IN THE SUPREME COURT OF TEXAS

Misc. Docket Nos. 08-9010 and 08-9046

FINAL REPORT OF THE ANCILLARY PROCEEDINGS TASK FORCE

Submitted to the Supreme Court of Texas on January 24, 2011

TO THE HONORABLE SUPREME COURT:

I. INTRODUCTION

The task force was established by the Texas Supreme Court pursuant to Misc. Docket No. 08-9010 and No. 08-9046. The task force was charged with the responsibility of reviewing and making recommendation of necessary revisions to ancillary proceeding rules contained in Part VI of the Texas Rules of Civil Procedure to clarify the procedures, modernize the language of the rules, resolves conflicts with other civil procedure rules, and reflect developments in the law.

The following persons served on the Task Force:

Professor Elaine Carlson, Chair-South Texas College of Law, Houston
Bruce A. Atkins, Law Offices of Bruce Atkins, Houston
Frederick J. Barrow, Littler Mendelson P.C., Dallas
Michael S. Bernstein, Michael S. Bernstein, P.C., Garland
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John T. Huffaker, Sprouse Shrader Smith P.C., Amarillo
Woody Hughes, Titus County Sheriff's Office, Mount Pleasant
The Honorable Tom Lawrence, Harris County JP Precinct 4-2, Humble
Clyde Lemon, Harris County District Clerk's Office
Chief Deputy Carlos Lopez, Travis County Constable Precinct Five, Austin
Raul Noriega, Texas RioGrande Legal Aid, San Antonio
Ronald Rodriguez, Law Offices of Ronald Rodriguez, Laredo
Stuart R. Schwartz, Scott, Hulse, Marshall, Feuille, Finger, & Thurmond P.C., El Paso
Carl Weeks, Chair, Process Server Review Board, Austin
The Honorable Randy Wilson, 157th Civil District Court, Houston
Dulcie Wink, The Wink Law Firm, Houston
Bonnie Wolbrueck, former Williamson County District Clerk (retired)
Christopher K. Wrampelmeier, Underwood Wilson, Berry, Stein, & Johnson, P.C., Amarillo
The Honorable Stephen Yelenosky, 345th Civil District Court, Austin
Staff Attorney: **Kennon Peterson,** Rules Attorney, Texas Supreme Court

II. PROCESS OF REVIEW

The task force began meeting in April 2008. Ten full task force meetings were held in Houston at South Texas College of Law and in Austin at the law offices of Haynes & Boone. In addition, the various subcommittees held numerous meetings across the state to prepare recommendations for the full committee's consideration. Thereafter, an editing subcommittee comprised of Professor Elaine Carlson, Dulcie Wink, David Fritsche, Pat Dyer, Judge Tom Lawrence and Kennon Peterson undertook the task of modernizing the language of the rules, organizing the rules in a logical sequence and harmonizing the full committee draft proposals. The edited final proposals were sent back to subcommittees for any proposed suggestions and for approval.

III. RECOMMENDATIONS

Attached are the Task Force recommended changes to the Ancillary Proceeding Rules of Procedure, currently contained in Rules 592-734, affecting attachment, garnishment, sequestration, distress warrants, injunctions, execution, turnover and receiverships, trial of right of property and mandamus proceedings. The Committee was constrained by governing statutes pertaining to ancillary proceedings. For that reason, the proposed rules are presented together with companion statutory provisions, as both must be considered in tandem to comprehend the applicable procedures.

IV. CONCLUSION

The Task Force proposed amendments to the rules of civil procedure pertaining to Ancillary Proceedings are submitted for consideration of the Supreme Court. We appreciate the opportunity to participate in this collaborative process.

Table of Contents

Texas Rules of Civil Procedure Part V: Rules Relating To Ancillary Proceedings

SECTION 2. ATTACHMENT

Rule ATT 1 (604). Application for Writ of Attachment and Order

(a) *Pending Suit Required for Issuance of Writ.* An application for a writ of attachment may be filed at the initiation of a suit or at any time during the progress of a suit.

(b) *Application.* An application for a writ of attachment must:

(1) state the nature of the applicant's underlying claim;

(2) state the statutory grounds for issuance of the writ as provided in Chapter 61 of the Civil Practice and Remedies Code and the specific facts justifying attachment; and

(3) state the dollar amount sought to be satisfied by attachment.

(c) *Verification.* The application must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for the belief are specifically stated.

(d) *Order.*

(1) *Issuance Without Notice.* No writ shall issue before a final judgment except on written order of the court after a hearing, which may be ex parte.

(2) *Effect of Pleading.* The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively.

(3) *Return.* The order must provide that the writ is returnable to the court that issued the writ.

(4) *Findings of Fact.* The order must include specific findings of fact supporting the statutory grounds for issuance of the writ.

(5) *Amount of Property to be Attached.* The order must state the dollar amount to be satisfied by attachment.

(6) *Levy and Safekeeping.* The order must command the sheriff and any constable of any county to levy on the property found in the officer's county and keep the property safe and preserved subject to further order of the court.

(7) *Applicant's Bond.* The order must state the amount of the bond required from the applicant. The bond must be in an amount which, in the court's opinion, will adequately compensate the respondent in the event the applicant fails to prosecute the suit to effect and pay all damages and costs as may be adjudged against the applicant for wrongful attachment.

(8) *Respondent's Replevy Bond.* The order must set the amount of the respondent's replevy bond equal to the lesser of the value of the property or the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

(e) *Multiple Writs.* Multiple writs may issue at the same time, or in succession, without requiring the return of the prior writ or writs. Writs may be sent to different counties for service by the sheriffs or constables. In the event multiple writs are issued, the applicant must inform the officers to whom the writs are delivered that multiple writs are outstanding.

Rule ATT 2 (605). Applicant's Bond or Other Security

(a) *Requirement of Bond.* A writ of attachment may not be issued unless the applicant has filed with the clerk or justice of the peace a bond:

(1) payable to the respondent in the amount set by the court's order;

(2) with sufficient surety or sureties as approved by the clerk or justice of the peace; and

(3) conditioned on the applicant prosecuting the applicant's suit to effect and paying all damages and costs as may be adjudged against the applicant for wrongful attachment.

(b) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

(c) *Review of Applicant's Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the applicant's bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of uncontroverted affidavits setting forth facts as would be admissible in evidence; otherwise, the parties must submit evidence. After a hearing, the court must issue a written order on the motion.

Rule ATT 3 (606). Contents of Writ

(a) *General Requirements.* A writ of attachment must be dated and signed by the district or county clerk or the justice of the peace, must bear the seal of the court, and must be directed to the sheriff or any constable of any county within the State of Texas.

(b) *Command of Writ.* The writ must command the sheriff or constable to levy on so much of the respondent's property as may be found within the county and that approximates the amount set by the court order, and to keep the property safe and preserved subject to further order of the court.

(c) *Return of Writ.* The writ must be made returnable to the court that ordered the issuance of the writ within thirty, sixty, or ninety days from the date of issuance, as directed by the applicant.

(d) *Notice to Respondent.* The face of the writ must display, in not less than 12-point type and in a manner calculated to advise a reasonably attentive person, the following notice:

"To _____, Respondent:

"YOU ARE HEREBY NOTIFIED THAT PROPERTY ALLEGED TO BE OWNED BY YOU HAS BEEN ATTACHED. IF YOU CLAIM ANY RIGHTS IN THE PROPERTY, YOU ARE ADVISED:

"YOUR FUNDS OR OTHER PROPERTY MAY BE EXEMPT UNDER FEDERAL OR STATE LAW.

"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 OR MODIFY THIS WRIT."

(e) *Form of Writ.* The following form of writ may be issued, but any form used must contain the Notice to Respondent:

"The State of Texas.

"To the Sheriff or any Constable of any County of the State of Texas, greetings:

"We command that you promptly attach so much of the property of [Respondent], if it be found in your county, as shall be of sufficient value to make the sum of _____ dollars, and the probable costs of suit, to satisfy the demand of [Applicant], and that you keep the attached property safe and preserved, unless replevied, that the same may be liable to further proceedings before the court in

_____ County, Texas. You will return this writ on or before [30, 60, 90] days from the date of issuance of the writ showing how you have executed the same."

Rule ATT 4 (607). Delivery, Levy, and Return of Writ

(a) *Delivery of Writ.* The clerk or justice of the peace issuing a writ of attachment must deliver the writ to:

(1) the sheriff or constable; or

(2) the applicant, who must then deliver the writ to the sheriff or constable.

(b) *Timing and Extent of Levy.* The sheriff or constable who receives the writ of attachment must:

(1) endorse the writ with the date of receipt;

(2) as soon as practicable proceed to levy on property subject to the writ and found within the sheriff's or constable's county; and

(3) levy on property in an amount that the sheriff or constable determines to be sufficient to satisfy the writ.

(c) *Method of Levy.*

(1) *Real Property.* Levy on real property is made by the sheriff or constable describing the property on the return and immediately filing for record a copy of the writ and return with the county clerk of each county in which the property is located.

(2) *Personal Property.* The sheriff or constable may levy on personal property by:

(A) seizing the property and holding it in a location under the control of the sheriff or constable;

(B) seizing the property in place, in which case the sheriff or constable must affix a notice of the seizure to or near the property; or

(C) seizing the property and holding it in a bonded warehouse, or other secure location in which case the applicant may be held responsible for the costs. In the event the property is released to the respondent by the court, the respondent must pay all expenses

associated with storage of the property. Storage fees may be taxed as costs against the non-prevailing party.

(d) *Return of Writ.*

(1) The sheriff's or constable's return must be in writing and must be signed by the sheriff or constable. The writ must be returned to the clerk or justice of the peace from which it issued within the time stated in the writ.

(2) The sheriff's or constable's action must be endorsed on or attached to the writ. In the return, the sheriff or constable must state what action the sheriff or constable took in levying, describe the property attached with sufficient certainty to identify it and distinguish it from property of like kind, and state when the property was seized and where the property is being held. When property has been replevied, the sheriff or constable must deliver the replevy bond to the clerk or justice of the peace to be filed with the papers of the suit.

Rule ATT 5 (608). Service of Writ on Respondent After Levy

As soon as practicable following levy, the applicant must serve the respondent with a copy of the writ of attachment, the application, accompanying affidavits, and orders of the court. Service may be in any manner prescribed for service of citation or as provided in Rule 21a.

Rule ATT 6 (609). Respondent's Replevy Rights

(a) *Where Filed.* At any time before judgment, if the attached property has not been previously claimed or sold, the respondent may replevy some or all of the property, or the proceeds from the sale of the property if it has been sold under order of the court, by filing a replevy bond with the court or the sheriff or constable and serving the applicant with a copy of the bond. All motions regarding the attached property must be filed with the court having jurisdiction of the suit.

(b) *Amount and Form of the Respondent's Replevy Bond.* The respondent's replevy bond must be made payable to the applicant in the amount set by the court's order with sufficient surety or sureties, as provided by law, to be approved by the court or by the sheriff or constable who has possession of the property. The bond must be conditioned on the respondent satisfying to the extent of the penal amount of the bond any judgment that may be rendered against the respondent in the suit.

(c) *Other Security.* In lieu of a bond, the respondent may deposit cash or other security in compliance with Rule 14c.

(d) *Review of Respondent's Replevy Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the respondent's replevy bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of uncontroverted affidavits setting forth facts as would be admissible in evidence; otherwise, the parties must submit evidence. After a hearing, the court must issue a written order on the motion.

