

**COLLECTING JUDGMENTS PENDING APPEAL:  
RISKS, REWARDS, AND ENCOURAGING SUPERSEDEAS**

**DONNA BROWN, *Austin***  
Donna Brown, P.C.

State Bar of Texas  
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## COLLECTING JUDGMENTS PENDING APPEAL: RISKS, REWARDS, AND ENCOURAGING SUPERSEDEAS

### I. THE SCENARIO: INTRODUCTION.

You have a judgment, your client is anxious to be paid, then the judgment debtor files notice of appeal: Now what? Do you stop all collection action and await appeal, or go full force into collecting your judgment until a supersedeas bond is filed? This paper discusses the risks and rewards of collecting your judgment when it is on appeal.

### II. HAVE YOU DONE YOUR HOMEWORK?

Even before you filed the suit, the debtor and its assets should have been thoroughly investigated.

#### A. Initial and Interim Asset Searches.

Asset searches should be done at the onset of the claim analysis to determine whether investing in a lawsuit makes economic sense. Additionally, searches often reveal information on potentially liable parties and provide a snapshot of the available assets for satisfaction of the judgment. A periodic update of the search may also provide a red flag if assets are moved during the course of the litigation. See “How to Take an Effective Post judgment Deposition and Finding Assets Via Technology” at [dbrownlaw.com](http://dbrownlaw.com), including a Quick Guide for Assets Searches Via Technology.

#### B. Pre-Suit Discovery for Punitive Damages.

Net worth is discoverable by statute to prove up exemplary damages for cases governed by Chapter 41 of the Civil Practices and Remedies Code. Prior to the 2015 amendments to §41.011, the ability to discover the potential debtor’s assets and liabilities at the early stages of the case provided a great opportunity to determine collectability of the claim very early on. For cases filed on or after September 1, 2015, discovery of the defendant’s net worth is only allowed on motion after notice and hearing by “written order that the claimant has demonstrated a substantial likelihood of success on the merits of a claim for exemplary damages.”

#### C. Use of Investigator.

In addition to basic searches that can be performed online or at the local courthouse, one may want to consider obtaining an asset search by a qualified investigator if the amount of the claim justifies the expense. Many private investigators have access to numerous search services and databases beyond the basics. A really good investigator will ask you questions about your judgment debtor’s background (as you should your client) as well as the nature of the case (for example, a suit for fraud in real estate may lead the investigator to delve into searches for real estate

transactions, lawsuits, real estate license information and real estate related news). A good investigator will assist in analyzing and summarizing the data found – instead of merely furnishing a raw printout from the investigator’s database searches.

### III. POST JUDGMENT DISCOVERY.

#### A. Discovery Generally.

Texas Rules of Civil Procedure, Rule 621a, provides the authority for conducting post judgment discovery and provides that the successful party may initiate discovery in the same suit in which the judgment was rendered and use any discovery proceedings authorized by the rules for pre-trial matters. However, pre-trial discovery limitations do not apply. Tex. R.C.P. Rule 190.6 provides that limitations on discovery do not apply to discovery conducted under Rule 621a. The use of contempt to enforce post judgment discovery under Tex. R. C. P. 215.2(b)(6) is a common practice. This discovery is available when the judgment is final as to all parties and issues. *In re Edward B. Elmer, M.D. P.A.*, 158 S.W. 3d 603 (Tex. App. – San Antonio 2005, orig. proceeding). “Final” does not mean unappealable or even that the case has not been appealed. One may proceed with post judgment discovery as long as a supersedeas bond is not on file. Tex. R.C.P. Rule 621a. Pressing forward with post judgment discovery can encourage the posting of a supersedeas bond. The collectability of a judgment is greatly enhanced by the posting of the bond or cash in lieu of bond.

#### B. Practice Tips.

1. Especially for higher dollars cases, a request for production of documents should precede the post judgment deposition notice and include documents requests specific to the judgment debtor relative to assets found via technology. This gives the practitioner time to study the documents before the deposition. It also signals to the judgment debtor that their assets are going to be investigated thoroughly pending appeal.
2. Post judgment discovery can be sent as soon as a judgment is signed and signals that the judgment creditor means business and that appeal does not equal delay.
3. Since discovery is available, a judgment creditor must pursue it during an appeal to find fraudulent transfers that may have occurred or that occur during appeal. The 4-year statute of limitations and one-year discovery extension for fraudulent transfers makes timely discovery of fraudulent transfers critically important.
4. Some debtors would rather pay a judgment than respond to discovery.

