travis County, Texas, has by virtue of an execution issued upon said judgment, levied upon the property of Defendant described in the attached list and incorporated herein by reference, and such execution will expire before the sale of the said property can occur, and levy on the real property having been made on _____10_____, at _____10_____ o'clock _____.m.;

AND WHEREAS, no part of said judgment, interest, or costs has been paid except as has been heretofore set out,

Therefore, you are hereby commanded to proceed according to law to sell the above-described property as under execution and apply the proceeds thereof to the payment and satisfaction of the aforesaid sum of $_____6_____ with interest due thereon, from the _____8_____ day of _____8_____, 19_____, and for all costs of court in this behalf expended, together with the further costs of executing this writ.

Herein fail not, and have you the said money, together with this writ showing how you have executed the same, before said Court at the Courthouse of said county in the City of Austin, Texas, within 60 days.

Witness _____11_____, _____4_____ Clerk of Travis County, Texas.

Given under my hand and seal of office at Austin, Texas, this the _____ day of _____, 19_____.

_____12_____ _____11_____,
_____12_____ _____4_____ Clerk
_____12_____ Travis County, Texas.

By_____
Deputy

[**NOTE**: The venditioni exponas is referred to in Rule 647 pertaining to notice of sale of real estate "...under execution, order of sale, or venditioni exponas..." This author has found no other reference to venditioni exponas. Locally, in Travis County, constables who have been unable to levy on and sell real or personal property under a writ of execution before its expiration date have requested that we obtain a venditioni exponas from the clerk issuing the writ of execution to extend the life of the writ of execution to allow the property to be sold. This prevents any lapse between seizure and sale which could occur if the first writ is returned unexecuted and a second writ is issued.]

ATTACHMENT NO. 10

> > > > **ORDER OF SALE** < < < <

THE STATE OF TEXAS §
§ CAUSE NO. _____
COUNTY OF TRAVIS §

To the Sheriff of Any Constable of Any County of the State of Texas, GREETING:

WHEREAS, _____2_____, Plaintiff(s) on the _____3__ day of _____3_____, 19___, in the _____CHOOSE EITHER COUNTY OR DISTRICT:_ _____County Court at Law No. _____4_____ _____or_ _____4_____ Judicial District Court_____ of _____5_____ County, Texas, recovered judgment against _____6_____, Defendant(s), for the sum of $_____7_____ with interest from that date at the rate of _____8_____% per annum, until paid and the further sum of $_____9_____ costs of suit, as is manifest from the itemized bill of costs hereto attached and made a part hereof, and for the foreclosure of Plaintiff's lien on the following described personal property, to-wit:

_____10_____

as said lien existed on the said judgment day, and that said property be sold as under execution in satisfaction of said judgment.

THEREFORE, you are hereby commanded that you proceed to levy upon, seize and sell the above-described property as under execution in satisfaction of said judgment, interest, cost and the added cost of executing this writ; and that if the said property can not be found or if the proceeds derived from the sale of said property be insufficient to satisfy said judgment, interest and cost together with your fees and commissions for executing this Writ, then you are hereby commanded to make said moneys or any balance thereof remaining unpaid out of any other property of the defendant(s) as in ordinary execution, and if more money is received from said sale than is sufficient to pay off said judgment, interest and above costs, as directed by law, you shall pay the surplus thereof over to the defendant(s), and you are further directed that you shall execute and deliver to the purchaser(s) of said property the proper deed of conveyance of all the right, title, interest and claim which the defendant(s) had and held in and to said property at the time of the execution of this Writ and at the time of said sale, and you apply the proceeds thereof to the payment and satisfaction of the said judgment, and costs of suit, together with your legal fees and commissions for executing this Writ; and you will forthwith execute this Writ, according to law and the mandates hereof.

AND WHEREAS said judgment is entitled to the following credits:

_____11_____

HEREIN FAIL NOT and have you this writ showing how you have executed the same, together with said moneys collected as herein directed, before the above Court at the courthouse thereof in _____12_____, Texas, within 90 days from the date of the issuance of this Writ.

Issued and Given Under My Hand and Seal of said Court at my office in _____12_____, Texas, on _____13-date_____, 20___.