(e) *Respondent's Right to Possession.* If the respondent files a proper replevy bond, and the replevy bond is not successfully challenged by the applicant, the sheriff or constable in possession of the attached property must release the property to the respondent within a reasonable time after a copy of the bond is delivered to the sheriff or constable. Before the property is released to the respondent, the respondent must pay all expenses associated with storage of the property.

(f) *Substitution of Property.* On reasonable notice, which may be less than three days, the respondent shall have the right to move the court for a substitution of property of equal value or greater value as the property attached. Unless the court orders otherwise, no property on which a lien exists may be substituted.

(1) *Court Must Make Findings.* If sufficient property has been attached to satisfy the writ, the court may by written order authorize substitution of one or more items of respondent's property for all or part of the property attached. The court must include in the order findings as to the value of the property to be substituted.

(2) *Method of Substitution.* No personal property under levy of attachment shall be deemed released until the property to be substituted is delivered to the location named in the order; no real property under levy of attachment shall be deemed released until the order authorizing substitution is filed of record with the county clerk of each county in which the property is located. The original property under levy of attachment may not be released until the respondent pays all costs associated with the substitution of the property, including all expenses associated with storage of the property.

(3) *Status of Lien.* Upon substitution, the attachment lien on the released property is deemed released, and a new lien attaches to the substituted property. The new lien is deemed to have been perfected as of the date of levy on the original property.

Rule ATT 7 (610). Applicant's Replevy Rights

(a) *Motion.* If the respondent does not replevy attached personal property within ten days after service of the writ on the respondent, and if the attached property has not been previously claimed or sold, at any time before judgment the applicant may move the court to replevy some or all of the property.

(b) *Notice and Hearing.* The court may in its discretion, after notice and a hearing, grant the applicant's motion to replevy and set the applicant's replevy bond.

(c) *Order.* The order must set the amount of the applicant's replevy bond equal to the lesser of the value of the property or the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court. The bond must be made payable to the respondent in the amount set by the court's order, with sufficient surety or sureties as approved by the clerk or the justice of the peace. The order must also include the conditions of the applicant's replevy bond as provided in this rule.

(d) *Conditions of Applicant's Replevy Bond.* The applicant's replevy bond must be conditioned on the applicant satisfying to the extent of the penal amount of the bond any judgment which may be rendered against the applicant in the action. The bond must also contain the conditions that the applicant will:

(1) not remove the personal property from the county;

(2) not waste, ill-treat, injure, destroy, or dispose of the property;

(3) maintain the property, in the same condition as when it is replevied, together with the value of the fruits, hire or revenue derived from the property;

(4) return the property, along with all fruits, hire, or revenue derived therefrom, to the respondent in the same condition if the underlying suit is decided against the applicant; and

(5) to the extent that the:

(A) property is not returned, pay the value of the property, along with the fruits, hire, or revenue derived therefrom; and

(B) returned, but not in the same condition, pay the difference between the value of the property as of the date of replevy and the date of judgment, regardless of the cause of the difference in value, along with the value of the fruits, hire, or revenue derived therefrom.

(e) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

(f) *Service on Respondent.* The applicant must serve the respondent with a copy of the court's order and the applicant's replevy bond. Service may be in any manner prescribed for service of citation or as provided in Rule 21a.

(g) *Applicant's Right to Possession.* If the court grants the applicant's motion to replevy, a copy of the court's order and applicant's replevy bond must be delivered to the sheriff or constable in possession of the attached personal property. The sheriff or constable must then release the property to the applicant within a reasonable time. Before the property is released to the applicant, the applicant must pay all expenses associated with storage of the property.

Rule ATT 8 (611). Dissolution or Modification of Order or Writ

(a) *Motion.* Any party, or any person who claims an interest in the property under levy of attachment, may move the court to dissolve or modify the order or writ, for any ground or cause, extrinsic or intrinsic. The motion must be verified and must admit or deny each finding set forth in the order directing the issuance of the writ. If the movant is unable to admit or deny the finding, the movant must set forth the reasons why the movant cannot do so.

(b) *Time for Hearing.* Unless the parties agree to an extension of time, the motion must be heard promptly, after reasonable notice to all parties, which may be less than three days, and the motion must be determined not later than ten days after it is filed.

(c) *Stay of Proceedings.* The filing of the motion stays any further proceedings under the writ, except for any orders concerning the care, preservation, or sale of any perishable property, until a hearing is held, and the motion is determined.

(d) *Conduct of Hearing; Burden of Proof.*

(1) *Burden of Applicant.* The applicant has the burden to prove the statutory grounds relied on for issuance of the writ of attachment. If the applicant fails to carry its burden, the writ must be dissolved and the underlying order set aside.

(2) *Burden of Movant.* If the applicant carries its burden, the movant has the burden to prove the grounds alleged to dissolve or modify the order or writ. If the movant seeks to modify the order or writ based upon the value of the property, the movant has the burden to prove that the reasonable value of the property attached exceeds the amount necessary to secure the claim, interest for one year, and probable costs.

(3) *Hearing.* The court's determination may be made after a hearing involving all parties, or upon the basis of affidavits setting forth facts as would be admissible in evidence. Additional evidence, if tendered by any party, may be received and considered.

(e) *Orders Permitted.* The court may order the dissolution or modification of the order or writ, and may make orders allowing for the care, preservation, disposition, or substitution of the property (or the proceeds if the same has been sold), as justice may require. If the court modifies its order granting attachment, it must make further orders with respect to the bond that are consistent with the modification of the order. If the movant has given a replevy bond, an order to dissolve the writ must release the replevy bond and discharge the sureties thereon. If the writ is dissolved, the order must be set aside, the attached property must be released, and all expenses associated with storage of the property may be taxed as costs to the applicant.

(f) *Third-Party Claimant.* If any person other than the applicant or respondent in the original suit claims all or part of the attached property, the court, on motion and hearing, may order the release of the property to that third-party claimaint. The court may require a bond payable to the applicant or respondent, as ordered by the court, in an amount set by the court with sufficient surety or sureties and conditioned that the third-party claimant will pay, up to the amount of the bond, all damages and costs adjudged against the third-party claimant for wrongfully seeking the release of the property. If the court does not order the release of the property to the third-party claimant, the third-party claimant may follow the procedure for the trial of right of property.

(g) *Wrongful Attachment; Attorney's Fees.* A writ of attachment must be dissolved before a respondent may bring a claim for wrongful attachment. In addition to damages for wrongful attachment, the respondent may recover reasonable attorney's fees incurred in obtaining dissolution or modification of the order or writ.

Rule ATT 9 (612). Judgment

(a) *Judgments on Replevy Bond.*

(1) *Judgment Against Respondent on Replevy Bond.* If the underlying suit is decided against a respondent who replevied the attached property, final judgment must be rendered against all of the obligors on the respondent's replevy bond, jointly and severally, for the amount of the judgment plus interest and costs, or for an amount equal to the value of the property replevied as of the date of the execution of the respondent's replevy bond,

and the value of the fruits, hire, revenue, or rent derived from the property.[19]

(2) *Judgment Against Applicant on Replevy Bond.* If the underlying suit is decided against an applicant who replevied the attached property, final judgment must be rendered against all of the obligors on the applicant's replevy bond, jointly and severally, for the value of the property replevied as of the date of the execution of the applicant's replevy bond, and the value of the fruits, hire, revenue, or rent derived from the property.

(b) *All Judgments.* In any judgment, all expenses associated with storage of the property may be taxed as costs against the non-prevailing party.

PROPOSED COMMENT TO RULE **ATT 9 (612)**: See Sections 61.062 and 61.063 of the Texas Civil Practice and Remedies Code.

Rule ATT 10 (613). Perishable Property

(a) *Definition of Perishable Property.* Property may be found to be perishable when it is in danger of serious and immediate waste or decay, or if the keeping of the property until the trial will necessarily be attended with expense or deterioration in value that will greatly lessen the amount likely to be realized therefrom. For the purposes of this rule, the word "property" refers to personal property under levy of attachment pursuant to court order.

(b) *Trial Court Discretion.* The judge or justice of the peace may make any orders necessary for the property's preservation or use.

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[19] **Comment to the Court**: Rule **ATT 9(a) (612(a))** is based on Section 61.063 of the Texas Civil Practice and Remedies Code and existing Rule 709. Section 61.063 provides: "A judgment against a defendant who has replevied attached personal property shall be against the defendant and his sureties on the replevy bond for the amount of the judgment plus interest and costs or for an amount equal to the value of the replevied property, plus interest, according to the terms of the replevy bond." Existing Rule 709, which applies to sequestration, provides: "[I]n case the suit is decided against the plaintiff, final judgment shall be entered against all the obligors in [the plaintiff's replevy bond], jointly and severally for the value of the property replevied as of the date of the execution of the replevy bond, and the value of the fruits, hire, revenue or rent thereof as the case may be. The same rules which govern the discharge or enforcement of a judgment against the obligors in the defendant's replevy bond shall be applicable to and govern in case of a judgment against the obligors in the plaintiff's replevy bond." The Task Force incorporated components of existing Rule 709 into Rule **ATT 9(a) (612(a))** in an attempt to harmonize the attachment and sequestration rules. But to be consistent with Section 61.063 of the Civil Practice and Remedies Code, the Task Force included the language requiring the final judgment to "be rendered against all of the obligors . . . for the amount of the judgment plus interests and costs." The Task Force is perplexed by a statutory requirement that obligors be responsible for an amount that could be greater than the penal amount of the bond and recommends that the Court seek a statutory amendment to enable a rule limiting the liability of the obligors to the penal amount of the bond, consistent with other rules, such as existing Rule 709, limiting the liability of similar obligors.

(c) *Motion and Affidavit for Sale of Perishable Property.* If the respondent has not replevied property after the levy of a writ of attachment, the applicant, or other party claiming an interest in the property may file a motion with the court clerk or justice of the peace, supported by affidavit, stating specific facts to support a finding that the property or any portion of the property is perishable. A copy of the motion and affidavit must be delivered to the person who is in possession of the property and served on all other parties in any manner prescribed for service of citation or as provided in Rule 21a.

(d) *Hearing.* The judge or justice of the peace must hear the motion, with or without notice to the parties, as the urgency of the case may require. The judge or justice of the peace may, based on affidavits or oral testimony, order the sale of the perishable property and must set the amount of the movant's bond, if required.

(e) *Movant's Bond.* If the motion for an order of sale is filed by the applicant or respondent, no bond is required; the applicant or respondent may replevy the property at any time before the sale. If the motion for an order of sale is filed by any person or party other than the respondent whose property is under levy of attachment, the court shall not grant the order, unless the movant files with the court a bond payable to the applicant or respondent as ordered by the court, with one or more good and sufficient sureties to be approved by said court, conditioned that the movant will be responsible to the applicant or respondent as ordered by the court for any damages, up to the amount of the bond, sustained upon a finding that the motion or sale was wrongful.

(f) *Order.* An order to sell perishable property must be in writing, specifically describe the property to be sold, be directed to a sheriff or constable, and command the sheriff or constable to sell the property. If the property is being held by a person other than a sheriff or constable, then the sheriff or constable conducting the sale must deliver a copy of the order of sale to the person in possession of the property.

