

# **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**  
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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.

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## PART VI. Rules Relating To Ancillary Proceedings

### SECTION 1. INJUNCTIONS

#### Rule INJ 1 (592). Temporary Restraining Orders<sup>1</sup>

- (a) *Application.* A temporary restraining order may be sought by a motion or application<sup>2</sup> that must:
- (1) contain a plain and intelligible statement of the grounds for injunctive relief;
  - (2) state why immediate and irreparable injury, loss, or damage will result if the temporary restraining order is not granted;
  - (3) state why the applicant has no adequate remedy at law;
  - (4) state why the applicant has a probable right to recover on a cause of action; and
  - (5) if sought without notice to the adverse party or its attorney, demonstrate through specific facts, supported by verification or affidavit, that:
    - (A) notice was not possible or practicable; or
    - (B) the applicant will sustain substantial damage before notice can be served and a hearing held.
- (b) *Verification.* All facts supporting 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. Pleading on information and belief is insufficient to support the granting of the application.<sup>3</sup>

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<sup>1</sup> This rule has been rewritten completely and contains information from existing Rules 680 through 683.

<sup>2</sup> Throughout the injunction rules, the term “application” refers to an application or a motion.

<sup>3</sup> This draft requires each element of the application to be supported by sworn allegations. The existing Texas Rules of Civil Procedure only expressly require sworn averments for TROs that are issued *without notice*. *In re Texas Natural Resource Conservation Commission* cites *Millwrights Local Union No. 2484 v. Rust Engineering Company* for the proposition that a TRO may issue on merely a sworn petition, whereas a temporary injunction requires evidence. *See In re Tex. Natural Resource Conservation Comm’n*, 85 S.W.3d 201, 204 (Tex. 2002) (orig. proceeding); *Millwrights Local Union No. 2484 v. Rust Eng’g Co.*, 433 S.W.2d 683, 685-87 (Tex. 1968). Neither case addresses the issue of whether a TRO may be granted without sworn allegations of the elements so long as the opposing party is given notice of the TRO hearing. No Texas case addresses this issue directly, most likely because TROs are not usually appealable. However, existing Rule 682 provides that *no* writ of injunction may be granted without a pleading verified by affidavit. Because a TRO is a writ of injunction, the sworn pleading rule should apply.

- (c) *Time for Hearing.* The court may conduct a hearing on the application at such time and upon such notice, if any, as directed by the court.
- (d) *Order.* A court may grant the application with or without written or oral notice to the adverse party or its attorney. Unless provided otherwise by the Texas Family Code or other statute, every order granting an application for a temporary restraining order must:
  - (1) state the date and hour of issuance;
  - (2) state why immediate and irreparable injury, loss, or damage will result if the temporary restraining order is not granted;
  - (3) state why the applicant has no adequate remedy at law;
  - (4) state why the applicant has a probable right to recover on a cause of action;
  - (5) describe in reasonable detail, and not by reference to the petition or other document, the act or acts sought to be mandated or restrained;
  - (6) set a specific date and time for hearing on the application for the temporary or permanent injunction sought;
  - (7) state the amount and terms of the applicant's bond, if a bond is required;
  - (8) if granted without notice to the adverse party or its attorney:
    - (A) state why it was granted without notice; and
    - (B) set a hearing of the application for a temporary injunction that is at the earliest possible date, taking precedence over all matters except older matters of the same character;
  - (9) state the duration of the order;
  - (10) state that the order is binding on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise; and
  - (11) be filed promptly in the clerk's office.

(e) *Duration and Extension.*

- (1) The duration of a temporary restraining order may not exceed fourteen days from the date of issuance.
- (2) The court may extend the duration of a temporary restraining order for a like period not to exceed fourteen days. The reasons for the extension must be stated in the order.
- (3) The parties may agree to extend the duration beyond the above-referenced time periods.

(f) *Applicant's Bond.* No temporary restraining order may be issued unless the applicant first posts a bond or other security pursuant to Rule **INJ 4 (595)**.

(g) *Motion to Dissolve or Modify.*<sup>4</sup> On two days' notice to the party who obtained the temporary restraining order, or shorter if the court directs, a party may move for dissolution or modification of the temporary restraining order. The court must hear and determine the motion as expeditiously as practicable. If the grounds for the motion to dissolve or modify are based on an issue of fact, the motion must be supported by specific facts shown by affidavit, verified denial, testimony, or other evidence.

