Memo from LN to Judge Lawrence
June 10, 2002 4:00 pm

RIGHT TO APPEAL AND LITIGATE POSSESSION IN COUNTY COURT IF RENT IS NOT TENDERED BY DEFENDANT IN JP COURT IN RENT EVICTION CASE

The following language should be inserted as a new sentence at the end of the third paragraph of the Subcommittee's Proposed Rule 749b in lieu of the sentence that says "and the issue of possession may not be further litigated in the forcible detainer action in the county court."

> "If the justice court granted possession to the plaintiff and the defendant thereafter vacated the premises voluntarily or as a result of the writ of possession issued by the justice court, the defendant may not reacquire possession by appealing and prevailing in a trial de novo in county court. However, the defendant may still litigate the issue of possession in county court for the sole purpose of being able to remove the justice court judgment from the tenant's credit record and rental history.

Reasoning: This above language is important to uphold tender of rent into JP court in unpaid rent cases. This tender is essential to protect the landlord since supersedeas bonds are worthless in most cases and since an affidavit of indigency is useless to keep the landlord from losing 3 or 4 more weeks of rent during appeal. The Dillingham case says in effect that a party doesn't have to put up money to cover the judgment *as a condition for appealing*. Our TAA proposal only requires the defendant to put up one month's rent (or less) *to stop issuance of the writ* which the tenant is appealing by appeal bond or affidavit of indigency and supersedeas bond or affidavit of indigency. Under TAA's proposed Rule 750 (May 13th draft), no money to secure the judgment for possession or rent is required to perfect the tenant's appeal under any circumstances. But allowing continued litigation of the possession issue is important so that there will be something to appeal and so the tenant is not deprived of appeal by any theory of mootness when the JP issues the writ because of nonpayment of one month's rent in an eviction for unpaid rent. Also, remember the JP and county court decision would not be res judicata; and any tenant who was wrongfully evicted can still sue the landlord for money damages. The tenants (via Fred Fuchs) have agreed in principle to TAA's proposed Rule 750 (except for Subsection (C)(3) regarding prerequisites for tendering less than one month' rent if there is a third-party subsidy). The tenants have also agreed to the above quoted language for continued litigation in county court.

In the Bluewater case, the tenant was required to put up one month's rent even in a case *not involving* unpaid rent…and the rent tender requirement in that case was tantamount to having to put up money in order *to perfect the appeal*. Both of those problems are avoided by (1) limiting posting one month's rent (or less) to non-payment-of-rent evictions, (2) clarifying that non-tender of on-month's rent (or less) to the JP court is not a condition for perfecting an appeal, and (3) providing that the possession issue can still be litigated on appeal for purposes of removing the JP eviction judgment from the tenant's record.

BENCH TRIAL IN BOND FOR POSSESSION CASES INVOLVING SAFETY/SECURITY

To avoid a delay from a jury trial and to remove any imminent danger to persons or property, as stated earlier, TAA has no problem limiting bond for possession cases to those involving threats or damage to safety or security of others and on-going significant damage to property of others.

On the subject of bench-trials-only in these cases, it appears that Article 1 Section 15 of the Texas Constitution may require retention of the right to trial by jury in any kind of an eviction case. It says: "The right to trial by jury shall remain inviolate." Texas courts appear to have held that if a right to jury trial existed in a type of case at common law, such jury trial right cannot constitutionally be taken away by the legislature. A forcible detainer and forcible entry and detainer action did exist under common law at that time, and I could find no statute or case law that existed in 1876 that foreclosed the right to a jury trial in a forcible case. Nonetheless, if it can be confirmed that a jury trial was not available for eviction cases in 1876, TAA would still support the proposition of only bench trials in bond for possession cases.