5. Some debtors would rather post a *supersedeas* bond than respond to discovery.

#### IV. POST JUDGMENT REMEDIES.

This section highlights post judgment remedies considerations when the judgment is on appeal. See “Post Judgment Remedies, Judgment Liens, Garnishment, Execution, Turnover Proceedings, Receiverships under the DTPA, Charging Orders, and Other Stuff” for a full discussion of post judgment remedies at [dbrownlaw.com](http://dbrownlaw.com).

##### A. Judgment Liens.

###### 1. Judgment Liens Generally.

A judgment lien is created by the proper recording and indexing of an abstract of judgment in the county real property records. It attaches to any nonexempt real property in the county where filed. Tex. Prop. Code Ann. §52.001. Nothing in the statutes related to abstracts of judgment requires that the judgment be 30 days old. Tex. Prop. Code Ann. §52.002. If the judgment debtor has nonexempt real property, it is vitally important to file the abstract as soon as possible after the judgment is signed. It is not uncommon for a judgment debtor to attempt some post judgment asset protection planning when the reality of the judgment sets in.

The abstract of judgment can be prepared by the judgment creditor’s attorney, unless it is a Federal Court judgment in which case it must be “on the certificate of the clerk of the court”. Tex. Prop. Code Ann. §52.002, 52.007.

The judgment lien attaches to property that was previously exempt and becomes non-exempt. *Walton v. Stinson*, 140 S.W.2d 497 (Tex. App. – Dallas 1940, writ ref’d); *Intertex, Inc. v. Kneisley*, 837 S.W.2d 136 (Tex. App. – Houston [14<sup>th</sup>] writ denied). It also attaches to after-acquired non-exempt property. Tex. Prop. Code Ann. § 52.001. Therefore, one should consider filing the abstract in every county in which the debtor owns property, does business, or may inherit property.

###### 2. Judgment Liens Pending Appeal.

The judgment lien is effective even if a *supersedeas* bond is filed. The judgment debtor can obtain relief from the judgment lien under Chapter 52 of the Property Code.

In summary, one should always perfect a judgment lien as soon as possible after the judgment is rendered, even if the case is headed for the appellate courts.

###### 3. Relief for Debtor Pending Appeal.

Chapter 52 of the Property Code 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:

- a. the defendant has posted security as provided by law or is excused by law from posting security; and
- b. 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.

###### 4. Practice Tips.

- a. Before you file suit, determine your defendant’s legal name and all names in which the defendant holds property. Include those in your suit so that judgment liens and writs of execution cover all names in which property can be held.
- b. If you don’t include all possible names in your pleadings, an abstract of judgment can be drafted to include other names the debtor uses for holding property. It cannot, however, cure a misnomer.
- c. A defendant with real estate of any kind signals the practitioner to get an abstract ready to file as soon as the judgment is signed. This is even more important if the defendant is in a business which deals in real estate routinely.
- d. If the defendant holds property in an entity, determine during the main case whether there is a good faith basis to include the defendant’s entity as a party.

## B. Executions.

### 1. Executions Generally.

As a general rule, the writ of execution is not issued until 30 days after the final judgment is signed. Tex. R. Civ. P. 627. However, the writ can be issued earlier upon affidavit that the judgment debtor is about to remove non-exempt property from the county or transfer or secrete it for purposes of defrauding creditors. Tex. R. Civ. P. 628.

The general contents of the writ of execution are covered by Tex. R. Civ. P. 629. Additional requirements for the writ will depend on the nature of the recovery, i.e. whether it is a money judgment, for sale of particular property, for delivery of personal property or for possession or value of personal property, and are found at Tex. R. Civ. P. 630, 631, 632 and 633. The attorney should review the writ as issued to ensure that the writ correctly reflects the judgment.

Local practice varies from county to county on whether writs are handled by the sheriff's department or the constable's office. Local practice also varies on whether the constable's office in one precinct will handle a writ against a judgment debtor residing or doing business in another precinct. For example, in Travis County writs of execution are handled by the constable's office and the constable is not limited to his or her precinct. In Harris County the constables usually do not cross precinct lines. In Bexar County, writs of execution are generally handled by the civil division of the sheriff's department. The cost of handling a writ of execution likewise varies from county to county.

