

Changes to Tex. R. App. P. 24 and 29 Necessitated By HB 4, Article 7. These changes apply to "any case in which a final judgment is signed on or after the effective date of this Act". (9/1/03)

Tex. R. App. P. 24. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

24.1 Suspension of Enforcement

(a) Methods. Unless the law or these rules provide otherwise, a judgment debtor may supersede the judgment by:

(1) filing with the trial court clerk a written agreement with the judgment creditor for suspending enforcement of the judgment;

(2) filing with the trial court clerk a good and sufficient bond;

(3) making a deposit with the trial court clerk in lieu of a bond; or

(4) providing alternate security ordered by the court.

(b) Bonds.

(1) A bond must be:

(A) in the amount required by 24.2;

(B) payable to the judgment creditor;

(C) signed by the judgment debtor or the debtor's agent;

(D) signed by a sufficient surety or sureties as obligors; and

(E) conditioned as required by (d).

(2) To be effective a bond must be approved by the trial court clerk. On motion of any party, the trial court will review the bond.

(c) Deposit in Lieu of Bond.

(1) Types of Deposits. Instead of filing a surety bond, a party may deposit with the trial court clerk:

(A) cash;

(B) a cashier's check payable to the clerk, drawn on any federally insured and federally or state-chartered bank or savings-and-loan association; or

(C) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state-chartered bank or savings- and-loan association.

(2) Amount of Deposit. The deposit must be in the amount required by 24.2.

(3) Clerk's Duties. The clerk must promptly deposit any cash or a cashier's check in accordance with law. The clerk must hold the deposit until the conditions of liability in (d) are extinguished. The clerk must then release any remaining funds in the deposit to the judgment debtor.

(d) Conditions of Liability. The surety or sureties on a bond, any deposit in lieu of a bond, or any alternate security ordered by the court is subject to liability for all damages and costs that may be awarded against the debtor--up to the amount of the bond, deposit, or security--if:

(1) the debtor does not perfect an appeal or the debtor's appeal is dismissed, and the debtor does not perform the trial court's judgment;

(2) the debtor does not perform an adverse judgment final on appeal; or

(3) the judgment is for the recovery of an interest in real or personal property, and the debtor does not pay the creditor the value of the property interest's rent or revenue during the pendency of the appeal.

(e) Orders of Trial Court. The trial court may make any order necessary to adequately protect the judgment creditor against loss or damage that the appeal might cause.

(f) Effect of Supersedeas. Enforcement of a judgment must be suspended if the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded. If execution has been issued, the clerk will promptly issue a writ of supersedeas.

24.2 Amount of Bond, Deposit or Security

(a) Type of Judgment.

(1) For Recovery of Money. When the judgment is for money, the amount of the bond, deposit, or security must be at least the amount of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment, provided however, the amount of security must not exceed the lesser of:

a. 50 percent of the judgment debtor's current net worth based upon fair market value*, as established by an order of the trial court after notice and evidentiary hearing;** or

b. \$25 million dollars.***

Discussion:

** Query: How should the procedures be handled for the defendant establishing net worth?

- as claimed by the judgment debtor unless challenged by the judgment creditor within x days of filing appellate security (so trial clerk would have a ministerial duty to accept tendered security on a claim of value of net worth by judgment debtor) OR
- as established by affidavit proof filed by the judgment debtor together with the appellate security unless challenged by the judgment creditor within x days of filing appellate security OR
- as determined by the trial court, after notice and evidentiary hearing

Query: Is Net Worth Discoverable? If so, when?

Query: May a judgment debtor conceptually be excused from filing any supersedeas, when it has a negative net worth? See Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35 (Tex. 1998) (Defendant's negative net worth in relation to award of punitive damages.).

**Query: What is "net worth"? Textbook definition: Assets less liabilities. I am told that generally accepted accounting principles, require that net worth be reported based upon historical costs (book value) as opposed to current fair market value (with the exception of marketable securities). Assume judgment debtor assets consist of 3 acres of land purchased 20 years ago at \$1,000 acre. The land is paid for.