(g) *Procedure for Sale of Perishable Property.* The sale of perishable property must be conducted in the same manner as sales of personal property under execution, provided that the judge or justice of the peace may set the time of advertising and sale at a time earlier than ten days, according to the exigency of the case, and in that event notice must be given in the manner directed by the order.

(h) *Return of Order of Sale.* The sheriff or constable conducting the sale of perishable property must promptly remit the proceeds of the sale to the clerk or to the justice of the peace. The sheriff or constable must sign and file with the papers of the case a written return of the order of sale, stating the time and place of the sale, the name of the purchaser, and the amount of money received, with an itemized account of the expenses attending the sale.

Rule ATT 11 (614). Report of Disposition of Property

When attached property is claimed, replevied, or sold, or otherwise disposed of after the writ has been returned, the sheriff or constable who had custody of the property must immediately complete and sign a report describing the disposition of the property. If the property was replevied, the report must also describe the condition of the property on the date and time of replevy. The report must be filed with the clerk or justice of the peace.

Rule ATT 12 (615). Amendment of Errors

(a) *Before Order.* Before the court issues an order on an application for writ of attachment, the application and any supporting affidavits may be amended to correct any errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk at a time that will not operate as a surprise to the respondent.

(b) *After Order, Before Levy of the Writ.* After the court issues an order on an application for writ of attachment but before the writ of attachment is levied, the application, any supporting affidavits, and the bond may be amended to correct any clerical errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk or justice of the peace at a time that will not operate as a surprise to the respondent. Clerical errors in the court's order for issuance of the writ and the writ of attachment may also be corrected by the court, without notice.

(c) *After Order and Levy of the Writ.* After levy of the writ of attachment, on motion, notice, and hearing, the court in which the suit is filed may grant leave to amend clerical errors in the application, any supporting affidavits, the bond, the writ of attachment, or the sheriff or constable's return, for good cause, provided the amendment does not change or add to the grounds of attachment stated in the original application.

Attachment Statutes
Texas Civil Practice & Remedies Code

§ 61.001. General Grounds

A writ of original attachment is available to a plaintiff in a suit if:

(1) the defendant is justly indebted to the plaintiff;

(2) the attachment is not sought for the purpose of injuring or harassing the defendant;

(3) the plaintiff will probably lose his debt unless the writ of attachment is issued; and

(4) specific grounds for the writ exist under Section 61.002.

§ 61.002. Specific Grounds

Attachment is available if:

(1) the defendant is not a resident of this state or is a foreign corporation or is acting as such;

(2) the defendant is about to move from this state permanently and has refused to pay or secure the debt due the plaintiff;

(3) the defendant is in hiding so that ordinary process of law cannot be served on him;

(4) the defendant has hidden or is about to hide his property for the purpose of defrauding his creditors;

(5) the defendant is about to remove his property from this state without leaving an amount sufficient to pay his debts;

(6) the defendant is about to remove all or part of his property from the county in which the suit is brought with the intent to defraud his creditors;

(7) the defendant has disposed of or is about to dispose of all or part of his property with the intent to defraud his creditors;

(8) the defendant is about to convert all or part of his property into money for the purpose of placing it beyond the reach of his creditors; or

(9) the defendant owes the plaintiff for property obtained by the defendant under false pretenses.

§ 61.0021. Grounds for Attachment in Suit for Sexual Assault

(a) Notwithstanding any other provision of this code, attachment is available to a plaintiff who:

(1) has general grounds for issuance under Sections 61.001(2) and (3); and

(2) institutes a suit for personal injury arising as a result of conduct that violates:

(A) Section 22.011(a)(2), Penal Code (sexual assault of a child);

(B) Section 22.021(a)(1)(B), Penal Code (aggravated sexual assault of a child);

(C) Section 21.02, Penal Code (continuous sexual abuse of young child or children); or

(D) Section 21.11, Penal Code (indecency with a child).

(b) A court may issue a writ of attachment in a suit described by Subsection (a) in an amount the court determines to be appropriate to provide for the counseling and medical needs of the plaintiff.

§ 61.003. Pending Suit Required

A writ of attachment may be issued in a proper case at the initiation of a suit or at any time during the progress of a suit, but may not be issued before a suit has been instituted.

§ 61.004. Available for Debt Not Due

A writ of attachment may be issued even though the plaintiff's debt or demand is not due. The proceedings relating to the writ shall be as in other cases, except that final judgment may not be rendered against the defendant until the debt or demand becomes due.

§ 61.005. Certain Torts and Unliquidated Demands

Nothing in this chapter prevents issuance of a writ of attachment in a suit founded in tort or on an unliquidated demand against an individual, partnership, association, or corporation on whom personal service cannot be obtained in this state.

§ 61.006. to 61.020 [Reserved for expansion]

§ 61.021. Who May Issue

The judge or clerk of a district or county court or a justice of the peace may issue a writ of original attachment returnable to his court.

§ 61.022. Affidavit

(a) Except as provided by Subsection (a-1), to apply for a writ of attachment, a plaintiff or the plaintiff's agent or attorney must file with the court an affidavit that states:

(1) general grounds for issuance under Sections 61.001(1), (2), and (3);

(2) the amount of the demand; and

(3) specific grounds for issuance under Section 61.002.

(a-1) To apply for a writ of attachment under Section 61.0021, a plaintiff or the plaintiff's agent or attorney must file with the court an affidavit that states:

(1) general grounds for issuance under Sections 61.001(2) and (3);

(2) specific grounds for issuance under Section 61.0021(a); and

(3) the amount of the demand based on the estimated cost of counseling and medical needs of the plaintiff.

(b) The affidavit shall be filed with the papers of the case.

§ 61.023. Bond

(a) Before a writ of attachment may be issued, the plaintiff must execute a bond that:

(1) has two or more good and sufficient sureties;

(2) is payable to the defendant;

(3) is in an amount fixed by the judge or justice issuing the writ; and

(4) is conditioned on the plaintiff prosecuting his suit to effect and paying all damages and costs adjudged against him for wrongful attachment.

(b) The plaintiff shall deliver the bond to the officer issuing the writ for that officer's approval. The bond shall be filed with the papers of the case.

§ 61.024. to 61.040 [Reserved for expansion]

§ 61.041. Subject Property

A writ of attachment may be levied only on property that by law is subject to levy under a writ of execution.

§ 61.042. Attachment of Personalty

The officer attaching personal property shall retain possession until final judgment unless the property is:

(1) replevied;

(2) sold as provided by law; or

(3) claimed by a third party who posts bond and tries his right to the property.

§ 61.043. Attachment of Realty

(a) To attach real property, the officer levying the writ shall immediately file a copy of the writ and the applicable part of the return with the county clerk of each county in which the property is located.

(b) If the writ of attachment is quashed or vacated, the court that issued the writ shall send a certified copy of the order to the county clerk of each county in which the property is located.

§ 61.044. Claim on Attached Personalty by Third Party

A person other than the defendant may claim attached personal property by making an affidavit and giving bond in the manner provided by law for trial of right of property.

§ 61.045. Attachment of Personalty Held by Financial Institution

Service of a writ of attachment on a financial institution relating to personal property held by the financial institution in the name of or on behalf of a customer of the financial institution is governed by Section 59.008, Finance Code.

§ 61.046. to 61.060 [Reserved for expansion]

§ 61.061. Attachment Lien

Unless quashed or vacated, an executed writ of attachment creates a lien from the date of levy on the real property attached, on the personal property held by the attaching officer, and on the proceeds of any attached personal property that may have been sold.

§ 61.062. Judgment and Foreclosure

(a) If the plaintiff recovers in the suit, the attachment lien is foreclosed as in the case of other liens. The court shall direct proceeds from personal property previously sold to be applied to the satisfaction of the judgment and the sale of personal property remaining in the hands of the officer and of the real property levied on to satisfy the judgment.

(b) If the writ of attachment on real property was issued from a county or justice court, the court is not required to enter an order or decree foreclosing the lien, but to preserve the lien the judgment must briefly recite the issuance and levy of the writ. The land may

be sold under execution after judgment, and the sale vests in the purchaser all of the estate of the defendant in the land at the time of the levy.

§ 61.063. Judgment on Replevied Property

A judgment against a defendant who has replevied attached personal property shall be against the defendant and his sureties on the replevy bond for the amount of the judgment plus interest and costs or for an amount equal to the value of the replevied property plus interest, according to the terms of the replevy bond.

§ 61.064. to 61.080 [Reserved for expansion]

§ 61.081. Exemption When En Route to or in an Exhibition

(a) Subject to the limitations of this section, a court may not issue and a person may not serve any process of attachment, execution, sequestration, replevin, or distress or of any kind of seizure, levy, or sale on a work of fine art while it is:

(1) en route to an exhibition; or

(2) in the possession of the exhibitor or on display as part of the exhibition.

(b) The restriction on the issuance and service of process in Subsection (a) applies only for a period that:

(1) begins on the date that the work of fine art is en route to an exhibition; and

(2) ends on the earlier of the following dates:

(A) six months after the date that the work of fine art is en route to the exhibition; or

(B) the date that the exhibition ends.

(c) Subsection (a) does not apply to a work of fine art if, at any other time, issuance and service of process in relation to the work has been restricted as provided by Subsection (a).

(d) Subsection (a) does not apply if theft of the work of art from its owner is alleged and found proven by the court.

(e) A court shall, in issuing service of process described by Subsection (a), require that the person serving the process give notice to the exhibitor not less than seven days before the date the period under Subsection (b) ends of the person's intent to serve process.

(f) In this section, "exhibition" means an exhibition:

(1) held under the auspices or supervision of:

(A) an organization exempt from federal income tax under Section 501(a), Internal Revenue Code of 1986, as amended, by being listed as an exempt organization in Section 501(c)(3) of the code; or

(B) a public or private institution of higher education;

(2) held for a cultural, educational, or charitable purpose; and

(3) not held for the profit of the exhibitor.

§ 61.082. Handling and Transportation

A court may not issue any process of attachment, execution, sequestration, replevin, or distress or of any kind of seizure, levy, or sale on a work of fine art unless the court requires, as part of the order authorizing the process, that the work of fine art is handled and transported in a manner that complies with the accepted standards of the artistic

community for works of fine art, including, if appropriate, measures relating to the maintenance of proper environmental conditions, proper maintenance, security, and insurance coverage.

SECTION 3. GARNISHMENT

Rule GARN 1 (616). Application for Writ of Garnishment Before Judgment and Order

(a) *Pending Suit Required for Issuance of Writ.* An application for a pre-judgment writ of garnishment may be filed at the initiation of a suit or at any time before final judgment.

(b) *Application.* An application for a writ of garnishment before judgment must:

(1) state the nature of the applicant's claim against the respondent in the underlying proceeding;

(2) state one or more statutory grounds for issuance of the writ as provided in Chapter 63 of the Civil Practice and Remedies Code and the specific facts supporting the statutory grounds for garnishment; and

(3) state the maximum dollar amount sought to be satisfied by garnishment.

(c) *Verification.* The application must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for belief are specifically stated.

(d) *Order.*

(1) *Issuance Without Notice.* No writ shall issue before a final judgment except on written order of the court after a hearing, which may be ex parte.

(2) *Effect of Pleading.* The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively.

(3) *Return.* The order must provide that the writ is returnable to the court that issued the writ.

(4) *Findings of Fact.* The order must include specific findings of fact supporting the statutory grounds for issuance of the writ.

(5) *Amount of Property to be Garnished.* The order must state the maximum dollar amount to be satisfied by garnishment.