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 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.

Sheriffs and constables appreciate receiving as much information on the judgment debtor as possible to assist them in the levy including where the debtor lives and works, phone numbers, identifying information such as dates of birth, drivers' license numbers and social security numbers, plus information on the debtor's non-exempt property that is subject to levy. A

complete discussion of exempt property is beyond the scope of this paper. A discussion of exempt property is included in a comprehensive paper on post judgment remedies on the author's website at [dbrownlaw.com](http://dbrownlaw.com) entitled Judgment Liens, Garnishment, Execution, Turnover Proceedings, Receiverships Under the DPTA, and "Other Stuff". Note that the dollar amount of personal property exemptions found in Tex. Prop. Code §42.001(a) was increased effective September 1, 2015, from \$30,000 to \$50,000 for a single adult who is not a member of a family, and from \$60,000 to \$100,000 for a family.

The levy on real property merely requires that the officer endorse the levy on the writ; however, levy on personal property requires seizure of the personal property. Tex. Rules Civ. P. 639. Special rules for levy on livestock running at large and shares of stock are found in Rules 640 and 641, Tex. R. Civ. P. Bulky property may be seized in place if proper procedures are taken to insure it is secure pending sale. *Smith v. Harvey*, 104 S.W. 2d 938 (Tex. App. – San Antonio 1937, writ ref'd). The constable would likely require bonded security guards.

Once the property is levied on, the execution sale is scheduled. The manner of notice, scheduling and sale depends on whether the property is real or personal property. Execution sales of real property require that notice be published in the newspaper pursuant to Rule 647 and that they occur at the courthouse door of the county where the property is located. Tex. R. Civ. P. Rules 646a, 647 and 648. It is good practice to review the sale notice for compliance with the rules. Often the sheriff or constable's office will require that a copy of the deed into the debtor's name be furnished for purposes of the real estate description. In addition to notice by publication, notice is given to the defendant or his attorney as well. Tex. R. Civ. P. Rule 647. Execution sales of personal property do not require publication in the newspaper, only posting at the courthouse door and at the place where the sale is to be made, which can be where the property was seized or at some other place, for example, the office of the sheriff or constable who seized the property. While notice to the defendant of sales of personal property is not required by the rules, notice is usually given by mail. Tex. R. Civ. P. Rules 649 and 650.

Judgment creditors often consider purchasing property at execution sales. They should be cautioned that the purchaser at the execution sale receives only the interest that the defendant had in the property and that it is subject to any all and liens. Civ. Prac. & Rem. Code §34.045. An appropriate lien search should be done on any property that the judgment creditor wishes to purchase, just as if the purchase was a regular asset sale. The judgment creditor can purchase at the execution sale by bidding credits to the judgment; however, the judgment creditor may still be required to come out of

pocket for costs and commissions associated with the sale. *Blum v. Rogers*, 71 Tex. 669, 9 S.W. 595 (1888). Costs of levy and commissions charged on sales proceeds vary from county to county. Any person, including the judgment creditor, who wishes to purchase real property at execution sale, must comply with the requirements of the Civil Practices and Remedies Code. In some counties the person must show that there are no delinquent ad valorem taxes owed by the person in that county. Civ. Prac. & Rem. Code §34.0445.

While property subject to liens can be levied upon pursuant to Texas Rules of Civil Procedure Rule 643, one should be aware of a line of cases that would give priority to creditors with security interests in personal property. See *Grocers Supply v. Intercity Investment Properties, Inc.*, 795 S.W. 2d 225 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1990, no writ) wherein the court held that a prior perfected security interest holder who has right to possession of the property has superior rights over a ‘mere’ judgment creditor. This author believes that this line of cases is subject to challenge with a strict reading of Rule 643 as well as Civ. Prac & Rem. Code §34.004, which was not even mentioned in the *Grocers Supply* case and which provides that mortgaged property may not be seized if the mortgagee points out other property of the debtor in the county that is ‘sufficient to satisfy the execution’. This would indicate that if the mortgagee cannot point out other property then the mortgaged property can be seized. Note that comments in revised Article 9, section 9.401. §9.401 states that “whether a debtor’s rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this chapter” and 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. Law “other than this chapter” could very well be Civ. Prac. & Rem. Code §34.004.

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 days 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.