ATTEST:

_____Dana DeBeauvoir,
Travis County Clerk

_____OR_____

_____Amalia Rodriguez-Mendoza,
Travis County District Clerk

By_____
Deputy

Sheriff's/Constable's Fee		Clerk's Fees	
Levy	_____	Clerk Fees	_____
Ads	_____	Library fee	_____
Service	_____	Dispute fund	_____
Commission	_____	Judge's fee	_____
Deeds	_____	Sheriff fee	_____
Executing	_____	Abstract fee	_____
Return	_____	Attorney's fee	_____
Mileage	_____	Venire fee	_____
Printer's	_____	Execution fee	_____
Total:	_____	Other	_____
Clerk's fee	_____		
TOTAL:	$_____	**TOTAL:**	$_____

THE STATE OF TEXAS §
§
COUNTY OF _____5_____ §

I, _____14_____, Clerk of the _____County or District Courts_____ of said County and State, do hereby certify that the above and foregoing is a true and correct Bill of Costs in the above entitled cause up to this date.

WITNESS MY HAND AND OFFICIAL SEAL, on _____13_____, 20___.

_____Dana DeBeauvoir,
Travis County Clerk

_____OR_____

_____Amalia Rodriquez-Mendoza,
Travis County District Clerk

By_____
Deputy

OFFICER'S RETURN

Came to hand the ____ day of _____, 20___ at ____ o'clock and executed on the ____ day of _____, 20__ at ____ o'clock

Sheriff/Constable,
_____County, TX

[**NOTE**: Some clerks do not have forms for orders of sale and you may be required to draft one yourself. The order of sale is needed when the judgments provides for judicial foreclosure of a lien on certain property described therein. The order of sale also provides for seizure of additional non-exempt property if the property foreclosed upon is not sufficient to satisfy the judgment.]

ATTACHMENT NO. 11

SHERIFF'S DEED

THE STATE OF TEXAS §
§ KNOW ALL MEN BY THESE PRESENTS:
COUNTY OF _____1_____ §

WHEREAS, by virtue of a certain execution issued by the clerk of the _____2-court_____ of _____3_____ County, Texas, which execution was delivered to me as Sheriff of _____1_____ County, Texas, commanding any sheriff or constable of any county of the State of Texas to seize and sell the property of Defendant, _____4_____; and whereas, the real property hereinafter described was pointed out to me as being subject to sale under execution; and whereas, I did on the _____5_____ day of _____5_____, 20_____, at _____ o'clock ___.m., levy upon all the estate, right, title, claim, and interest which the Defendant, _____4_____, so had of, in, and to, and since said time had of, in, and to of the premises hereinafter described; and on the first Tuesday of _____6_____, 20_____, the same being on the _____7_____ day of _____6_____, 20_____, between the hours of 10:00 o'clock a.m. and 4:00 o'clock p.m., as prescribed by law, did sell said premises at the Courthouse thereof, in the City of _____8_____, Texas, having first given public notice of the authority by virtue of which such sale was to be made, the time of levy, the time and place of sale, and a description of the property that was to be sold; and

WHEREAS, at said sale, said premises were struck off to _____9_____, for the sum of _____10_____ Dollars ($_____10_____) subject, however, to the superior lien indebtedness upon such property, _____he/she/it___he_____ being the highest bidder therefore, and that being the highest bid for same, said successful bidder having exhibited to the officer conducting the sale **[option 1]** an unexpired written statement issued to the bidder in the manner prescribed by section 34.015, Tax Code, **[end option 1] [option 2]** the written registration statement issued to the bidder in the manner prescribed by section 34.011, Tax Code, **[end option 2]** and said sale being duly conducted; and

WHEREAS, the said _____9_____, has paid to me said sum of _____10_____ Dollars ($_____10_____), the receipt of which is hereby acknowledged.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS:

That in consideration of the premises in said judgment and execution, and of the payment of the said sum of _____10_____ Dollars ($_____10_____), I, _____11_____, Sheriff of _____1_____ County, Texas, have granted, sold, and conveyed, and by these presents do grant, sell, and convey unto the said _____9_____, all the estate, right, title, interest, and claim which the said _____4_____ had on the _____5_____ day of _____5_____, 19_____, or at any time afterwards, in and to the premises described in said execution, and further described as follows, to-wit:

_____legal description_____.

TO HAVE AND TO HOLD the above-described property unto the said _____9_____, _____his/hers/its___his_____ heirs and assigns, forever, as fully and as absolutely as I, Sheriff as aforesaid, can convey.

IN TESTIMONY WHEREOF, I hereunto set my hand this ____ day of _____, 20____.

_____
_____11_____, Sheriff of
_____1_____ County, Texas.

THE STATE OF TEXAS §
§
COUNTY OF _____1_____ §

BEFORE ME, the undersigned authority, on this day personally appeared _____11_____, Sheriff of _____1_____ County, Texas, known to me to be the person and official whose name is subscribed to the foregoing instrument and acknowledged to me that _____he executed the same for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER my hand and seal of office this _____ day of _____, 20____.