(6) *Safekeeping.* The order must command that the property be kept safe and preserved subject to further order of the court.

(7) *Applicant's Bond.* The order must state the amount of the bond required from the applicant. The bond must be in an amount which, in the court's opinion, will adequately compensate the respondent in the event the applicant fails to prosecute the suit to effect and pay all damages and costs as may be adjudged against the applicant for wrongful garnishment.

(8) *Respondent's Replevy Bond.* The order must set the amount of the respondent's replevy bond equal to the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

(e) *Multiple Writs.* Writs may issue at the same time, or in succession, without requiring the return of the prior writ or writs. Writs may be sent to different counties for service by the sheriffs, constables, or other persons authorized by Rule 103 or Rule 536 to serve the writs. In the event multiple writs are issued, the applicant must inform the officers or persons to whom the writs are delivered that multiple writs are outstanding.

PROPOSED COMMENT TO RULE **GARN 1(b)(1) (657(b)(1))**: In a garnishment action, the respondent is the defendant in the underlying action.

Rule GARN 2 (617). Applicant's Bond or Other Security for Writ of Garnishment Before Judgment

(a) *Requirement of Bond.* A writ of garnishment before judgment may not be issued unless the applicant has filed with the clerk or justice of the peace a bond:

(1) payable to the respondent in the amount set by the court's order;

(2) with sufficient surety or sureties as approved by the clerk or justice of the peace; and

(3) conditioned on the applicant prosecuting the applicant's suit to effect and paying all damages and costs as may be adjudged against the applicant for wrongful garnishment.

(b) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

(c) *Review of Applicant's Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the applicant's bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of uncontroverted affidavits setting forth facts as would be admissible in evidence; otherwise, the parties must submit evidence. After a hearing, the court must issue a written order on the motion.

Rule GARN 3 (618). Application for Writ of Garnishment After Judgment and Order

(a) *Garnishment After Final Judgment.* At any time after final judgment, the judgment creditor may file with the clerk or justice of the peace an application for a writ of garnishment. The judgment, whether based on a liquidated or unliquidated demand, shall be deemed final and subsisting for the purpose of garnishment from and after the date it is signed, unless a supersedeas bond shall have been filed and approved in accordance with the Texas Rules of Appellate Procedure or an appeal bond is filed and approved by the justice of the peace.

(b) *Application.* An application for a writ of garnishment after judgment must state:

(1) that the applicant has a valid, subsisting judgment;

(2) that, within the applicant's knowledge, the judgment debtor does not possess property in Texas subject to execution sufficient to satisfy the judgment; and

(3) the maximum dollar amount sought to be satisfied by garnishment.

(c) *Verification.* The application must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for belief are specifically stated.

(d) *Order.*

(1) *Issuance Without Notice.* No writ shall issue except on written order of the court after a hearing, which may be ex parte.

(2) *Effect of Pleading.* The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively.

(3) *Return.* The order must provide that the writ is returnable to the court that issued the writ.

(4) *Findings of Fact.* The order must include specific findings of fact supporting the statutory grounds for issuance of the writ.

(5) *Amount of Property to be Garnished.* The order must state the maximum dollar amount to be satisfied by garnishment.

(6) *Safekeeping.* The order must command that the property be kept safe and preserved subject to further order of the court.

(7) *No Bond Required.* No bond shall be required to be posted by the applicant for a writ of garnishment after final judgment.

(8) *Respondent's Replevy Bond.* The order must set the amount of the respondent's replevy bond equal to the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

(9) *Multiple Writs.* Writs may issue at the same time, or in succession, without requiring the return of the prior writ or writs. Writs may be sent to different counties for service by the sheriffs, constables, or other persons authorized by Rule 103 or Rule 536 to serve the writs. In the event multiple writs are issued, the applicant must inform the officers or persons to whom the writs are delivered that multiple writs are outstanding.

Rule GARN 4 (619). Case Docketed

When the foregoing requirements of these rules have been complied with, the clerk or justice of the peace shall docket the case in the name of the applicant as plaintiff and of the garnishee as defendant, and shall immediately issue a writ of garnishment directed to the garnishee.

Rule GARN 5 (620). Contents of Writ of Garnishment

(a) *General Requirements.* A writ of garnishment must be dated and signed by the clerk or the justice of the peace, bear the seal of the court, and be directed to the garnishee.

(b) *Command of Writ.* The writ must command the garnishee to:

(1) appear before the court out of which the writ is issued at 10 o'clock a.m. of the Monday next following the expiration of twenty days from the date the writ was served, if the writ is issued out of the district or county court, or the Monday next after the expiration of ten days from the date the writ was served, if the writ is issued out of the justice court; and

(2) answer under oath:

(A) what, if anything, the garnishee was indebted to the respondent as of the date the writ was served;

(B) what, if anything, the garnishee is indebted to the respondent as of the date the garnishee is required to appear pursuant to the writ;

(C) what effects, if any, of the respondent the garnishee had in its possession as of the date the writ was served;

(D) what effects, if any, of the respondent the garnishee has in its possession as of the date the garnishee is required to appear pursuant to the writ; and

(E) what other persons, if any, within the garnishee's knowledge, are indebted to the respondent or have in their possession effects belonging to the respondent.

(c) *Return of Writ.* The writ must be made returnable to the court that ordered the issuance of the writ in the same manner as a citation.

(d) *Notice to Respondent.* The face of the writ must display, in not less than 12-point type and in a manner calculated to advise a reasonably attentive person, the following notice:

"To _____, Respondent:

"YOU ARE HEREBY NOTIFIED THAT PROPERTY ALLEGED TO BE OWNED BY YOU HAS BEEN GARNISHED. IF YOU CLAIM ANY RIGHTS IN THE PROPERTY, YOU ARE ADVISED:

"YOUR FUNDS OR OTHER PROPERTY MAY BE EXEMPT UNDER FEDERAL OR STATE LAW.

"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 OR MODIFY THIS WRIT."

(e) *Form of Writ.* The following form of writ may be issued, but any form used must contain the Notice to Respondent:

"The State of Texas.

"To _____, Garnishee, greetings:

"Whereas, in the _____Court of _____County (if a justice court, state also the number of the precinct), in a certain cause wherein _____ is plaintiff and _____ is defendant in the underlying proceeding and Respondent in this proceeding, the plaintiff, claiming an indebtedness against _____ [Respondent] of _____dollars, besides interest and costs of suit, has applied for a writ of garnishment against you; therefore you are hereby commanded to be and appear before that court at _____ in said county (if the writ is issued from the county or district court, here proceed: 'at 10 o'clock a.m. on the Monday next following the expiration

of twenty days from the date of service hereof.' If the writ is issued from a justice of the peace court, here proceed: 'at 10 o'clock a.m. on the Monday next after the expiration of ten days from the date of service hereof.' In either event, proceed as follows:) then and there to answer under oath: (a) what, if anything, the garnishee was indebted to _____ [Respondent] as of the date the writ was served; (b) what, if anything, the garnishee is indebted to _____ [Respondent] as of the date the garnishee is required to appear pursuant to the writ; (c) what effects, if any, of _____ [Respondent] the garnishee had in its possession as of the date the writ was served; (d) what effects, if any, of _____ [Respondent] the garnishee has in its possession as of the date the garnishee is required to appear pursuant to the writ; and (e) what other persons, if any, within the garnishee's knowledge, are indebted to _____ [Respondent] or have in their possession effects belonging to _____ [Respondent]. You are further commanded NOT to pay to _____ [Respondent] any debt or to deliver to _____ [Respondent] any effects, pending further order of this court. Herein fail not, but make due answer as the law directs."

PROPOSED COMMENT TO RULE **GARN 5(b)(2) (620(b)(2))**. This rule has been modified to make clear that the garnishee must account for property of the respondent in the garnishee's possession or knowledge on two dates—the date the writ was served, and the date the garnishee is required to appear pursuant to the writ. *See First Nat'l Bank in Dallas v. Banco Longoria, S.A.*, 356 S.W.2d 192 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.) (affirming judgment against garnishee that failed to account for funds held on both the date the writ was served and the date the garnishee was to answer pursuant to the writ).

PROPOSED COMMENT TO RULE **GARN 5(e) (620(e))**. The form of the writ has been modified as to justice courts to be consistent with **GARN 5(b)(2) (620(b)(2))**.

RULE GARN 6 (621). Delivery, Service, and Return of Writ

(a) *Delivery of Writ.* The clerk or justice of the peace issuing a writ of garnishment must deliver the writ to:

(1) the sheriff, constable, or other person authorized by Rule 103 or Rule 536; or

(2) the applicant, who must then deliver the writ to the sheriff, constable, or other person authorized by Rule 103 or Rule 536.

(b) *Service on Garnishee.* The sheriff, constable, or other person authorized by Rule 103 or Rule 536 who receives the writ of garnishment must immediately proceed to serve the writ by delivering a copy of it to the garnishee; however, only a

sheriff or constable may serve a writ of garnishment that requires the actual taking of possession of property. If the garnishee is a financial institution, service of the writ is governed by the service provisions of the Texas Finance Code.

(c) *Return of Writ.* The return must be in writing and signed by the sheriff, constable, or other person authorized by Rule 103 or Rule 536 who served the writ. The return must be filed with the issuing clerk or justice of the peace without delay in the same manner as a citation.

(d) *Service on Respondent.* As soon as practicable following service of the writ on the garnishee, the applicant must serve the respondent with a copy of the writ of garnishment, the application, accompanying affidavits, and orders of the court. Service may be in any manner prescribed for service of citation or as provided in Rule 21a. A certificate of service evidencing service of a copy of the writ on the respondent by the applicant must be on file with the court for at least 10 days prior to the entry of a judgment on the garnishment.

PROPOSED COMMENT TO RULE **GARN 6 (621)**: See Section 63.008 of the Texas Civil Practice and Remedies Code and Section 59.008 of the Texas Finance Code.

Rule GARN 7 (622). Respondent's Replevy Rights

(a) *Where Filed.* At any time before judgment, if the garnished property has not been previously claimed or sold, the respondent may replevy some or all of the property, or the proceeds from the sale of the property if it has been sold under order of the court, by filing a replevy bond with the court and serving the applicant with a copy of the bond. All motions regarding the garnished property must be filed with the court having jurisdiction of the suit.

(b) *Amount and Form of Respondent's Replevy Bond.* The respondent's replevy bond must be made payable to the applicant in the amount set by the court's order with sufficient surety or sureties, as provided by law, to be approved by the court. The bond must be conditioned on the respondent satisfying, to the extent of the penal amount of the bond, any judgment that may be rendered against the respondent in the suit.

(c) *Other Security.* In lieu of a bond, the respondent may deposit cash or other security in compliance with Rule 14c.

(d) *Review of Respondent's Replevy Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the respondent's replevy bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of uncontroverted affidavits

setting forth facts as would be admissible in evidence; otherwise, the parties must submit evidence. After a hearing, the court must issue a written order on the motion.

(e) *Respondent's Right to Possession.* If the respondent files a proper replevy bond, and the replevy bond is not successfully challenged by the applicant, the court must order the release of the garnished property to the respondent within a reasonable time after a copy of the court's order is delivered to the garnishee. Before the property is released to the respondent, the respondent must pay all expenses associated with storage of the property.

(f) *Substitution of Property.* On reasonable notice, which may be less than three days, the respondent shall have the right to move the court for a substitution of property of equal value or greater value as the property garnished. Unless the court orders otherwise, no property on which a lien exists may be substituted.