## 2. Executions Pending Appeal.

While pursuing the remedy of execution while a case is on appeal may encourage the posting of a supersedeas bond, one should be aware that a person is entitled to recover his property seized by a writ of execution if the judgment is later reversed or set aside and that, if the property has been sold, a person who is otherwise entitled to recover his property is entitled to recover from the judgment creditor the market value of the property sold at the time of the sale. This exposure presents a consideration for whether to proceed with the execution sale pending appeal. Tex. Civ. Prac. & Rem. Code §34.021 and 34.022. See G.2 below.

## 3. Practice Tips.

- a. If the judgment creditor insists on levying on the judgment creditor’s property pending appeal, notify the client in writing of the exposure of the judgment creditor in the event the defendant’s appeal is successful. See G. below.
- b. If the judgment creditor purchases property at execution while the case is on appeal, they should hold onto it until the appeal is over so that they can return possession to the judgment debtor if the judgment is overturned. See G. below.
- c. The execution can be used to encourage payment of judgments in lieu of actual levy and sale of personal or real property. While the judgment creditor may have to return the funds plus interest if the judgment is set aside, it is less risky than a levy and sale of personal or real property. See G. below.

## C. **Garnishment.**

### 1. Garnishment Generally.

Garnishment is available after judgment if (1) the creditor has a valid and subsisting judgment against the debtor, (2) the debtor has not filed an approved supersedeas bond, and (3) the creditor swears that, within his knowledge, the judgment debtor does not possess property in Texas subject to execution sufficient to satisfy the judgment. Tex. Civ. Prac. & Rem. Code Ann. §63.001(3). Judgment is final and subsisting for the purpose of garnishment from and after the date it is signed. Tex. R.C. P. Rule 657. The garnishment action is a separate suit from the main cause, but it is ancillary and therefore should be brought in the same court, i.e. if the original judgment was taken in the 153<sup>rd</sup> judicial

district court, then the garnishment action should be filed in the same court. *Townsend v. Fleming*, 64 S.W. 1006 (Tex. Civ. App. 1901, no writ) *Harvey v. Wichita National Bank*, 113 S.W. 2d 1022 (Tex. Civ. App. – Fort Worth, 1938, no writ).

Unlike pre-judgment garnishment actions, the writ of garnishment is issued on the application and does not require a court order. Tex. R. C. P. Rule 658. The writ should be served on the garnishee by a sheriff or constable. *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. See discussion under Execution *Supra* regarding amendments to Tex. R. C. P. Rule 103 effective July 1, 2005, which some interpret to expand the service of writs of garnishment to private process. This author will not advise the use of private process for writs of garnishment without court order.

A copy of the writ with specific notice language to the judgment debtor, the application and accompanying affidavit should be served on the judgment debtor as soon as practical after service of the writ on the garnishee, but this service can be done pursuant to Rule 21a. See Tex. R. C. P. Rule 663a for notice language.

Banks are the most common of garnishees, with bank account balances the target of the writ. However, the scope of the writ of garnishment is not limited to indebtedness, but also to “effects” in the possession of the garnishee. Tex. R. C. P. Rule 661. The writ can reach items in the depositor’s safety deposit box, stocks, bonds, or any personal property items of the judgment debtor in the possession of the garnishee. Basically, any third party indebted to the judgment debtor or holding non-exempt personal property of the judgment debtor can be a garnishee.

Historically, writs of garnishment were served on bank presidents and vice presidents. As branch banking became popular, banks often designated a ‘branch’ and officer at the branch to be available to accept writs of garnishment. Service of writs of garnishment is now governed by Section 59.008 of the Finance Code, pursuant to Section 63.008 of the Civil Practices and Remedies Code. Writs of garnishment served on financial institutions that appoint an agent for process are not effective if served or delivered to an address other than the address designated, although the customer bears the burden of preventing or limiting a financial institution’s compliance with the writ. Finance Code § 59.008 and related §§ 201.102 and 201.103.