_____
NOTARY PUBLIC, STATE OF TEXAS

Printed Name of Notary
Commission Expires:

[**NOTE**: The Sheriff or Constable may require the creditor's attorney to prepare the Deed or Bill of Sale for property sold at execution.]

ATTACHMENT NO. 12

LETTER FILING APPLICATION FOR WRIT OF GARNISHMENT

_____[DATE]_____

_____ Court Clerk via e-file
_____
_____

Re: _____2_____ vs. _____2_____; _____3[court]_____

Dear _____1_____:

Enclosed please find our Application for Writ of Garnishment After Judgment.

Please issue the Writ of Garnishment and forward it to our office so that we may forward it to the appropriate officer for service.

Thank you.

Very truly yours,

_____
(Attorney's name)

_____:____
Enclosures

ATTACHMENT NO. 13

LETTER RECORDING ABSTRACT OF JUDGMENT

_____[date]_____

_____
County Clerk
_____ County Courthouse
_____, Texas _____

Re: Cause No. _____;
_____ v. _____

Dear _____:

Enclosed you will find an Abstract of Judgment in the above numbered and styled cause along with a check for $_____ to cover recording fees. Please record the abstract in your real property records and return it to this office.

Thank you for your assistance.

Very truly yours,

_____
Legal Assistant to
_____

_____:____
Enclosures

ATTACHMENT NO. 14

LETTER REQUESTING WRIT OF EXECUTION

____[date]_____

Court Clerk via e-file
_____
_____
_____

Re: Cause No. ____(1)___; ____(2)___ vs. ____(3)___

Dear _____:

Please issue a Writ of Execution pursuant to the judgment in the captioned case and forward same to this office. We will then forward it to the office of the sheriff or constable for service. The judgment debtor's last known address is ____(4)___. **_____Option A:___**Please show credits to the judgment of $____(5)___.**_____End Option A**

Thank you for your assistance.

Very truly yours,

_____
Legal Assistant to
_____

____:____
Enclosure

cc: _____

ATTACHMENT NO. 15

RELEASE OF JUDGMENT

THE STATE OF TEXAS §
§ **RELEASE OF JUDGMENT**
COUNTY OF _____1_____ §

WHEREAS, in Cause No. _____2_____, in the **__Choose court____**County Court at Law No. _____3_____ _____#Judicial District Court_____ of _____ County, Texas, the Plaintiff, _____4_____, recovered judgment against the Defendant, _____5_____, and

WHEREAS, such judgment indebtedness has been fully and finally compromised, settled and agreed to be released;

NOW, THEREFORE, Plaintiff and Judgment Creditor, _____4_____, acting herein by and through its authorized attorney of record, does hereby release _____5_____ of and from the judgment and any and all liens of every character arising out of such judgment, including but not limited to those expressed in that certain abstract of judgment recorded at Book _____6_____, page _____7_____, of the Abstract of Judgment Records [**or other records where filed in particular county**] of _____1_____ County, Texas.

EXECUTED this _____ day of _____, 20____.

ATTORNEY'S FIRM
FIRM ADDRESS

By_____
_____
Bar No. _____
Attorneys for _____

THE STATE OF TEXAS §
§
COUNTY OF _____ §

BEFORE ME, the undersigned authority, on this day personally appeared _____, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER my hand and seal of office this _____ day of _____, 20___.

_____
NOTARY PUBLIC, STATE OF TEXAS

_____
Notary's Printed Name
Commission Expires:_____

After recording, return to:
_____
_____
_____

ATTACHMENT NO. 16

LETTER FORWARDING RELEASE OF JUDGMENT

____[DATE]_____

_____(1)-name___
_____(2)-address___
_____

Re: Cause No. _____(3)-cause no.___;
_____(4)-style___ vs.
_____

Dear _____:

Enclosed is the original Release of Judgment in the above-named cause which you will need to have recorded at the _____ [**counties where abstract of judgment was filed**] County Courthouse. A copy is provided for your own records.

If you have any further questions, please give me a call.

Thank you.