(1) *Court Must Make Findings.* If sufficient property has been garnished to satisfy the writ, the court may by written order authorize substitution of one or more items of respondent's property for all or part of the property garnished. The court must include in the order findings as to the value of the property to be substituted.

(2) *Method of Substitution.* No garnished personal property shall be deemed released until the property to be substituted is delivered to the location designated in the court's order. The original property garnished may not be released until the respondent pays all costs associated with substitution of the property, including all expenses associated with storage of the property.

(3) *Status of Garnishment.* Garnishment of substituted property shall be deemed to have existed from the date of service of the original writ of garnishment.

(g) *Judgment Against Respondent on Replevy Bond.* If the underlying suit is decided against a respondent who replevied the garnished property, final judgment must also be against all of the obligors on the respondent's replevy bond, jointly and severally, for the lesser of (1) the amount of the judgment plus interest and costs, or (2) the amount of the replevy bond.

Rule GARN 8 (623). Garnishee's Answer to Writ of Garnishment

(a) *Garnishee's Answer.* The garnishee's answer must be in writing, sworn to, signed by the garnishee, and respond to each matter inquired of in the writ of garnishment. The garnishee's answer may be filed as in any other civil case at any time before default judgment.

(b) *Judgment by Default.* If the garnishee fails to file an answer to the writ of garnishment at or before the time directed in the writ, the court may, at any time after final judgment has been signed against the respondent, and on or after the garnishee's appearance day, sign a default judgment against the garnishee for the full amount of the judgment against the respondent together with all interest and costs that have accrued in the main case and also in the ancillary garnishment proceedings. However, if the garnishee is a financial institution, default judgment must be determined by the Texas Finance Code.

PROPOSED COMMENT TO RULE **GARN 8 (623)**: See Section 276.002 of the Texas Finance Code.

Rule GARN 9 (624). Garnishee's Answer May Be Controverted

(a) *Either Party May Controvert the Answer.* If the applicant is not satisfied with the answer of any garnishee, the applicant may controvert the answer by affidavit stating that the applicant has good reason to believe, and does believe, that the answer of the garnishee is incorrect, stating in what particular the applicant believes the answer to be incorrect. The respondent may also, in like manner, controvert the answer of the garnishee.

(b) *Place for Trial When Answer Controverted.* If the garnishee whose answer is controverted is a resident of the county in which the garnishment proceeding is pending, or a foreign corporation, the matter shall be tried in the county in which the garnishment proceeding is pending. Otherwise, the matter shall be tried in the county in which the garnishee resides.

(c) *Procedure for Docketing of Action Against Non-Resident Garnishee.* The clerk or the justice of the peace of the county of residence of the non-resident garnishee, on receipt of certified copies filed by the applicant under the provisions of section 63.005 of the Texas Civil Practice & Remedies Code, shall docket the case in the name of the applicant as plaintiff, and of the garnishee as defendant, and issue a notice to the garnishee, stating that the answer has been controverted, and that the issue will stand for trial on the docket of the court. The notice shall be directed to the garnishee, be dated and signed as other process from the court, and served by delivering a copy thereof to the garnishee. It shall be returnable, if issued from the district or county court, at ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of its service; and if issued from the justice court, at ten o'clock a.m. of the Monday next after the expiration of ten days from the date of service. Upon the return of the notice served, the matter shall be tried as in other cases.

Rule GARN 10 (625). Judgment After Answer

(a) *Judgment When Answer Uncontroverted And Garnishee Is Neither Indebted Nor Has Effects.*

(1) The court must enter a take-nothing judgment against the applicant and in favor of the garnishee if it appears from the garnishee's answer that:

(A) the garnishee is not indebted to the respondent, and was not indebted when the writ was served on the garnishee;

(B) the garnishee does not have in its possession any effects of the respondent and did not have such effects in its possession when the writ was served;

(C) the garnishee has either denied that any other persons within its knowledge are indebted to the respondent or have in their possession effects belonging to the respondent, or else has named all persons within its knowledge who are indebted to the respondent or have in their possession effects belonging to the respondent; and

(D) the answer of the garnishee has not been controverted.

(2) *Costs.* Costs of the garnishment proceeding, including reasonable compensation to the garnishee, shall be taxed against the applicant.

(b) *Judgment When Garnishee is Indebted.*

(1) If the garnishee's answer admits, or the court finds, that the garnishee is indebted to the respondent in any amount, or was indebted when the writ of garnishment was served, the court must render judgment for the applicant against the garnishee. The judgment must be the lesser of:

(A) the amount admitted or found to be due to the respondent from the garnishee; or

(B) if that amount is in excess of the amount of the applicant's judgment against the respondent with interest and costs, for the full amount of the judgment already rendered against the respondent, together with interest and costs of the suit in the main case and also in the ancillary garnishment proceedings.

(2) *Costs.*

(A) If the garnishee's answer is not controverted, and the court enters judgment for the amount admitted by the garnishee, costs, including reasonable compensation to the garnishee, shall be taxed against the respondent.

(B) If the garnishee's answer is successfully controverted, the garnishee is not entitled to recover its costs.

(C) If the garnishee's answer is not successfully controverted, the court may award and apportion the costs, including reasonable compensation to the garnishee, as may be appropriate.

(D) Notwithstanding the above, if the garnishee is determined to be indebted to the respondent for less than the amount of the costs of the garnishment proceeding, costs in the amount of the indebtedness shall be taxed against the respondent, and the balance of the costs shall be taxed against the applicant.

(c) *Judgment When Garnishee Has Effects.*

(1) If the garnishee's answer admits, or the court finds, that the garnishee has in its possession, or had in its possession when the writ was served, any personal property of the respondent subject to execution, the court must order sale of the personal property by execution to satisfy the applicant's judgment against the respondent. The order must direct the garnishee to deliver so much of the personal property necessary to satisfy the judgment to the sheriff or constable for execution.

(2) If the garnishee fails to deliver personal property to the sheriff or constable on demand, on motion of the applicant, the garnishee must be ordered to appear and show cause why it should not be held in contempt of court.

(3) *Costs.*

(A) If the garnishee's answer is not controverted, and the court enters judgment ordering the sale of any effects in the possession of the garnishee, costs, including reasonable compensation to the garnishee, shall be taxed against the respondent.

(B) If the garnishee's answer is successfully controverted, the garnishee is not entitled to recover its costs.

(C) If the garnishee's answer is not successfully controverted, the court may award and apportion the costs, including reasonable compensation to the garnishee, as may be appropriate.

(d) *Garnishee Discharged on Proof of Compliance with Order.* It shall be a sufficient answer to any claim of the respondent against the garnishee founded on an indebtedness of the garnishee, or on the possession by the garnishee of any effects, for the garnishee to show that the indebtedness has been paid, or that the effects, including any certificates of stock in any incorporated or joint stock company, have been delivered to any sheriff or constable as provided in these rules.

(e) *Costs If Writ Dissolved or Overturned.* If a writ of garnishment is dissolved or overturned on appeal, the costs of the garnishment proceeding, including reasonable compensation to the garnishee, shall be taxed against the applicant.

Rule GARN 11 (626). Dissolution or Modification of Order or Writ

(a) *Motion.* Any party, or any person who claims an interest in the garnished property, may move the court to dissolve or modify the order or writ, for any ground or cause, extrinsic or intrinsic. The motion must be verified and must admit or deny each finding set forth in the order directing the issuance of the writ. If the movant is unable to admit or deny a finding, the movant must set forth the reasons why the movant cannot do so.

(b) *Time for Hearing.* Unless the parties agree to an extension of time, the motion must be heard promptly, after reasonable notice to all parties, which may be less than three days, and the motion must be determined not later than ten days after it is filed.

(c) *Stay of Proceedings.* The filing of the motion stays any further proceedings under the writ, except for any orders concerning the care, preservation, or sale of any perishable property, until a hearing is held, and the motion is determined.

(d) *Conduct of Hearing; Burden of Proof.*

(1) *Burden of Applicant.* The applicant has the burden to prove the statutory grounds relied on for issuance of the writ of garnishment. If the applicant fails to carry its burden, the writ must be dissolved and the underlying order set aside.

(2) *Burden of Movant.* If the applicant carries its burden, the movant has the burden to prove the grounds alleged to dissolve or modify the order or writ. If the movant seeks to modify the order or writ based upon the value of the property, the movant has the burden to prove that the reasonable

value of the property garnished exceeds the amount necessary to secure the claim, interest for one year, and probable costs.

(3) *Hearing.* The court's determination may be made after a hearing involving all parties, or upon the basis of affidavits setting forth facts as would be admissible in evidence. Additional evidence, if tendered by any party, may be received and considered.

(e) *Orders Permitted.* The court may order the dissolution or modification of the order or writ, and may make orders allowing for the care, preservation, disposition, or substitution of the property (or the proceeds if the property has been sold), as justice may require. If the court modifies its order granting garnishment, it must make further orders with respect to the bond, if any, that are consistent with the modification of the order. If the movant has given a replevy bond, an order to dissolve the writ must release the replevy bond and discharge the sureties thereon. If the writ is dissolved, the order must be set aside, the garnished property must be released and all expenses associated with storage of the property may be taxed as costs to the applicant.

(f) *Third-Party Claimant.* If any person other than the applicant or respondent in the original suit claims all or part of the garnished property, the court, on motion and hearing, may order the release of the property to that third-party claimant. The court may require a bond payable to the applicant or respondent, as ordered by the court, in an amount set by the court with sufficient surety or sureties and conditioned that the third-party claimant will pay, up to the amount of the bond, all damages and costs adjudged against the third-party claimant for wrongfully seeking the release of the property. If the court does not order the release of the property to the third-party claimant, the third-party claimant may follow the procedure for the trial of right of property.

Rule GARN 12 (627). Perishable Property

(a) *Definition of Perishable Property.* Property may be found to be perishable when it is in danger of serious and immediate waste or decay, or if the keeping of the property until the trial will necessarily be attended with expense or deterioration in value that will greatly lessen the amount likely to be realized therefrom. For the purposes of this rule, the word "property" refers to personal property garnished pursuant to court order.

(b) *Trial Court Discretion.* The judge or justice of the peace may make any orders necessary for the property's preservation or use.

(c) *Motion and Affidavit for Sale of Perishable Property.* If the respondent has not replevied property after the garnishment, the applicant or other party claiming an interest in the property may file a motion with the clerk or justice of the peace,

supported by affidavit, stating specific facts to support a finding that the property or any portion of the property is perishable. A copy of the motion and affidavit must be delivered to the person who is in possession of the property and served on all other parties in any manner prescribed for service of citation or as provided in Rule 21a.

(d) *Hearing.* The judge or justice of the peace must hear the motion, with or without notice to the parties, as the urgency of the case may require. The judge or justice of the peace may, based on affidavits or oral testimony, order the sale of the perishable property, and must set the amount of the movant's bond, if required.

(e) *Movant's Bond.* If the motion for an order of sale is filed by the applicant or respondent no bond is required; the applicant or respondent may replevy the property at any time before the sale. If the motion for an order of sale is filed by any other person or party, and the motion is granted, the court shall not issue the order unless the movant files with the court a bond payable to the applicant or respondent as ordered by the court, with one or more good and sufficient sureties to be approved by the court, conditioned that the movant will be responsible to the applicant or respondent as ordered by the court for any damages, up to the amount of the bond, sustained upon a finding that the motion or sale was wrongful.