Current "net worth" using historical costs of assets=\$3,000. Assume the current fair market value of that land is \$100,000 an acre, using the fair market value approach the net worth of the judgment debtor is \$300,000. The book value "net worth" formula does reflect depreciation, but generally does not reflect appreciation, save for marketable investment securities. HB 4 is silent as to whether net worth should be assessed based upon book value or fair market value. The proposal above incorporates the fair market value standard. (Profit is an opinion, but cash is a fact.)

Another gray area that affects the calculation of net worth is reserves. Assume that the judgment debtor manufactures widgets and provides a 1 year repair or replacement warranty. It will carry reserves to cover the repair or replacement but will necessarily have to estimate that number based on historical data (1 of out every 100 items has historically been replaced.)

Does net worth include insurance coverage for the claimed wrong in determining net worth? (Insurance is generally not considered an asset for accounting purposes unless it has a cash surrender value.)

Do we include exempt assets (such as a homestead, qualified retirement accounts) in calculating net worth? (It would seem so). Is the amount of the judgment itself included in determining net worth? (It would not seem proper to include the judgment as that is what the bond is securing.)

*** The cap is the cap is the cap. It appears that if a party posts security at the "cap" (lesser of \$25 mil or 50% of judgment debtor's net worth) interest and costs do not have to be further secured.

(2) For Recovery of Property. When the judgment is for the recovery of an interest in real or personal property, the trial court will determine the type of security that the judgment debtor must post. The amount of that security must be at least:

(A) the value of the property interest's rent or revenue, if the property interest is real; or

(B) the value of the property interest on the date when the court rendered judgment, if the property interest is personal.

(3) Other Judgment. When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. But the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that that relief was improper.

(4) Conservatorship or Custody. When the judgment involves the conservatorship or custody of a minor or other person under legal disability, enforcement of the judgment will not be suspended, with or without security, unless ordered by the trial court. But upon a proper showing, the appellate court may suspend enforcement of the judgment with or without security.

(5) For a Governmental Entity. When a judgment in favor of a governmental entity in its governmental capacity is one in which the entity has no pecuniary interest, the trial court must determine whether to suspend enforcement, with or without security, taking into account the harm that is likely to result to the judgment debtor if enforcement is not suspended, and the harm that is likely to result to others if enforcement is suspended. The appellate court may review the trial court's determination and suspend enforcement of the judgment, with or without security, or refuse to suspend the judgment. If security is required, recovery is limited to the governmental entity's actual damages resulting from suspension of the judgment.

(b) Lesser Amount.

1. The trial court **shall** lower the amount of the security ~~may order a lesser amount than~~ required by (a)(1) to an amount that will not cause the judgment debtor substantial economic harm, if, after notice to all parties and a hearing, the court finds that posting a bond, deposit, or security in the amount required by (a)(1) is likely to cause the judgment debtor substantial economic harm. ~~will irreparably harm the judgment debtor; and~~

~~(2) that posting a bond, deposit, or security in a lesser amount will not substantially impair the judgment creditor's ability to recover under the judgment after all appellate remedies are exhausted.~~

The trial court may enjoin the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor's use, transfer, conveyance, or dissipation of assets in the normal course of business.

[NOTE: HB4 only addresses money judgments, thus the standard for lesser security that has been a part of our rules is retained as to non-monetary judgments. Is there any sentiment for using the "new" standard for lesser security as to all judgments?]

2. The trial court may order a lesser amount than required by (a)(2)-(5) if, after notice to all parties and a hearing, the court finds:

(1) that posting a bond, deposit, or security in the amount required by (a)(2)-(5) will irreparably harm the judgment debtor; and

(2) that posting a bond, deposit, or security in a lesser amount will not substantially impair the judgment creditor's ability to recover under the judgment after all appellate remedies are exhausted.

