May 22, 2002

Report on Eviction Rules Meeting Between Judge Sandy Prindle, Larry Niemann, and Fred Fuchs

The Supreme Court Advisory Committee (SCAC) at its last meeting in Austin requested that all of the parties--including a representative of the JP and Constables Association and the lawyers for Travis County Legal Aid, TAA, HAA, SAAA, and GDAA--get together for purposes of trying to reach a consensus recommendation to the Supreme Court Advisory Committee on the outstanding issues that the SCAC had not yet voted on. The following Monday, Judge Tom Lawrence called Judge Prindle, Larry Niemann, and Fred Fuchs, asking those three to get together when Judge Prindle was in Austin the next day (Tuesday) to try to reach agreement on as many of the resolved issues as possible prior to a May 30th meeting he was calling for all the above parties. As requested, we met in Austin on Tuesday afternoon, May 21st, to discuss the various issues that were "left on the table" by the Supreme Court Advisory Committee for final resolution by them at their June meeting in Dallas.

The results of the Prindle-Niemann-Fuchs meeting were as follows:

Discovery. All three continued to be of the opinion that that the discovery rules should remain untouched and the subject of discovery should not be addressed in the eviction rules. If any kind of treatment is made of the subject in the eviction rules, it was feared that many tenants representing themselves would abuse the discovery right, attempt to delay their own eviction by discovery, and slow down other evictions as well as their own, and create undue paperwork for the court. Bottom line—too much potential for abuse and delay.

Bond for Possession. All agreed to recommend to our respective groups the following regarding bond for possession cases: bench trial only; no counterbonds, no early trial requests; no jury requests; defendant can stop issuance of writ of possession only by showing up at trial; trial date designated in citation; trial must be set on 7th day after service (to avoid problem of 6th day falling on Sunday); if tenant does show up, writ issuance is delayed 5 days like any other case; limit bond for possession cases to ones involving "criminal activity that threatens the health, safety or security of others in the rental community where the premises are located, or on-going significant property damage." (Except for the criminal activity/property damage limitation, all of the foregoing provisions are set forth in the TAA May 13th proposal.) Return date of citation by constable to the court should be "at least one day before the trial date designated in the citation"--not "within one day after date of service".

Rescheduling a Trial Because of a Jury Request. All agreed to recommend a two-week limit on the rescheduling of a trial due to a jury request (i.e., maximum of two weeks from the date of jury request). We recognized that such a time deadline may not always be achieved, but there needs to be some pressure on the JPs and on the central jury panel administrators to speed things up.

Tender of Rent into JP Court. All agreed to recommend the following: In nonpayment of rent cases (regardless of indigency or not), the tenant must within 5 days after judgment tender to the JP court one month's rent (or rental value) or, if all other back rent has been paid, the tenant must

tender the remainder of the current month's rent. The tender of rent into JP court would not be a condition of appeal. The tender would, however, be necessary for the defendant to stop the issuance of the writ of possession by the JP court during the appeal of a nonpayment of rent case. The JP court would keep limited jurisdiction over the case for this sole purpose. Appeal and trial de novo in county court, under the open courts doctrine of the Dillingham case, would still be available to the tenant (indigent or not) without putting up any cash deposit for the rent in nonpayment of rent cases—but the tenant could lose possession during appeal of nonpayment-of-rent evictions if the tenant doesn't tender the required rent in JP court.

The following language would be added to make sure it is clear that if the writ is not stopped by the tender of rent, the tenant can still appeal and litigate the issue of possession (and any money award) in county court. Language would be added as follows:

> "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."

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

All three agreed to recommend language similar to the following be added in the appropriate rule:

> "A writ of possession in a nonpayment of rent case must contain a notice that the tenant needs to immediately contact the justice court if the tenant has paid rent into the justice court registry following the judgment of the justice court."

The purpose of the above sentence is to guard against issuance of the writ by clerical mistake in the JP court when in fact the required rent has been tendered by the tenant.

<u>"Lesser amount"</u>. Larry Niemann stated that the indigency exception to a supercedeas bond needs to have more safeguards than what is currently contained in Judge Lawrence's draft. Also, assuming that tender of rent will be required to stop JP issuance of the writ in nonpayment of rent cases, the same extra safeguards in allowing tender of lesser amounts of rent are needed when a third party has contracted to pay part of the rent. Niemann urged consideration of the list of safeguards that are in the TAA May 13th draft of Rule 750 since there has been and will continue to be significant potential for abuse by some judges in some areas of the state in setting "lesser amounts" if the safeguards are not included. Judge Prindle indicated that he preferred leaving it to judicial discretion, and he reserved comment on the TAA list until he studied it further. Fred Fuchs said he had problems with some of the safeguards and would report his opinion to Judge Lawrence in writing since he was going to be out of town on May 30th.

<u>Notice and hearing on default judgment in county court.</u> Fred Fuchs wanted the rule regarding trial in county court to contain a provision that requires notice and hearing for any default

judgment sought in county court. He believes this is the law right now as per the Supreme Court analysis in Hughes v. Habitat Apts., 860 S.W.2d 872 (Tex. 1993). Neither Niemann nor Prindle objected.

Motions for New Trial. Fred Fuchs stated he is going to make a proposal to the SCAC subcommittee to allow limited motions for new trials in default judgment cases in JP court, with safeguards for both the plaintiff and the court. Judge Prindle indicated that the idea of very limited MNTs would probably be acceptable to the JPs, in concept. Niemann stated that the position of TAA is to oppose all motions for new trial under any circumstances.

Constituants. Each of us is going to take these ideas and recommendations back to our respective groups for consideration prior to the May 30th meeting in Austin to try to finalize the exact language of rules that we can all live with.

Larry Niemann

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