Sincerely,

_____

__:__
Enclosure

ATTACHMENT 17

AREAS OF EXAMINATION CHECKLIST

A. Identification

1. Full legal name
2. Name debtor uses
3. Aliases
4. Social Security number
5. Driver's license number
6. Date of birth
7. Names of immediate family members (if divorced, obtain details of divorce(s) filing and property division)
8. Home address and phone number
9. email address and website URLs

B. Employment (for both debtor and spouse)

1. Employer and address
2. Manner of compensation - wages, commissions, independent contract
3. When paid, i.e., monthly, every Friday, etc.
4. When bonuses paid
5. Any ownership interest in the company
6. Job description, any licenses required

C. Real Property

1. Lease/Rent: landlord identification; monthly rent; any rent to own options

2. Ownership:

   a. Homestead:
      (1) address and property description
      (2) when acquired, purchase price, monthly payments, status of payments, mortgagee, current balance.
      (3) rural vs. urban homestead; acres; if urban, whether adjacent lots
      (4) occupied or abandoned
      (5) additional principal reductions; payments in fraud of creditors
      (6) name(s) on title
      (7) if the homestead was acquired less than 1215 days before the deposition, it is good practice to inquire about previous homestead ownership to gain information to analyze vulnerability of the homestead in the event of bankruptcy

   b. Other Real Property:

      (1) address and property description
      (2) when acquired, purchase price, monthly payments, status of payments
      (3) all liens, mortgagee, current balance
      (4) rental income, identity of renters
      (5) name(s) on title

   c. Miscellaneous Real Property Interests:

      (1) property owned by partnerships and corporation in which debtor has an interest
      (2) oil, gas and mineral interests
      (3) anticipated inheritances

(4) property which debtor owns an undivided interest (determine owners of remaining undivided interests)

D. Personal Property

1. Vehicles (including 2, 3 or 4-wheeled motor vehicles):

   a. model
   b. license plate number/V.I.N.
   c. when acquired
   d. purchase price
   e. monthly payments
   f. lienholder
   g. name on title
   h. number of individuals in family at home
   i. usual location of vehicle

2. Bank/Savings Accounts/Safety Deposit Boxes/CD's/Cash:

   a. the institution
   b. account numbers
   c. names on account and signatories
   d. whether owe debt to the institution
   e. review bank statements w/ cancelled checks
   f. whether direct deposit of paycheck and when
   g. contents of deposit boxes and ownership of contents
   h. any cash or cash equivalent in hand not in the accounts

3. Stocks, Bonds, Securities

   a. location of certificates or accounts
   b. names on certificates or stock accounts
   c. identity of securities
   d. whether pledged
   e. review monthly statement from securities accounts

4. Boats and RV's:

   a. description
   b. identification number
   c. location
   d. value
   e. lien
   f. whether boat used in debtor's business

5. Planes:

   a. description
   b. identification number
   c. location
   d. value
   e. lien

6. Claims Against Third Parties:

a. does anyone owe you money? - accounts receivable, notes receivable - identify and determine status
b. do you have any lawsuits or judgments against anyone?
c. do you have any claims that would make the basis for a lawsuit?
d. any expected claims in the future?
e. expected inheritances?
f. expected insurance proceeds?

7. Collections (i.e., stamp, gun, coin, etc.):

a. description
b. value
c. location
d. liens

8. Additional Exempt Property Information: Get (1) description; (2) location; (3) value; (4) liens on:

a. home furnishings (including art work)
b. farming and ranching vehicles and implements
c. tools, equipment, books and apparatus used in a trade or business
d. wearing apparel
e. jewelry
f. firearms (limit to 2 exempt)
g. athletic and sporting equipment
h. household pets
i. animals and forage for their consumption
   (1) horses, mules and donkeys with bridles (limit two)
   (2) cattle (limit 12)
   (3) other livestock (limit 60)
   (4) fowl (limit 120)

9. Insurance

a. company issuing
b. policy number
c. date issued
d. type of insurance
e. beneficiary
f. capacity to borrower against policy
g. large premium payments made in fraud of creditors

10. Retirement Accounts and IRA's:

a. review plan documents to determine if qualified
b. account value and history of contributions
c. capability to borrow from plan

11. Trusts:

a. beneficiary or trustor
b. property held in the trust
c. whether trust is spendthrift (insist on review of trust documents)
d. trustee
e. schedules of anticipated distributions

12. Other Intangibles: patents, trademarks, licenses, franchises, etc.; country club memberships

E. Business Interests

1. Sole Proprietorships:

   a. assets used in business
   b. liens on assets
   c. checking, savings, etc. accounts for business
   d. cash flow analysis

2. Partnerships and LLCs:

   a. assets used in business
   b. liens on assets
   c. checking, savings, etc. accounts for business
   d. cash flow analysis
   e. partners (members) and their percentage ownerships
   f. review partnership(LLC) documents

3. Corporations:

   a. assets used in business
   b. liens on assets
   c. checking, savings, etc. accounts for business
   d. cash flow analysis
   e. other shareholders and their share ownership
   f. review corporate documentation