24.3 Continuing Trial Court Jurisdiction; Duties of Judgment Debtor

(a) Continuing Jurisdiction. Even after the trial court's plenary power expires, the trial court has continuing jurisdiction to do the following:

(1) order the amount and type of security and decide the sufficiency of sureties; and

(2) if circumstances change, modify the amount or type of security required to continue the suspension of a judgment's execution.

(b) Duties of Judgment Debtor. If, after jurisdiction attaches in an appellate court, the trial court orders or modifies the security or decides the sufficiency of sureties, the judgment debtor must notify the appellate court of the trial court's action.

24.4 Appellate Review

(a) Motions; Review. On a party's motion to the appellate court, that court may review:

(1) the sufficiency or excessiveness of the amount of security, provided that when the judgment is for money, the appellate court may not modify the amount of security to exceed the amount allowed under 24.2(a)(1);

(2) the sureties on any bond;

- (3) the type of security;
- (4) the determination whether to permit suspension of enforcement; and
- (5) the trial court's exercise of discretion under 24.3(a).

(b) Grounds of Review. Review may be based both on conditions as they existed at the time the trial court signed an order, and on changes in those conditions afterward.

(c) Temporary Orders. The appellate court may issue any temporary orders necessary to preserve the parties' rights.

(d) Action by Appellate Court. The motion must be heard at the earliest practicable time. The appellate court may require that the amount of a bond, deposit, or other security be increased or decreased, and that another bond, deposit, or security be provided and approved by the trial court clerk. The appellate court may require other changes in the trial court order. The appellate court may remand to the trial court for entry of findings of fact or for the taking of evidence.

(e) Effect of Ruling. If the appellate court orders additional or other security to supersede the judgment, enforcement will be suspended for 20 days after the appellate court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced. When any additional bond, deposit, or security has been filed, the trial court clerk must notify the appellate court. The posting of additional security will not release the previously posted security or affect any alternative security arrangements that the judgment debtor previously made unless specifically ordered by the appellate court.

Tex. R. App. P. 29 Orders Pending. Interlocutory Appeals in Civil Cases.
(I did not see that any changes were required),

29.1 Effect of Appeal

Perfecting an appeal from an order granting interlocutory relief does not suspend the order appealed from unless:

- (a) the order is superseded in accordance with 29.2; or
- (b) the appellant is entitled to supersede the order without security by filing a notice of appeal.

29.2 Security

The trial court may permit an order granting interlocutory relief to be superseded pending an appeal from the order, in which event the appellant may supersede the order in accordance with Rule 24. ~~FNI~~—If the trial court refuses to permit the appellant to supersede the order, the appellant may move the appellate court to review that decision for abuse of discretion.

29.3 Temporary Orders of Appellate Court

When an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security. But the appellate court must not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas or another order made under Rule 24.

29.4 Enforcement of Temporary Orders

While an appeal from an interlocutory order is pending, only the appellate court in which the appeal is pending may enforce the order. But the appellate court may refer any enforcement proceeding to the trial

court with instructions to:

- (a) hear evidence and grant appropriate relief; or
- (b) make findings and recommendations and report them to the appellate court.

29.5 Further Proceedings in Trial Court

While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and may make further orders, including one dissolving the order appealed from, and if permitted by law, may proceed with a trial on the merits. But the court must not make an order that:

- (a) is inconsistent with any appellate court temporary order; or
- (b) interferes with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal.

29.6 Review of Further Orders

(a) Motion to Review Further Orders. While an appeal from an interlocutory order is pending, on a party's motion or on the appellate court's own initiative, the appellate court may review the following:

- (1) a further appealable interlocutory order concerning the same subject matter; and
 - (2) any interlocutory order that interferes with or impairs the effectiveness of the relief sought or that may be granted on appeal.
- (b) Record. The party filing the motion may rely on the original record or may file a supplemental record with the motion.