Additional issues related to garnishment of banks include locating the bank account and the bank’s rights of offset. Bank account location services should be utilized with extreme caution. If the information has been gained by false pretenses, criminal penalties could be imposed on the one using the information under the Fraudulent Access to Financial Information portion of

the Gramm-Leach-Bliley Act, 15 U.S.C. 6821, et seq. Bank account information is best gained through discovery or through dealings with the judgment debtor. Some collection attorneys keep copies of checks received from debtors, other buy a small item from the debtor’s store with a check and obtain deposit and check clearing information from the returned check. A stealth investigator may watch for bank pickups and deliveries to determine a deposit relationship. The location of the judgment debtor’s bank accounts is only the beginning of the inquiry. If the judgment debtor has a depository relationship with a particular financial institution, he or she may also have a lending relationship with the financial institution. If so, the service of the writ of garnishment may trigger an offset of the depositor’s account against outstanding obligations. Therefore, a discovery of liabilities to the institution is also needed. Formal discovery can be done as discussed above. Informally, one can also check for outstanding UCCs by searching <http://direct.sos.state.tx.us/>. Banks often enhance their common law rights of offset with contractual rights in their security agreements and account documents. Contrasting views on the bank’s right of offset after service of a writ of garnishment are addressed in Soussan and Cooper-Hill, *A Bank’s Right of Offset After Service of Writ of Garnishment*, 48 Tex. B.J. 638 (1985), and Vaughan and Messer, *A Bank’s Right of Offset After Service of Writ of Garnishment-A Reconciliation of San Felipe National Bank v. Caton*, 54 Tex. B. J. 368 (1991). See also *San Felipe National Bank v. Caton*, 668 S.W. 2d 804 (Tex. Civ. App. – Houston [14<sup>th</sup> Dist.] 1984, no writ).

Judgment creditors are often anxious to proceed with garnishment if they are aware of the judgment debtor’s banking relationship. However, the client should be cautioned about the strict grounds required for a post judgment garnishment. Cash in a bank account may seem like an easy way to get the judgment paid, but one must swear that “within plaintiff’s knowledge, the defendant does not have property in Texas subject to execution sufficient to satisfy the judgment.” Civ. Prac. & Rem. Code §63.001(3). The creditor has a duty to make 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). If the plaintiff knows that the debtor actually has property within the state subject to execution sufficient to satisfy the debt, wrongful garnishment may occur. *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).

## 2. Garnishments Pending Appeal.

A judgment which is valid, subsisting, and no 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 discussion of Restitution at G. below.

### 3. Practice Tips.

- a. Garnishment can issue as soon as the judgment is signed. If the basis for garnishment are clear, a quick garnishment can put the judgment creditor in a good position to negotiate with the defendant and perhaps ward off an appeal or encourage a settlement pending appeal.
- b. Remember to investigate whether the judgment debtor owes money to its bank; if so, the bank will likely exercise a right of offset when the account is garnished.

## D. Turnover Order and Turnover Receiverships.

### 1. Turnovers Generally.

Turnover proceedings are a unique post judgment remedy governed by Sections 31.002, 31.0025 and 31.010 of the Civil Practices and Remedies Code and interpretive case law. There are no rules of civil procedure associated with the proceeding. The statute states that the judgment creditor is “entitled to aid” from the court to reach property owned by the judgment debtor that is not exempt from attachment, execution, or seizure for the satisfaction of liabilities. The courts have held that the statute does not require that a judgment creditor first exhaust legal remedies such as attachment, execution, and garnishment, before seeking turnover relief. Tex. Civ. Prac. & Rem. Code Ann. §31.002(a)(1) and (2). *Hennigan v. Hennigan*, 666 S.W. 2d 322 (Tex. App. – Houston [14<sup>th</sup>] 1984), writ ref’d n.r.e. per curiam, 677 S.W. 2d 495 (Tex. 1984). And the statute was amended in 2017 to specifically take out the requirement that the property cannot readily be attached or levied on by ordinary process. The use of the turnover proceeding has grown in popularity in many jurisdictions in Texas—often to the exclusion of the use of traditional garnishment and execution remedies. Tex. Civ. Prac. & Rem. Code §31.002(e). Still, review of a final appealable turnover order is whether the trial court abused its discretion. *Barlow v. Lane*, 745 S.W.2d 451 (Tex. App. – Waco 1988, writ denied); *Beaumont Bank, N.A. v. Buller*, 806 S.W. 2d 223 (Tex. 1991).

The turnover order may require the debtor to turn over non-exempt property in the debtor’s control to a sheriff or constable for execution, otherwise apply the property to satisfy the judgment, or appoint a receiver to take possession of the non-exempt property to sell it and pay the proceeds to the judgment creditor. Tex. Civ. Prac. & Rem. Code §31.002(b). Appointment of receivers is more common in some jurisdictions than in

others. The property should not be turned over directly to the judgment creditor. *Ex Parte Johnson*, 654 S.W. 2d 415 (Tex. 1983); *Lozano v. Lozano*, 975 S.W.2d 63 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1998, no writ).