(f) *Order.* An order to sell perishable property must be in writing, specifically describe the property to be sold, be directed to a sheriff or constable, and command the sheriff or constable to sell the property. If the property is being held by a person other than a sheriff or constable, then the sheriff or constable conducting the sale must deliver a copy of the order of sale to the person in possession of the property.

(g) *Procedure for Sale of Perishable Property.* The sale of perishable property must be conducted in the same manner as sales of personal property under execution, provided that the judge or justice of the peace may set the time of advertising and sale at a time earlier than ten days, according to the exigency of the case, and in that event notice must be given in the manner directed by the order.

(h) *Return of Order of Sale.* The sheriff or constable conducting the sale of perishable property must promptly remit the proceeds of the sale to the clerk or to the justice of the peace. The sheriff or constable must sign and file with the papers of the case a written return of the order of sale, stating the time and place of the sale, the name of the purchaser, and the amount of money received, with an itemized account of the expenses attending the sale.

Rule GARN 13 (628). Report of Disposition of Property

When garnished property is claimed, replevied, or sold, or otherwise disposed of after the writ has been returned, the sheriff or constable who had custody of the property

must immediately complete and sign a report describing the disposition of the property. If the property was replevied, the report must also describe the condition of the property on the date and time of replevy. The report must be filed with the clerk or justice of the peace.

Rule GARN 14 (629). Amendment of Errors

(a) *Before Order.* Before the court issues an order on an application for writ of garnishment, the application and any supporting affidavits may be amended to correct any errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk or justice of the peace at a time that will not operate as a surprise to the respondent.

(b) *After Order, Before Service of Writ.* After the court issues an order on an application for writ of garnishment but before the writ of garnishment is served, the application, any supporting affidavits, and the bond may be amended to correct any clerical errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk or justice of the peace at a time that will not operate as a surprise to the respondent. Clerical errors in the court's order for issuance of the writ and the writ of garnishment may also be corrected by the court, without notice.

(c) *After Order and Service of Writ.* After service of the writ of garnishment, on motion, notice, and hearing, the court in which the suit is filed may grant leave to amend clerical errors in the application, any supporting affidavits, the bond, the writ of garnishment, or the sheriff or constable's return, for good cause, provided the amendment does not change or add to the grounds of garnishment stated in the original application.

Garnishment Statutes
Texas Civil Practice & Remedies Code

§ 63.001. Grounds

A writ of garnishment is available if:

(1) an original attachment has been issued;

(2) a plaintiff sues for a debt and makes an affidavit stating that:

(A) the debt is just, due, and unpaid;

(B) within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt; and

(C) the garnishment is not sought to injure the defendant or the garnishee; or

(3) a plaintiff has a valid, subsisting judgment and makes an affidavit stating that, within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment.

§ 63.002. Who May Issue

The clerk of a district or county court or a justice of the peace may issue a writ of garnishment returnable to his court.

§ 63.003. Effect of Service

(a) After service of a writ of garnishment, the garnishee may not deliver any effects or pay any debt to the defendant. If the garnishee is a corporation or joint-stock company, the garnishee may not permit or recognize a sale or transfer of shares or an interest alleged to be owned by the defendant.

(b) A payment, delivery, sale, or transfer made in violation of Subsection (a) is void as to the amount of the debt, effects, shares, or interest necessary to satisfy the plaintiff's demand.

§ 63.004. Current Wages Exempt

Except as otherwise provided by state or federal law, current wages for personal service are not subject to garnishment. The garnishee shall be discharged from the garnishment as to any debt to the defendant for current wages.

§ 63.005. Place for Trial

(a) If a garnishee other than a foreign corporation is not a resident of the county in which the original suit is pending or was tried and a party to the suit files an affidavit controverting the garnishee's answer, the issues raised by the answer and controverting affidavit shall be tried in the county in which the garnishee resides. The issues may be tried in a court of that county that has jurisdiction of the amount of the original judgment if the plaintiff files with the court a certified copy of the judgment in the original suit and a certified copy of the proceedings in garnishment, including the plaintiff's application for the writ, the garnishee's answer, and the controverting affidavit.

(b) If a garnishee whose answer is controverted is a foreign corporation, the issues raised by the answer and controverting affidavit shall be tried in the court in which the original suit is pending or was tried.

§ 63.006. Administrative Fee for Certain Costs Incurred by Employers

(a) An employer who is required by state or federal law to deduct from the current wages of an employee an amount garnished under a withholding order may deduct monthly an administrative fee as provided by Subsection (b) from the employee's disposable earnings in addition to the amount required to be withheld under the withholding order. This section does not apply to income withholding under Chapter 158, Family Code.

(b) The administrative fee deducted under Subsection (a) may not exceed the lesser of:

(1) the actual administrative cost incurred by the employer in complying with the withholding order; or

(2) $ 10.

(c) For the purposes of this section, "withholding order" means:

(1) a withholding order issued under Section 488A, Part F, Subchapter IV, Higher Education Act of 1965 (20 U.S.C. Section 1095a); and

(2) any analogous order issued under a state or federal law that:

(A) requires the garnishment of an employee's current wages; and

(B) does not contain an express provision authorizing or prohibiting the payment of the administrative costs incurred by the employer in complying with the garnishment by the affected employee.

§ 63.007. Garnishment of Funds Held in Inmate Trust Fund

(a) A writ of garnishment may be issued against an inmate trust fund held under the authority of the Texas Department of Criminal Justice under Section 501.014, Government Code, to encumber money that is held for the benefit of an inmate in the fund.

(b) The state's sovereign immunity to suit is waived only to the extent necessary to authorize a garnishment action in accordance with this section.

§ 63.008. Financial Institution As Garnishee

Service of a writ of garnishment on a financial institution named as the garnishee in the writ is governed by Section 59.008, Finance Code.

§ 65.001. Application of Equity Principles

The principles governing courts of equity govern injunction proceedings if not in conflict with this chapter or other law.

§ 65.002. Restraining Order or Injunction Affecting Customer of Financial Institution

Service or delivery of a restraining order or injunction affecting property held by a financial institution in the name of or on behalf of a customer of the financial institution is governed by Section 59.008, Finance Code.

§ 65.003. to 65.010 [Reserved for expansion]

SECTION 4. SEQUESTRATION

Rule SEQ 1 (630). Application for Writ of Sequestration and Order

(a) *Pending Suit Required for Issuance of Writ.* An application for a writ of sequestration may be filed at the initiation of a suit or at any time before final judgment.

(b) *Application.* An application for a writ of sequestration must:

(1) set forth specific facts stating the nature of the applicant's claim to the property;

(2) state one or more statutory grounds for issuance of the writ as provided in Chapter 62 of the Texas Civil Practice and Remedies Code and the specific facts justifying sequestration of the property;

(3) describe the property to be sequestered with sufficient certainty that it may be identified and distinguished from property of like kind;

(4) state the amount in controversy of the underlying suit; and

(5) state the value of each item of property, if known, and the county in which the property is located.

(c) *Verification.* The application must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for belief are specifically stated.

(d) *Order.*

(1) *Issuance Without Notice.* No writ shall issue before a final judgment except on written order of the court after a hearing, which may be ex parte.

(2) *Effect of Pleading.* The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively.

(3) *Return.* The order must provide that the writ is returnable to the court that issued the writ.

(4) *Findings of Fact.* The order must include specific findings of fact supporting the statutory grounds for issuance of the writ.

(5) *Property to be Sequestered.* The order must describe the property to be sequestered and state the value of each item of property and the county in which it is located.

(6) *Levy and Safekeeping.* The order must command the sheriff and any constable of any county to levy on the property found in the officer's county and keep the property safe and preserved subject to further order of the court.

(7) *Applicant's Bond.* The order must state the amount of the bond required from the applicant. The bond must be in an amount which, in the court's opinion, will adequately compensate the respondent in the event the applicant fails to prosecute the suit to effect, and pay all damages and costs as may be adjudged against the applicant for wrongful sequestration.

(8) *Respondent's Replevy Bond.*

(A) If the suit is for the enforcement of a mortgage or lien on real or personal property, the order must set the amount of the respondent's replevy bond equal to the lesser of:

(i) the value of the property; or

(ii) the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

(B) If the suit is other than for the enforcement of a mortgage or lien on real or personal property, the order must set the amount of the respondent's replevy bond equal to the lesser of:

(i) the value of the property, plus the estimated value of the fruits, hire, revenue, or rent derived from the property; or

(ii) the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

(9) *Multiple Writs.* Multiple writs may issue at the same time, or in succession, without requiring return of the prior writ or writs. Writs may be sent to different counties for service by the sheriffs or constables. In the event multiple writs are issued, the applicant must inform the officers to whom the writs are delivered that multiple writs are outstanding.

Rule SEQ 2 (631). Applicant's Bond or Other Security

(a) *Requirement of Bond.* A writ of sequestration may not be issued unless the applicant has filed with the clerk or justice of the peace a bond:

(1) payable to the respondent in the amount set by the court's order;

(2) with sufficient surety or sureties as approved by the clerk or justice of the peace; and

(3) conditioned on the applicant prosecuting the applicant's suit to effect and paying all damages and costs as may be adjudged against the applicant for wrongful sequestration.

(b) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

(c) *Review of Applicant's Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the applicant's bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of uncontroverted affidavits setting forth facts as would be admissible in evidence; otherwise, the parties must submit evidence. After a hearing, the court must issue a written order on the motion.

Rule SEQ 3 (632). Contents of Writ

(a) *General Requirements.* A writ of sequestration must be dated and signed by the clerk or the justice of the peace, bear the seal of the court, and be directed to the sheriff or any constable of any county within the State of Texas.

(b) *Command of Writ.* The writ must describe the property in the same language as in the court's order for the issuance of the writ, and must command the sheriff or constable to levy on the property found in the officer's county and to keep the property safe and preserved subject to further order of the court.

(c) *Return of Writ.* The writ must be made returnable to the court that ordered the issuance of the writ within thirty, sixty, or ninety days from the date of issuance, as directed by the applicant.

(d) *Notice to Respondent.* The face of the writ must display, in not less than 12-point type and in a manner calculated to advise a reasonably attentive person, the following notice:

"To _____, Respondent:

"YOU ARE HEREBY NOTIFIED THAT PROPERTY ALLEGED TO BE OWNED BY YOU HAS BEEN SEQUESTERED. IF YOU CLAIM ANY RIGHTS IN THE PROPERTY, YOU ARE ADVISED:

"YOUR FUNDS OR OTHER PROPERTY MAY BE EXEMPT UNDER FEDERAL OR STATE LAW.

"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 OR MODIFY THIS WRIT."

(e) *Form of Writ.* The following form of writ may be issued, but any form used must contain the Notice to Respondent:

"The State of Texas.

"To the Sheriff or any Constable of any County of the State of Texas, greetings:

"We command that you promptly take into your possession the following property of [Respondent], [here describe the property as it is described in the application or affidavits], if it is found in your county, and that you keep the sequestered property safe and preserved, unless replevied, that the same may be liable to further proceedings before the court in _____ County, Texas. You will return this writ on or before [30, 60, 90] days from the date of issuance of the writ showing how you have executed the same."