(h) *Conflict.* If there is a conflict between a provision of this rule and the Texas Family Code, the Texas Family Code shall prevail.

PROPOSED COMMENTS TO RULE **INJ 1 (592(a))**: Throughout the injunction rules, the term "application" refers to an application or a motion.

A party seeking a temporary restraining order should include a request for a temporary or permanent injunction in its live pleadings. The application for a temporary restraining order may be included in the party's petition or in a separate pleading.

**Rule INJ 2 (593). Temporary Injunctions**<sup>5</sup>

(a) *Application.* A temporary injunction may be sought by a motion or application that must:

- (1) contain a plain and intelligible statement of the grounds for injunctive relief;

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<sup>4</sup> The existing rules also contain a "Bond on Dissolution" provision. The Injunctive Rule Subcommittee recommends deleting that rule completely. See July 2, 2008 Memorandum from Dulcie Green Wink to the Ancillary Task Force, Injunctive Rule Subcommittee (hereinafter referred to as "Attachment A").

<sup>5</sup> This draft rule incorporates information from existing Rules 681 and 682, and is prepared to be relatively parallel to pleading requirements for a TRO.

- (2) state why immediate and irreparable injury, loss, or damage will result if the temporary injunction is not granted;
  - (3) state why the applicant has no adequate remedy at law; and
  - (4) state why the applicant has a probable right to recover on a cause of action.
- (b) *Verification.* All facts supporting 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.
- (c) *Notice and Hearing.* The application cannot be granted without notice to the adverse party and an evidentiary hearing. The court must conduct the hearing at such time and upon such reasonable notice as the court may direct. An application for temporary injunction cannot be granted without evidence of each element in the hearing.
- (d) *Order.* Every order granting an application for a temporary injunction must:
  - (1) state the date and hour of issuance;
  - (2) state why immediate and irreparable injury, loss, or damage will result if the temporary injunction is not granted;
  - (3) state why the applicant has no adequate remedy at law;
  - (4) state why the applicant has a probable right to recover on a cause of action;
  - (5) describe in reasonable detail, and not by reference to the petition or other document, the act or acts sought to be mandated or restrained;
  - (6) state that the temporary injunction shall apply until trial on the merits with respect to the ultimate relief sought;
  - (7) set the cause for trial on the merits with respect to the ultimate relief sought;
  - (8) state the amount and terms of the applicant's bond, if a bond is required; and
  - (9) be filed promptly in the clerk's office.



- (c) *Effect of Appeal.* Unless ordered otherwise, the appeal of a temporary injunction may not delay the trial.
- (f) *Applicant's Bond.* No temporary injunction may be issued unless the applicant first posts a bond or other security pursuant to Rule **INJ 4 (595)**.
- (g) *Motion to Dissolve or Modify.*<sup>6</sup> On reasonable notice to the party who obtained the temporary injunction, which may be less than three days, a party may move for dissolution or modification of the temporary injunction. The court must hear and determine the motion as expeditiously as practicable. If the grounds for the motion to dissolve or modify are based on an issue of fact, the motion must be supported by specific facts shown by affidavit, verified denial, testimony, or other evidence.
- (h) *Conflict.* If there is a conflict between a provision of this rule and the Texas Family Code, the Texas Family Code shall prevail.

PROPOSED COMMENTS TO RULE **INJ 2 (593(a))**: Throughout the injunction rules, the term “application” refers to an application or a motion.

A party seeking a temporary injunction should include a request for a temporary and/or permanent injunction in its live pleadings. The application for the temporary injunction, itself, may be included in the party’s petition or in a separate pleading.

The parties may agree to expedited discovery in preparation for the injunction hearing. On a motion by a party, the court has the discretion to order expedited discovery to facilitate the parties’ preparation for the injunction hearing. The expedited discovery can, but is not required to, be limited to the injunctive issues. In determining whether and to what extent the discovery should be limited to the injunctive issues, the court should consider the facts and circumstances of the case, the ability to sever the injunctive issues from the other issues in the case, judicial economy, the costs to the parties and the potential harassment that can arise in injunctive cases. An order granting expedited discovery should specify whether and to what extent the discovery is limited to injunctive issues.