The turnover application is usually filed as a post judgment motion in the same proceeding in which the judgment is rendered, but it can be filed in an independent proceeding. Tex. Civ. Prac. Rem. Code Section 31.002(d); see also *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9<sup>th</sup> Cir. 1994, no writ) which involved a garnishment action in which the court found that the venue provision of the Fair Debt Collection Practices Act applied to post judgment enforcement proceedings, thus requiring the post judgment action be filed in a different court. An independent proceeding may be useful if the debtor and his property is in a county other than where the judgment was taken, because turnover orders are enforceable by contempt. Contempt actions are less complicated if a body attachment does not require transporting the contemnor across county lines. The statute does not address how one might bring the proceeding ‘in an independent proceeding’, but one would anticipate the need for citation to issue in order to bring the judgment debtor within the jurisdiction of the new court. Tex. Civ. Prac. Rem. Code § 31.002(e). The ability to enforce the order by contempt is a valuable tool for securing cooperation and does not constitute imprisonment for debt. *Ex Parte Buller*, 834 S.W. 2d 622 (Tex. App.—Beaumont 1992, orig. proceeding); however, care should be taken when the contempt proceeding provides for payment of cash. See *Ex Parte Roan*, 887 S.W. 462 (Tex. App.—Dallas, orig. proceeding).

The turnover statute does not require notice to the judgment debtor. Tex. Civ. Prac. & Rem. Code Ann. Section 32.002, et seq.; *ex parte* post judgment collection efforts have been upheld by the Supreme Court in *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285(1924). However, if a temporary restraining order is requested, notice to the adverse party is required 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. A judgment debtor about to abscond with non-exempt property may be just the facts that would suggest an *ex parte* hearing and temporary restraining order. Tex. R. C. P. 680.

Turnover proceedings have been used as a judicial method of determining if property is exempt and thus available to satisfy the debt, *Pace v. McEwen*, 671 S.W. 2d 826 (Tex. Civ. App.—Houston [14<sup>th</sup> Dist.] 1981, no writ), to reach property outside of Texas, *Reeves v. Federal Savings and Loan Insurance Corp.*, 732 S.W. 2d 380 (Tex. App.—Dallas 1987, no writ), to reach intangibles such as causes of action by requiring the



assignment of same, *Renger Memorial Hospital v. State*, 674 S.W. 2d 828 (Tex. App. –Austin 1984, no writ), to reach small amounts of property like accounts receivable, *Arndt v. National Supply Co.*, 650 S.W. 2d 547 (Tex. App.—Houston [14<sup>th</sup> Dist] 1982, writ ref'd n.r.e), and property such as stock and related corporate receipts. *Newman v. Toy*, 926 S.W. 2d 629 (Tex. App.—Austin 1996, writ denied). The turnover of paychecks and wages for debts other than child support is now statutorily prohibited, Tex. Civ. Prac. & Rem. Code. Section 31.002(f) and Section 31.0025.; however, turnover of income from a business or funds due an independent contractor is appropriate. *Hennigan v. Hennigan*, supra; *Ross v. 3D Tower Limited*, 824 S.W. 2d 270 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1992, writ denied); *Campbell v. Stucki*, 220 S.W.3d 562(Tex. App.-Tyler 2007, no pet.). Note that assignments of causes of action are not without limitation. See: the following cases involving denial of turnover of causes of action against oneself, *Commerce Savings Association v. Welsh*, 783 S.W. 668 (Tex. App.—San Antonio 1989, no writ); *Criswell v. Ginsberg & Foreman*, 843 S.W. 304 (Tex. App.—Dallas 1991, no writ); *Associated Ready Mix, Inc. v. Douglas*, 843 S.W. 2d 758 (Tex. App.—Waco 1992, orig. proceeding). Assignment 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); *Charles v. Tamez*, 878 S.W.2d 201 (Tex. App.—Corpus Christi 1994, writ denied),

Turnover orders affecting property held by a financial institution are required to be served in the same manner as garnishments. Tex. Civ. Prac. & Rem. Code §31.002(g). Additional special requirements for turnover orders as they relate to financial institutions are found at Tex. Civ. Prac. and Rem. Code §31.010.