Rule SEQ 4 (633). Delivery, Levy, and Return of Writ

(a) *Delivery of Writ.* The clerk or justice of the peace issuing a writ of sequestration must deliver the writ to:

(1) the sheriff or constable; or

(2) the applicant, who must then deliver the writ to the sheriff or constable.

(b) *Timing and Extent of Levy.* The sheriff or constable who receives the writ of sequestration must:

(1) endorse the writ with the date of receipt; and

(2) as soon as practicable, proceed to levy on the property subject to the writ and found within the sheriff's or constable's county.

(c) *Method of Levy.*

(1) *Real Property.* Levy on real property is made by the sheriff or constable describing the property on the return and immediately filing for record a copy of the writ and return with the county clerk of each county in which the property is located.

(2) *Personal Property.* The sheriff or constable may levy on personal property by:

(A) seizing the property and holding it in a location under the control of the sheriff or constable;

(B) seizing the property in place, in which case the sheriff or constable must affix a notice of the seizure to or near the property; or

(C) seizing the property and holding it in a bonded warehouse, or other secure location.

(d) *Return of Writ.*

(1) The sheriff's or constable's return must be in writing and must be signed by the sheriff or constable. The writ must be returned to the clerk or justice of the peace from which it issued within the time stated in the writ.

(2) The sheriff's or constable's action must be endorsed on or attached to the writ. In the return, the sheriff or constable must state what action the sheriff or constable took in levying, describe the property sequestered with sufficient certainty to identify it and distinguish it from property of like kind, and state when the property was seized and where the property is being held.

Rule SEQ 5 (634). Service of Writ on Respondent After Levy

As soon as practicable following levy, the applicant must serve the respondent with a copy of the writ of sequestration, the application, accompanying affidavits, and orders of the court. Service may be in any manner prescribed for service of citation or as provided in Rule 21a.

Rule SEQ 6 (635). Respondent's Replevy Rights

(a) *Where Filed.* At any time before judgment, if the sequestered property has not been previously claimed or sold, the respondent may replevy some or all of the property, or the proceeds from the sale of the property if it has been sold under order of the court, by filing a replevy bond with the court or the sheriff or constable and serving the applicant with a copy of the bond.

(b) *Amount and Form of Respondent's Replevy Bond.* The respondent's replevy bond must be made payable to the applicant in the amount set by the court's order with sufficient surety or sureties, as provided by law, to be approved by the court or by the sheriff or constable who has possession of the property. The bond must be conditioned on the respondent satisfying, to the extent of the penal amount of the bond, any judgment that may be rendered against the respondent in the suit.

(1) *Replevy Bond for Personal Property.* If the property to be replevied is personal property, the bond must also contain the conditions that the respondent will:

(A) not remove the property from the county;

(B) not waste, ill-treat, injure, destroy, or dispose of the property;

(C) maintain the property, in the same condition as when it is replevied, together with the value of the fruits, hire or revenue derived from the property;

(D) return the property, along with all fruits, hire, or revenue derived therefrom, to the applicant in the same condition if the underlying suit is decided against the respondent; and

(E) to the extent that the:

(i) property is not returned, pay the value of the property, along with the fruits, hire, or revenue derived therefrom; and

(ii) property is returned, but not in the same condition, pay the difference between the value of the property as of the date of replevy and the date of judgment, regardless of the cause of the difference in value, along with the value of the fruits, hire, or revenue derived therefrom.

(2) *Replevy Bond for Real Property.* If the property to be replevied is real property, the bond must also contain the condition that the respondent will not injure the property and will pay the value of the rents, fruits, and

revenues of the property if the underlying suit is decided against the respondent.

(3) *Exception.* In a suit for enforcement of a mortgage or lien on real or personal property, a respondent who replevies the property is not required to bond or account for the fruits, hire, revenue or rent of the property. The bond in that case would not include that condition.

(4) *Filing of Replevy Bond.* When property has been replevied, the sheriff or constable must deliver the replevy bond to the clerk or justice of the peace to be filed with the papers of the suit.

(c) *Other Security.* In lieu of a bond, the respondent may deposit cash or other security in compliance with Rule 14c.

(d) *Review of Respondent's Replevy Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the respondent's replevy bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of uncontroverted affidavits setting forth facts as would be admissible in evidence; otherwise, the parties must submit evidence. After a hearing, the court must issue a written order on the motion.

(e) *Respondent's Right to Possession.* If the respondent files a proper replevy bond, and the replevy bond is not successfully challenged by the applicant, the sheriff or constable in possession of the sequestered property must release the property to the respondent within a reasonable time after a copy of the bond is delivered to the sheriff or constable. Before the property is released to the respondent, the respondent must pay all expenses associated with storage of the property.

Rule SEQ 7 (636). Applicant's Replevy Rights

(a) *Motion.* If the respondent does not replevy sequestered personal property within ten days after service of the writ on the respondent, and if the sequestered property has not been previously claimed or sold, the applicant may, at any time before judgment, move the court to replevy some or all of the property.

(b) *Notice and Hearing.* The court may, in its discretion, after notice and hearing, grant the applicant's motion to replevy and set the applicant's replevy bond.

(c) *Order.* The order must set the amount of the applicant's replevy bond equal to the lesser of the value of the property or the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court. The bond must be made payable to the respondent in the amount set by

the court's order, with sufficient surety or sureties as approved by the clerk or the justice of the peace. The order must also include the conditions of the applicant's replevy bond as provided in this rule.

(d) *Conditions of the Applicant's Replevy Bond.* The applicant's replevy bond must be made payable to the respondent in the amount set by the court's order with sufficient surety or sureties, as provided by law, to be approved by the court or by the sheriff or constable who has possession of the property. The applicant's replevy bond must be conditioned on the applicant satisfying, to the extent of the penal amount of the bond, any judgment which may be rendered against the applicant in the action.

(1) *Replevy Bond for Personal Property.* If the property to be replevied is personal property, the bond must also contain the conditions that the applicant will:

(A) not remove the property from the county;

(B) not waste, ill-treat, injure, destroy, or dispose of the property;

(C) maintain the property, in the same condition as when it is replevied, together with the value of the fruits, hire or revenue derived from the property;

(D) return the property, along with all fruits, hire, or revenue derived therefrom, to the respondent in the same condition if the underlying suit is decided against the applicant; and

(E) to the extent that the:

(i) property is not returned, pay the value of the property, along with the fruits, hire, or revenue derived therefrom; and

(ii) property is returned, but not in the same condition, pay the difference between the value of the property as of the date of replevy and the date of judgment, regardless of the cause of the difference in value, along with the value of the fruits, hire, or revenue derived therefrom.

(2) *Replevy Bond for Real Property.* If the property to be replevied is real property,

the bond must also contain the condition that the applicant will not injure the property and will pay the value of the rents of the property if the underlying suit is decided against the applicant.

(e) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

(f) *Service on Respondent.* The applicant must serve the respondent with a copy of the court's order and the applicant's replevy bond. Service may be in any manner prescribed for service of citation or as provided in Rule 21a.

(g) *Applicant's Right to Possession.* If the court grants the applicant's motion to replevy, a copy of the court's order and applicant's replevy bond must be delivered to the sheriff or constable in possession of the sequestered personal property. The sheriff or constable must then release the property to the applicant within a reasonable time. Before the property is released to the applicant, the applicant must pay all expenses associated with storage of the property.

Rule SEQ 8 (637). Dissolution or Modification of Order or Writ

(a) *Motion.* Any party, or any person who claims an interest in the property under levy of sequestration, may move the court to dissolve or modify the order or writ, for any ground or cause, extrinsic or intrinsic. The motion must be verified and must admit or deny each finding set forth in the order directing the issuance of the writ. If the movant is unable to admit or deny the finding, the movant must set forth the reasons why the movant cannot do so.

(b) *Time for Hearing.* Unless the parties agree to an extension of time, the motion must be heard promptly, after reasonable notice to all parties, which may be less than three days, and the motion must be determined not later than ten days after it is filed.

(c) *Stay of Proceedings.* The filing of the motion stays any further proceedings under the writ, except for any orders concerning the care, preservation, or sale of any perishable property, until a hearing is held, and the motion is determined.

(d) *Conduct of Hearing; Burden of Proof.*

(1) *Burden of Applicant.* The applicant has the burden to prove the statutory grounds relied on for issuance of the writ of sequestration. If the applicant fails to carry its burden, the writ must be dissolved and the underlying order set aside.

(2) *Burden of Movant.* If the applicant carries its burden, the movant has the burden to prove the grounds alleged to modify or dissolve the order or the writ. If the movant seeks to modify the order or writ based upon the value of the property, the movant has the burden to prove that the reasonable value of the property sequestered exceeds the amount necessary to secure the claim, interest for one year, and probable costs.

(3) *Hearing.* The court's determination may be made after a hearing involving all parties, or upon the basis of affidavits setting forth facts as would be admissible in evidence. Additional evidence, if tendered by any party, may be received and considered.

(e) *Orders Permitted.* The court may order the dissolution or modification of the order or writ, and may make orders allowing for the care, preservation, disposition, or substitution of the property (or the proceeds if the property has been sold), as justice may require. If the court modifies its order granting sequestration, it must make further orders with respect to the bond that are consistent with the modification of the order. If the movant has given a replevy bond, an order to dissolve the writ must release the replevy bond and discharge the sureties thereon. If the writ is dissolved, the order must be set aside, the sequestered property must be released, and all expenses associated with storage of the property may be taxed as costs to the applicant.

(f) *Third-Party Claimant.* If any person other than the applicant or respondent in the original suit claims all or part of the sequestered property, the court, on motion and hearing, may order the release of the property to that third-party claimaint. The court may require a bond payable to the applicant or respondent, as ordered by the court, in an amount set by the court with sufficient surety or sureties and conditioned that the third-party claimant will pay, up to the amount of the bond, all damages and costs adjudged against the third-party claimant for wrongfully seeking the release of the property. If the court does not order the release of the property to the third-party claimant, the third-party claimant may follow the procedure for the trial of right of property.

(g) *Compulsory Counterclaim; Attorney's Fees.* A writ of sequestration must be dissolved before a respondent may bring a claim for wrongful sequestration. If a writ of sequestration is dissolved, any action by the respondent for damages for wrongful sequestration must be brought as a compulsory counterclaim in the same action. In addition to damages for wrongful sequestration, the respondent may recover reasonable attorney's fees incurred in obtaining dissolution or modification of the order or writ.

PROPOSED COMMENT TO **RULE SEQ 8 (637)**: See Sections 62.044 and 62.045 of the Texas Civil Practice and Remedies Code.

Rule SEQ 9 (638). Judgment

(a) *Judgment Against Respondent on Replevy Bond.*

(1) If the underlying suit is decided against a respondent who replevied the sequestered property, and the suit is for the enforcement of a mortgage or lien on real or personal property, final judgment must also be rendered

against all of the obligors on the respondent's replevy bond, jointly and severally, for the value of the property replevied as of the date of the execution of the respondent's replevy bond.

(2) If the underlying suit is decided against a respondent who replevied the sequestered property, and the suit is other than for the enforcement of a mortgage or lien on real or personal property, final judgment must also be rendered against all of the obligors on the respondent's replevy bond, jointly and severally, for the value of the property replevied as of the date of the execution of the respondent's replevy bond, and the value of the fruits, hire, revenue, or rent derived from the property.