### **Rule INJ 3 (594). Permanent Injunctions**

- (a) *Pleading.* To be awarded a permanent injunction, a party’s pleading must:
  - (1) contain a plain and intelligible statement of the grounds for injunctive relief;

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<sup>6</sup> The existing rules also contain a “Bond on Dissolution” provision. The Injunctive Rule Subcommittee recommends deleting that rule completely. See Attachment A.

- (2) state why immediate and irreparable injury, loss, or damage will result if the permanent injunction is not granted; and
  - (3) state why the applicant has no adequate remedy at law.
- (b) *Verification.* All facts supporting the plea for a permanent injunction 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. A permanent injunction cannot be granted without evidence of each element in the trial.
- (c) *Conflict.* If there is a conflict between a provision of this rule and the Texas Family Code, the Texas Family Code shall prevail.

**Rule INJ 4 (595). Applicant's Bond or Other Security<sup>7</sup>**

- (a) *Requirement of Bond.* Unless otherwise provided by statute,<sup>8</sup> a writ of injunction may not be issued unless the applicant has filed with the clerk a bond:
  - (1) payable to the respondent in the amount set by the court's order;
  - (2) with sufficient surety or sureties to be approved by the clerk; and
  - (3) conditioned that the applicant will abide the decision which may be made in the cause, and that the applicant will pay all sums of money and costs that may be adjudged against the applicant if the temporary restraining order or temporary injunction shall be dissolved in whole or in part.
- (b) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.
- (c) *Bond in Family Code Case.* To the extent permitted by the Texas Family Code, the court in its discretion may dispense with the necessity of a bond in connection with an ancillary injunction.<sup>9</sup>

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<sup>7</sup> This draft rule is derived from existing Rule 684.

<sup>8</sup> The Injunctive Rule Subcommittee recommends that the Supreme Court of Texas include a comment to the draft rule containing language such as: This rule recognizes that there are some statutes that dispense with the necessity of a bond under certain circumstances. *See, e.g.,* TEX. CIV. PRAC. & REM. CODE ANN. §§ 65.041-65.043.

<sup>9</sup> This language comes from existing Rule 693a.

- (d) *Restraining Governmental Entities.* Where the temporary restraining order or temporary injunction is against the State, a municipality, a State agency, or a subdivision of the State in its governmental capacity, and the State, municipality, State agency, or subdivision of the State in its governmental capacity has no pecuniary interest in the suit and no monetary damages can be shown, the bond shall be allowed in the sum set by the court, and the liability of the applicant will be for its face amount if the temporary restraining order or temporary injunction shall be dissolved in whole or in part. The court rendering judgment on the bond may allow recovery for less than its full face amount under equitable circumstances and for good cause shown by affidavit or otherwise.
- (e) *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.

PROPOSED COMMENT TO RULE **INJ 4 (595)**: This rule recognizes that there are some statutes that dispense with the necessity of a bond under certain circumstances. *See, e.g.* TEX. CIV. PRAC. & REM. CODE ANN. §§ 65.041-65.043.

**Rule INJ 5 (596). Contents of Writ of Injunction<sup>10</sup>**

- (a) *General Requirements.* Unless provided otherwise by statute, every writ of injunction, whether it be a temporary restraining order, temporary injunction, or permanent injunction must:
  - (1) be styled "The State of Texas";
  - (2) be dated and signed by the clerk officially;
  - (3) bear the seal of the court;
  - (4) state the names of the parties to the proceedings, the name of the applicant, the nature of the application, and the court's action on the application;
  - (5) be directed to the person or persons enjoined; and
  - (6) have a copy of the order granting the application for the writ attached.

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<sup>10</sup> This draft rule is derived from existing Rules 683 and 687. The Injunctive Rule Subcommittee has provided a proposed form for writs of injunction.

- (b) *Command of Writ.* The writ must command the person or persons to whom it is directed to, until the time specified:
- (1) cease and refrain from performing the acts enjoined in the court's issuing order or judgment, a copy of which must be attached to the writ; and
  - (2) to the extent the injunction is mandatory in nature, obey and execute the terms of the issuing order or judgment, a copy of which must be attached to the writ.
- (c) *Setting of Hearing or Trial.* If the writ is a temporary restraining order, it must state the date and time for the temporary injunction hearing. If the writ is a temporary injunction, it must state the date and time for trial on the merits.
- (d) *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.
- (e) *Form of Writ.*

- (1) If the writ is a temporary restraining order, it shall be substantially in the following form:

"The State of Texas.