The statute states that the court “may order the judgment debtor to turn over non-exempt property”; or “otherwise apply the property to the satisfaction of the judgment.” Tex. Civ. Prac. & Rem. Code § 31.002(b)(1) and (2). Case law is split on whether the court can order third parties to turn over non-exempt assets of the judgment debtor. *International Paper Company v. Garza*, 872 S.W. 2d 18 (Tex. App. – Corpus Christi 1994, orig. proceeding); *Republic Insurance Company v. Millard*, 825 S.W. 2d 788 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1992, orig. proceeding). The Supreme Court has not ruled on the point; however, in a general discussion of the turnover remedy, the court has stated that the turnover action can be brought “against one or more parties other than the judgment debtor.” *Schultz v. The Fifth Judicial District Court of Appeals*, 810 S.W. 2d 738 (Tex. 1991, orig. proceeding). The problem with third party turnover actions is that there is no clear procedure for the trial court’s obtaining personal jurisdiction over the third party so that its order is enforceable by contempt. Assuming the judgment

debtor can be located, the judgment debtor can be ordered to turn over property that is in his control, even if in the possession of a third party. *Norsul Oil & Mining Ltd. v. Commercial Equipment Leasing Co.*, 703 S.W. 2d 345 (Tex. App. – San Antonio 1985, no writ). If a third party has the judgment debtor’s personal property, a garnishment would be an appropriate remedy. See discussion above.

## 2. Turnovers Pending Appeal.

The turnover proceeding can be utilized as soon as the judgment is signed, much like the post judgment garnishment remedy, thus making it a very powerful and immediate collection tool. *Childre v. Great Southwest Life Insurance Co.*, 700 S.W.2d 284 (Tex. App.—Dallas 1985, no writ). Its availability continues, even during appeal, unless the judgment is superseded. *Anderson v. Lykes*, 761 S.W.2d 831 (Tex. App.—Dallas 1988, orig. proceeding).

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.

An additional consideration of pursuing a turnover order pending appeal is the exposure to an award of costs – namely the receiver’s fees and attorney’s fees associated with the receivership. In *Anderson v. Archer*, No. 03-19-00003-CV (Tex. App. – Austin 2019, motion for rehearing denied) (mem.op.), the underlying \$2 million judgment was overturned on appeal after a turnover receiver had sold assets and collected his fees. After the appeal, the previous judgment debtor sought to dissolve the receivership and the previous judgment creditor sought to be awarded costs. The trial court ruled that both parties be responsible for half the costs of court associated with the receivership. Both sides appealed, and the Court of Appeals held that the trial court could adjudge costs when concluding the receivership, citing both Tex. Civ. Prac. & Rem. Code §§ 31.002(e) and 31.007(b)(4), even though § 31.002(e) only speaks to awarding a judgment creditor its reasonable costs, including attorney’s fees.

## 3. Practice Tips.

- a. Receivers are generally reluctant to serve in a receivership if the judgment is on appeal; they can invest a great deal of effort only to have a *supersedeas* bond posted.
- b. Know your receiver. If property is liquidated recklessly during an appeal, the recovery will

be against your client for a restitution on reversal claim. See G. below.

## E. Charging Orders.

### 1. Charging Orders Generally.

Charging orders may be used to reach a judgment debtor's interest in a general or limited partnership by ordering payment to the creditor of distributions that the debtor would be entitled to receive from their interest in the partnership. Similarly, a member's interest in a limited liability company may be charged with payment of a judgment. A complete discussion of the history and application of the Texas Revised Limited Partnership Act, The Texas Limited Liability Company Act and the Business Organizations Code is beyond the scope of this paper; however, this author's paper on Post Judgment Remedies discusses the evolution of the charging order and the application of the particular statutes at [dbrownlaw.com](http://dbrownlaw.com).

### 2. Charging Orders Pending Appeal.

Charging orders create a lien on the judgment debtor's interests in a partnership or LLC. The entitlement to the judgment debtor's share of distributions can be powerful if the judgment debtor has placed assets in entities to try to protect those assets from seizure. It can provide an interim means of reaching the debtor's cash flow until a fraudulent transfer case can be tried.

### 3. Practice Tips.

- a. Charging orders are relatively easy to obtain, but can be tricky to enforce if the entity is closely held by the debtor and the debtor's spouse, or the debtor and the debtor's business partners or buddies.
- b. Since the charging order places a lien on the business interest and traps distributions, the exposure for restitution after reversal is a matter of dollars received plus interest. See G. below.