(b) *Judgment Against Applicant on Replevy Bond.* If the underlying suit is decided against an applicant who replevied the sequestered property, final judgment must be rendered against all of the obligors on the applicant's replevy bond, jointly and severally, for the value of the property replevied as of the date of the execution of the applicant's replevy bond, and the value of the fruits, hire, revenue, or rent derived from the property.

(c) *All Judgments.* In any judgment, all expenses associated with storage of the property may be taxed as costs against the non-prevailing party.

Rule SEQ 10 (639). Obligation to Return Replevied Personal Property After Judgment

(a) *Judgment Against Respondent.* Within ten days after final judgment is signed, the respondent must return personal property replevied by the respondent as follows:

(1) *Judgment for Property or Possession.* If the judgment awards possession of the replevied personal property or the property itself to the applicant, the respondent must deliver the property (A) directly to the applicant upon demand, or (B) to the officer who levied the writ of sequestration who shall then deliver the property to the applicant, upon demand.

(2) *Judgment for Title.* If the judgment awards title to the replevied personal property to the applicant, the respondent must deliver the property (A) to the officer demanding the property under execution on a judgment for title of the property or (B) as otherwise ordered by the court.

(3) *Judgment Foreclosing Lien or Mortgage.* If the judgment orders the foreclosure of a lien or mortgage on the replevied personal property, the respondent must deliver the property to the officer calling for the property under an order of sale on a judgment foreclosing the lien, either in the county of the respondent's residence or in the county where the property was sequestered, as determined by the officer.

(4) *Disposition of Property by Officer.* If the respondent delivers the property to the officer who sequestered the property or to the officer calling for same under an order for sale, the officer must provide the respondent with a receipt for the property and hold or dispose of the property as ordered by the court. Any sale or disposition of the property by the officer under the court's order does not affect or limit any of the applicant's rights under the respondent's replevy bond.

(b) *Judgment Against Applicant.* Within ten days after final judgment is signed, the applicant must return personal property replevied by the applicant (A) directly to the respondent upon demand, or (B) to the officer who levied the writ of sequestration who shall then deliver the property to the respondent upon demand. If the applicant delivers the property to the officer who sequestered the property, the officer must provide the applicant with a receipt for the property and hold or dispose of the property as ordered by the court.

(c) *Effect of Return on Replevy Bond.* Return by the applicant or respondent of replevied personal property is without prejudice to any party's rights under the returning party's replevy bond.

(d) *Failure to Return Replevied Personal Property.* If the personal property replevied is not returned, or the returned property is insufficient to satisfy the judgment, execution may be issued on the judgment in the underlying suit as in other cases.

Rule SEQ 11 (640). Perishable Property

(a) *Definition of Perishable Property.* Property may be found to be perishable when it is in danger of serious and immediate waste or decay, or if the keeping of the property until the trial will necessarily be attended with expense or deterioration in value that will greatly lessen the amount likely to be realized therefrom. For the purposes of this rule, the word "property" refers to personal property under levy of sequestration pursuant to court order.

(b) *Trial Court Discretion.* The judge or justice of the peace may make any orders necessary for the property's preservation or use.

(c) *Motion and Affidavit for Sale of Perishable Property.* If the respondent has not replevied property after the levy of a writ of sequestration, the applicant, or other party claiming an interest in the property, may file a motion with the clerk or justice of the peace, supported by affidavit, stating specific facts to support a finding that the property or any portion of the property is perishable. A copy of the motion and affidavit must be delivered to the person who is in possession of the property and served on all other parties in any manner prescribed for service of citation or as provided in Rule 21a.

(d) *Hearing.* The judge or justice of the peace must hear the motion, with or without notice to the parties, as the urgency of the case may require. The judge or justice of the peace may, based on affidavits or oral testimony, order the sale of the perishable property and must set the amount of the movant's bond, if required.

(e) *Movant's Bond.* If the motion for an order of sale is filed by the applicant or respondent, no bond is required; the applicant or respondent may replevy the property at any time before the sale. If the motion for an order of sale is filed by any other person or party and the motion is granted, the court shall not issue the order of sale unless the movant files with the court a bond payable to the applicant or respondent as ordered by the court, with one or more good and sufficient sureties to be approved by the court conditioned that the movant will be responsible to the applicant or respondent as ordered by the court for any damages, up to the amount of the bond, sustained upon a finding that the motion or sale was wrongful.

(f) *Order.* An order to sell perishable property must be in writing, specifically describe the property to be sold, be directed to a sheriff or constable, and command the sheriff or constable to sell the property. If the property is being held by a person other than a sheriff or constable, then the sheriff or constable conducting the sale must deliver a copy of the order of sale to the person in possession of the property.

(g) *Procedure for Sale of Perishable Property.* The sale of perishable property must be conducted in the same manner as sales of personal property under execution, provided that the judge or justice of the peace may set the time of advertising and sale at a time earlier than ten days, according to the exigency of the case, and in that event notice must be given in the manner directed by the order.

(h) *Return of Order of Sale.* The sheriff or constable conducting the sale of perishable property must promptly remit the proceeds of the sale to the clerk or to the justice of the peace. The sheriff or constable must sign and file with the papers of the case a written return of the order of sale, stating the time and place of the sale, the name of the purchaser, and the amount of money received, with an itemized account of the expenses attending the sale.

Rule SEQ 12 (641). Report of Disposition of Property

When sequestered property is claimed, replevied, or sold, or otherwise disposed of after the writ has been returned, the sheriff or constable who had custody of the property must immediately complete and sign a report describing the disposition of the property. If the property was replevied, the report must also describe the condition of the property on the date and time of replevy. The report must be filed with the clerk or justice of the peace.

Rule SEQ 13 (642). Amendment of Errors

(a) *Before Order.* Before the court issues an order on an application for writ of sequestration, the application and any supporting affidavits may be amended to correct any errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk or justice of the peace at a time that will not operate as a surprise to the respondent.

(b) *After Order, Before Levy of Writ.* After the court issues an order on an application for writ of sequestration but before the writ of sequestration is levied, the application, any supporting affidavits, and the bond may be amended to correct any clerical errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk or justice of the peace at a time that will not operate as a surprise to the respondent. Clerical errors in the court's order for issuance of the writ and the writ of sequestration may also be corrected by the court, without notice.

(c) *After Order and Levy of Writ.* After levy of the writ of sequestration, on motion, notice, and hearing, the court in which the suit is filed may grant leave to amend clerical errors in the application, any supporting affidavits, the bond, the writ of sequestration, or the sheriff or constable's return, for good cause, provided the amendment does not change or add to the grounds of sequestration stated in the original application.

Sequestration Statutes
Texas Civil Practice & Remedies Code

§ 62.001. Grounds

A writ of sequestration is available to a plaintiff in a suit if:

(1) the suit is for title or possession of personal property or fixtures or for foreclosure or enforcement of a mortgage, lien, or security interest on personal property or fixtures and a reasonable conclusion may be drawn that there is immediate danger that the defendant or the party in possession of the property will conceal, dispose of, ill-treat, waste, or destroy the property or remove it from the county during the suit;

(2) the suit is for title or possession of real property or for foreclosure or enforcement of a mortgage or lien on real property and a reasonable conclusion may be drawn that there is immediate danger that the defendant or the party in possession of the property will use his possession to injure or ill-treat the property or waste or convert to his own use the timber, rents, fruits, or revenue of the property;

(3) the suit is for the title or possession of property from which the plaintiff has been ejected by force or violence; or

(4) the suit is to try the title to real property, to remove a cloud from the title of real property, to foreclose a lien on real property, or to partition real property and the plaintiff makes an oath that one or more of the defendants is a nonresident of this state.

§ 62.002. Pending Suit Required

A writ of sequestration may be issued at the initiation of a suit or at any time before final judgment.

§ 62.003. Available for Claim Not Due

A writ of sequestration may be issued for personal property under a mortgage or a lien even though the right of action on the mortgage or lien has not accrued. The proceedings relating to the writ shall be as in other cases, except that final judgment may not be rendered against the defendant until the right of action has accrued.

§ 62.004. to 62.020 [Reserved for expansion]

§ 62.021. Who May Issue

A district or county court judge or a justice of the peace may issue writs of sequestration returnable to his court.

§ 62.022. Application

The application for a writ of sequestration must be made under oath and must set forth:

(1) the specific facts stating the nature of the plaintiff's claim;

(2) the amount in controversy, if any; and

(3) the facts justifying issuance of the writ.

§ 62.023. Required Statement of Rights

(a) A writ of sequestration must prominently display the following statement on the face of the writ:

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.
(b) The statement must be printed in 10-point type and in a manner intended to advise a reasonably attentive person of its contents

§ 62.024. to 62.040 [Reserved for expansion]

§ 62.041. Motion for Dissolution; Stay
(a) The defendant may seek dissolution of an issued writ of sequestration by filing a written motion with the court.
(b) The right to seek dissolution is cumulative of the right of replevy.
(c) The filing of a motion to dissolve stays proceedings under the writ until the issue is determined.

§ 62.042. Hearing on Motion
Unless the parties agree to an extension, the court shall conduct a hearing on the motion and determine the issue not later than the 10th day after the motion is filed.

§ 62.043. Dissolution
(a) Following the hearing, the writ must be dissolved unless the party who secured its issuance proves the specific facts alleged and the grounds relied on for issuance.
(b) If the writ is dissolved, the action proceeds as if the writ had not been issued.

§ 62.044. Compulsory Counterclaim for Wrongful Sequestration
(a) If a writ is dissolved, any action for damages for wrongful sequestration must be brought as a compulsory counterclaim.
(b) In addition to damages, the party who sought dissolution of the writ may recover reasonable attorney's fees incurred in dissolution of the writ.

§ 62.045. Wrongful Sequestration of Consumer Goods
(a) If a writ that sought to sequester consumer goods is dissolved, the defendant or party in possession of the goods is entitled to reasonable attorney's fees and to damages equal to the greater of:
(1) $ 100;
(2) the finance charge contracted for; or
(3) actual damages.
(b) Damages may not be awarded for the failure of the plaintiff to prove by a preponderance of the evidence the specific facts alleged if the failure is the result of a bona fide error. For a bona fide error to be available as a defense, the plaintiff must prove the use of reasonable procedures to avoid the error.
(c) In this section, "consumer goods" has the meaning assigned by the Business & Commerce Code.

§ 62.046. Liability for Fruit of Replevied Property

(a) In a suit for enforcement of a mortgage or lien on property, a defendant who replevies the property is not required to account for the fruits, hire, revenue, or rent of the property.
(b) This section does not apply to a plaintiff who replevies the property.

§ 62.047. to 62.060 [Reserved for expansion]

§ 62.061. Officer's Liability and Duty of Care

(a) An officer who executes a writ of sequestration shall care for and manage in a prudent manner the sequestered property he retains in custody.
(b) If the officer entrusts sequestered property to another person, the officer is responsible for the acts of that person relating to the property.
(c) The officer is liable for injuries to the sequestered property resulting from his neglect or mismanagement or from the neglect or mismanagement of a person to whom he entrusts the property.

§ 62.062. Compensation of Officer

(a) An officer who retains custody of sequestered property is entitled to just compensation and reasonable charges to be determined by the court that issued the writ.
(b) The officer's compensation and charges shall be taxed and collected as a cost of suit.

§ 62.063. Indemnification of Officer for Money Spent

If an officer is required to expend money in the security, management, or care of sequestered property, he may retain possession of the property until the money is repaid by the party seeking to replevy the property or by that party's agent or attorney.