"To \_\_\_\_\_, [Respondent];

"Whereas, in the \_\_\_\_\_ Court of \_\_\_\_\_ County, in a certain cause wherein \_\_\_\_\_ is plaintiff and \_\_\_\_\_ is defendant, as shown by a true copy of the attached Petition;

"And whereas \_\_\_\_\_ [Applicant] applied for a temporary restraining order against \_\_\_\_\_ [Respondent] as shown by true copy of the attached application;

"And whereas the Honorable Judge of said court, upon presentment of the application, entered an order granting the application for temporary restraining order, a true copy of which is attached.

"THEREFORE YOU ARE COMMANDED TO OBEY ALL OF THE TERMS OF SAID ORDER, and that you cease and refrain from performing all of the acts said Order restrains you from performing, [and/or, to the extent the injunction is mandatory in nature: "and that you obey and execute the terms of the said Order,"] until hearing on an application for temporary injunction to be held before the Judge of said Court, on the \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_ at \_\_\_\_\_

o'clock \_\_\_\_\_ M, in the courtroom for the \_\_\_\_\_ Court in \_\_\_\_\_ County, in \_\_\_\_\_, Texas, and when and where you will appear and show cause why a temporary injunction should not be issued as prayed for in the application, and why the other relief prayed for therein should not be granted.

"ISSUED AND GIVEN UNDER MY HAND and seal of said Court at my office in \_\_\_\_\_ [City], \_\_\_\_\_ County, Texas, this the \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_."

- (2) If the writ is a temporary injunction, it shall be substantially in the following form:

"The State of Texas.

"To \_\_\_\_\_, [Respondent]:

"Whereas, in the \_\_\_\_\_ Court of \_\_\_\_\_ County, in a certain cause wherein \_\_\_\_\_ is plaintiff and \_\_\_\_\_ is defendant, as shown by a true copy of the attached Petition;

"And whereas \_\_\_\_\_ [Applicant] applied for a temporary injunction against \_\_\_\_\_ [Respondent] as shown by true copy of the attached application;

"And whereas the Honorable Judge of said court, upon presentment of the application, granted a temporary injunction and entered an Order, a true copy of which is attached;

"THEREFORE YOU ARE COMMANDED TO OBEY ALL OF THE TERMS OF THE ATTACHED ORDER, and that you cease and refrain from performing all of the acts said Order restrains you from performing, [and/or, to the extent the injunction is mandatory in nature: "and that you obey and execute the terms of the said Order,"] until trial on the merits with respect to the ultimate relief sought, which shall be conducted on the \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_ at \_\_\_\_\_ o'clock \_\_\_\_\_ M, in the courtroom for the \_\_\_\_\_ Court in \_\_\_\_\_ County, in \_\_\_\_\_, Texas, or such other date and time as said Court shall order.

"ISSUED AND GIVEN UNDER MY HAND and seal of said Court at my office in \_\_\_\_\_ [City], \_\_\_\_\_ County, Texas, this the \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_."

- (3) If the writ is a permanent injunction, it shall be substantially in the following form:

"The State of Texas.

"To \_\_\_\_\_, [Respondent]:

"Whereas, in the \_\_\_\_\_ Court of \_\_\_\_\_ County, in a certain cause wherein \_\_\_\_\_ is plaintiff and \_\_\_\_\_ is defendant;

"And whereas \_\_\_\_\_ [Applicant] applied for a permanent injunction against \_\_\_\_\_ [Respondent];

"And whereas the Honorable Judge of said court, upon presentment of the application in trial granted a permanent injunction against \_\_\_\_\_ [Respondent] and entered a Judgment, a true copy of which is attached;

"THEREFORE YOU ARE COMMANDED TO OBEY ALL OF THE TERMS OF THE ATTACHED JUDGMENT, and that you permanently cease and refrain from performing all of the acts said Judgment restrains you from performing [*and/or, to the extent the injunction is mandatory in nature: "and that you permanently obey and execute the terms of the said Order"*].

"ISSUED AND GIVEN UNDER MY HAND and seal of said Court at my office in \_\_\_\_\_ [City], \_\_\_\_\_ County, Texas, this the \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_."

- (f) *Conflict.* If there is a conflict between a provision of this rule and the Texas Family Code, the Texas Family Code shall prevail.