## F. Fraudulent Transfers.

### 1. Fraudulent Transfers Generally.

Finally, though not considered a traditional post judgment remedy, a fraudulent transfer suit becomes a post judgment remedy if the fraudulent transfer was not discovered before judgment, or if the fraudulent transfer occurred after judgment. Tex. Bus. & Com. Code Ann. §24.001 *et seq.* (the Uniform Fraudulent Transfer Act). Fraudulent transfers are often the judgment debtor's way of marking their most valuable asset!

### 2. Fraudulent Transfers Pending Appeal.

A claim under the Act need not be reduced to judgment to support a suit for fraudulent transfer.

Therefore, a fraudulent transfer suit can similarly be commenced when a judgment is on appeal

### 3. Practice Tips.

- a. A fraudulent transfer suit should be brought with the primary case if discovered in time. And it can certainly be brought pending appeal.
- b. Debtors often transfer their most prized non-exempt assets.
- c. Asset searches should reach back beyond the date that the suit is filed and before any other suits on judgments that might cause asset protection planning.
- d. Because of the limitations included in the fraudulent transfer statute, transfers to insiders for antecedent debt must be brought in a year. The limitations for other fraudulent transfers are 4 years, or 4 years or within one year of discovery.

## G. 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. It is not clear whether the framework of this statute would be applied to the sale of property by a receiver under a turnover order.

If a Constable collects 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.*, 516 S.W.3d 635 (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.

The court in *J&J Container* set out the process for obtaining restitution:

“When a judgment is reversed, the prevailing party is entitled to restitution of any sum that it paid in satisfaction of the judgment with interest. *Miga v. Jensen*, 299 S.W.3<sup>rd</sup> 98, 101 (Tex. 2009); *Cleveland v. Tufts*, 7 S.W. 72, 74, 69 Tex. 580 (Tex. 1888). The prevailing party is entitled to seek this relief in the same suit; it need not file a new lawsuit to obtain restitution. *Peticolas v. Carpenter*, 53 Tex. 23,

29 (1880); *Long v. Elliott*, 416 S.W.3d 152, 166 (Tex. App.—Eastland 2013, no pet.). Instead, it may obtain restitution based on its own motion after an evidentiary hearing showing with certainty the sum that it is entitled to recover. *Outdoor Sys. v. BBE, L.L.C.*, 105 S.W.3d 66, 75 (Texas. App.—Eastland 2003, pet. denied).”

#### H. Conclusion.

Collecting judgments pending appeal requires an investment of resources that may prove futile if the judgment is ultimately overturned on appeal. That said, pursuing post judgment discovery and remedies can press the judgment debtor to post a *supersedeas* bond that will at least pay damages if the judgment is upheld.

Filing an abstract can be done immediately when a judgment is signed and with little effort or expense and can provide a valuable lien on the judgment debtor’s non-exempt real property.

Post judgment discovery can encourage offers of settlement or posting of a *supersedeas* bond. It can also be crucial to discovering assets that are not readily discoverable through technology and public records. The discovery may also be critical to locating fraudulent transfers in a timely manner.

While levy and sale of a debtor’s non-exempt personal and real property may bring a debtor to the table, it can also give rise to a restitution claim based on fair market value. On the other hand, it may lead to payments being made in lieu of levy that give rise to a simple restitution on reversal claim that doesn’t expose the judgment credit to a fair market value claim.

Garnishments can be filed as soon as a judgment is signed and can reach the judgment debtor’s available funds to pursue an appeal. They are a quick exercise of power if the debtor does not have sufficient assets in Texas subject to execution to satisfy the judgment. They can result in exposure for costs and the garnishee’s attorney fees if the garnishee is holding little or none of the debtor’s funds or assets.

Since most Texas turnover receivers are paid a percentage of the funds collected, they may be reluctant to invest time in pursuing a judgment while on appeal. For the receiver, posting of a *supersedeas* bond is not a desired result of their efforts.

Charging orders are fairly simple to obtain, but can be costly to enforce if the judgment debtor is in a closely held partnership or LLC.

Fraudulent transfers are not an uncommon occurrence when a defendant is threatened by a suit or an impending judgment. Those involving real estate are easier to ascertain, while those involving other assets require post judgment discovery. Sitting back and waiting for all appeals to be complete can be a missed opportunity.