F. Transfers, Conversions, Third Parties

1. Property Transferred (within 4 years):

   a. identify property transferral and current location
   b. transferee
   c. consideration given (or was it a gift)
   d. date of transfer
   e. review historical financial statements to detect transfers

2. Personal Property Converted from Non-exempt to Exempt:

   a. exempt property purchased (or traded for) within 2 years
   b. review historical financial statements to detect conversions

3. Property Held by Someone Else:

   a. Real property
   b. Personal property
   c. Bank and savings accounts
   d. other intangibles

4. Marital Property Agreements:

   a. pre-/post-nuptial
   b. partitions

5. Closely held business that have closed:

a. who got assets, phone number, client lists
b. payments to insiders for antecedent debts
c. accounts and notes receivable

G. Debts

1. Name of creditor
2. amount owed
3. whether suit filed or judgment taken
4. collateral
5. when incurred
6. status of payments and if any extraordinary payments made

H. Other Income/Sources of Cash

1. review tax returns for sources of income
2. tax refunds
3. anticipated inheritances

I. Cash Flow Analysis

1. monthly receipts and expenses

J. Payment Proposals

1. monthly
2. lump sum
3. bankruptcy - past filings, intent to file in future

K. Documents Review - go over documents requested in notice or subpoena duces tecum

L. If Corporate Debtor (remember: corporations have no exempt property)

1. name, assumed names
2. incorporation date, whether $1,000 paid in
3. shareholders, directors, officers
4. status of franchise tax payments
5. location(s) of business
6. nature of business
7. identify deponent (see A above)
8. review property issues (See C through K, above)

ATTACHMENT 18

STYLE OF CASE

APPLICATION FOR CHARGING ORDER

1. *Parties.* Applicant [**name of plaintiff**], Plaintiff and judgment creditor in this cause, requests that the Court grant this Application for Charging Order against the nonexempt interest of [**name of defendant**], Defendant and judgment debtor, a partner in the limited partnership of [**name of limited partnership**], which has its principal place of business in [**county**] County, Texas. Service on [**name of limited partnership**] can be made by delivering citation to [**name of general partner**], a general partner, at [**address, city, state**].

2. *Judgment.* Plaintiff obtained a judgment against Defendant on [**date**] in this cause. A true and correct copy of the judgment is attached to this application as Exhibit [**exhibit number/letter**] and included by reference. The judgment remains unsatisfied.

3. *Grounds.* Plaintiff has reason to believe that Defendant is a partner with [**name of limited partnership**]. Plaintiff is entitled by reason of its judgment against Defendant to a charging order against the nonexempt interest of Defendant in [**name of limited partnership**].

4. *Prayer*. Plaintiff prays that the Court—

a. set this matter for hearing;

b. order Defendant to produce in court and to turn over to Plaintiff true copies of the partnership agreement and true copies of any other agreements or documents evidencing the interest of Defendant in [**name of limited partnership**] and any amounts due or to become due to Defendant by reason of Defendant's interest in [**name of limited partnership**];

c. enter its order charging Defendant's interest in [**name of limited partnership**], as requested in this application, in the amount of the unsatisfied judgment;

d. grant Plaintiff reasonable expenses incurred in obtaining the orders; and

e. grant Plaintiff all further relief to which Plaintiff may be entitled.

_____

[**Name**]
Attorney for Plaintiff
State Bar No.:
[**E-mail address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

ATTACHMENT 19

STYLE OF CASE

CHARGING ORDER

On [**date**] the Court considered Plaintiff's Application for Charging Order.

The Court considered the pleadings, the evidence, and the argument of counsel and finds that—

1. Defendant is a partner in [**name of limited partnership**]; and

2. Plaintiff is entitled to a charging order against Defendant's interest in [**name of limited partnership**].

It is therefore ORDERED that—

1. the interest of Defendant in [**name of limited partnership**] is subjected to a charging order in favor of and for the benefit of Plaintiff;

2. distributions owed or payable to Defendant by [**name of limited partnership**] be paid directly to Plaintiff; and

3. [**name of limited partnership**] will be discharged from its obligations to Defendant to the extent of any amounts so paid to Plaintiff, until the judgment against [**name of defendant**] entered in this cause is paid in full.

It is further ORDERED that Defendant deliver to Plaintiff true copies of the partnership agreement and true copies of any other agreements or documents evidencing the interest of Defendant in [**name of limited partnership**] and any distributions due or to become due to Defendant by reason of Defendant's interest in [**name of limited partnership**].

SIGNED on _____.

_____
JUDGE PRESIDING