#### **Rule INJ 6 (597). Delivery, Service, and Return of Writ<sup>11</sup>**

(a) *Delivery of Writ.*

- (1) The clerk issuing a writ of injunction must deliver the writ to the sheriff, constable, or other person authorized by Rule 103, or the applicant, who must then deliver the writ to the sheriff, constable, or other person authorized by Rule 103.
- (2) If several persons are enjoined, residing in different counties, the clerk must issue additional copies of the writ as requested by the applicant.

(b) *Service of Writ.*

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<sup>11</sup> This draft rule is derived from existing Rule 689.

- (1) A temporary restraining order or other writ of injunction is not effective until served upon the person(s) to be enjoined. The writ may be served by any person authorized by Rule 103 of the Texas Rules of Civil Procedure. Only a sheriff or constable may serve a temporary restraining order or other writ of injunction that requires the actual taking of possession of a person, property, or thing, or a writ requiring that an enforcement action be physically enforced by the person delivering the writ.
  - (2) The person authorized to serve the writ, upon receipt, must:
    - (A) endorse the writ with the date of receipt; and
    - (B) as soon as practicable, serve the writ on the party enjoined.
- (c) *Return of Writ.*
- (1) The return must be in writing and signed by the sheriff, constable, or other person authorized by Rule 103 executing the writ. The return must be filed with the issuing clerk within the time stated in the writ.
  - (2) The action of the sheriff, constable, or other person authorized by Rule 103 must be endorsed on or attached to the writ, showing how and when the writ was executed.

**Rule INJ 7 (598). Scope of the Writ of Injunction<sup>12</sup>**

Every writ of injunction, whether temporary or permanent in nature, is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

**Rule INJ 8 (599). Orders that are Issued Before the Petition is Filed<sup>13</sup>**

A temporary restraining order or an order setting a time for hearing upon an application for temporary injunction may be issued prior to suit being filed. If so, the following must occur:

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<sup>12</sup> This draft rule is derived from existing Rule 683.

<sup>13</sup> This draft rule contains the substance of existing Rules 685 and 686, both of which seem to apply only when the applicant seeks a TRO or a date for an injunction hearing *before* filing the original petition. Thus, the two rules have been combined here for clarity.

- (a) *Filing and Docketing.* The party for whom the order is granted must file the order and the petition as soon as practicable with the clerk of the proper court.
- (b) *Issuance of Citation.* The clerk must then docket the case to the court to which the case is permanently assigned. The clerk must also issue a citation to the defendant as in other civil cases, which will be served and returned in like manner as ordinary citations. When a true copy of the petition is attached to the temporary restraining order or the order setting a time for the temporary injunction hearing, it is not necessary to attach a separate copy of the petition to the citation; instead, it is sufficient for the citation to refer to plaintiff's petition.<sup>14</sup>

#### **Rule INJ 9 (600). The Answer<sup>15</sup>**

The defendant to a cause involving an application for a temporary restraining order, a temporary injunction, or a permanent injunction may answer as in other civil actions. No injunction shall be dissolved before final hearing because of the denial of the material allegations of the application, unless the answer denying the allegations is supported by a verification or affidavit.

#### **Rule INJ 10 (601). Disobedience<sup>16</sup>**

The court may punish disobedience of a temporary restraining order, a temporary injunction, or a permanent injunction as contempt. The complainant may file in the court in which the injunction is pending an affidavit stating what person is guilty of disobedience and describing the acts constituting the disobedience. The court may then issue a writ of attachment for the disobedient person, directed to the sheriff or any constable of any county, and requiring that officer to arrest the person therein named if found within any county and have the person brought before the court at the time and place named in the writ. Alternatively, the court may issue a show cause order requiring the person to appear on a designated date and show cause why the person should not be adjudged in contempt of court. On return of the writ of attachment or show cause order, the court must proceed to hear proof. If satisfied that the person has disobeyed the injunction, either directly or indirectly, the court may commit the person to jail without bail until the person is purged of the contempt in the manner and form as the court may direct.

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<sup>14</sup> Existing Rule 685(b) has been incorporated here. The last sentence of existing Rule 685(b) has been moved to Rules INJ 1(c) (592(c)) and INJ 2(a) (593(a)).

<sup>15</sup> This draft rule is modeled after existing Rule 690.

<sup>16</sup> This draft rule is modeled after existing Rule 692.



**Rule INJ 11 (602). Principles of Equity Applicable<sup>17</sup>**

The principles, practice, and procedure governing courts of equity govern proceedings in injunctions when not in conflict with these rules or the provisions of the statutes.

**Rule INJ 12 (603). Bond on Dissolution<sup>18</sup>**

[NO RULE CONTENT RECOMMENDED]

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<sup>17</sup> This draft rule is modeled after existing Rule 693.

<sup>18</sup> The Injunctive Rule Subcommittee recommends deleting existing Rule 691. *See* Attachment A. Rule 691 reads:

Upon the dissolution of an injunction restraining the collection of money, by an interlocutory order of the court or judge, made in term time or vacation, if the petition be continued over for trial, the court or judge shall require of the defendant in such injunction proceedings a bond, with two or more good and sufficient sureties, to be approved by the clerk of the court, payable to the complainant in double the amount of the sum enjoined, and conditioned to refund to the complainant the amount of money, interest and costs which may be collected of him in the suit or proceeding enjoined if such injunction is made perpetual on final hearing. If such injunction is so perpetuated, the court, on motion of the complainant, may enter judgment against the principal and sureties in such bond for such amount as may be shown to have been collected from such defendant.

A number is retained for the rule in case the Supreme Court Advisory Committee disagrees with the recommendation.

**Injunction Statutes**  
**Texas Civil Practice & Remedies Code**

**§ 65.011. Grounds Generally**

A writ of injunction may be granted if:

- (1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant;
- (2) a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual;
- (3) the applicant is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions;
- (4) a cloud would be placed on the title of real property being sold under an execution against a party having no interest in the real property subject to execution at the time of sale, irrespective of any remedy at law; or
- (5) irreparable injury to real or personal property is threatened, irrespective of any remedy at law.

**§ 65.012. Operation of Well or Mine**

- (a) A court may issue an injunction or temporary restraining order prohibiting subsurface drilling or mining operations only if an adjacent landowner filing an application claims that a wrongful act caused injury to his surface or improvements or loss of or injury to his minerals and if the party against whom the injunction is sought is unable to respond in damages for the resulting injuries.
- (b) To secure the payment of any injuries that may be sustained by the complainant as a result of subsurface drilling or mining operations, the party against whom an injunction is sought under this section shall enter into a good and sufficient bond in an amount fixed by the court hearing the application.
- (c) The court may appoint a trustee or receiver instead of requiring a bond if the court considers it necessary to protect the interests involved in litigation concerning an injunction under this section. The trustee or receiver has the powers prescribed by the court and shall take charge of and hold the minerals produced from the drilling or mining operation or the proceeds from the disposition of those minerals, subject to the final disposition of the litigation.

**§ 65.013. Stay of Judgment or Proceeding**

An injunction may not be granted to stay a judgment or proceeding at law except to stay as much of the recovery or cause of action as the complainant in his petition shows himself equitably entitled to be relieved against and as much as will cover the costs.

**§ 65.014. Limitations on Stay of Execution of Judgment**

(a) Except as provided by Subsection (b), an injunction to stay execution of a valid judgment may not be granted more than one year after the date on which the judgment was rendered unless:

- (1) the application for the injunction has been delayed because of fraud or false promises of the plaintiff in the judgment practiced or made at the time of or after

rendition of the judgment; or

(2) an equitable matter or defense arises after the rendition of the judgment.

(b) If the applicant for an injunction to stay execution of a judgment was absent from the state when the judgment was rendered and was unable to apply for the writ within one year after the date of rendition, the injunction may be granted at any time within two years after that date.

#### **§ 65.015. Closing of Streets**

An injunction may not be granted to stay or prevent the governing body of an incorporated city from vacating, abandoning, or closing a street or alley except on the suit of a person:

(1) who is the owner or lessee of real property abutting the part of the street or alley vacated, abandoned, or closed; and

(2) whose damages have neither been ascertained and paid in a condemnation suit by the city nor released.

#### **§ 65.016. Violation of Revenue Law**

At the instance of the county or district attorney or the attorney general, a court by injunction may prevent, prohibit, or restrain the violation of any revenue law of this state.

#### **§ 65.017. Cigarette Seller, Distribution, or Manufacturer**

In addition to any other remedy provided by law, a person may bring an action in good faith for appropriate injunctive relief if the person sells, distributes, or manufactures cigarettes and sustains a direct economic or commercial injury as a result of a violation of:

(1) Section 48.015, Penal Code; or

(2) Section 154.0415, Tax Code.

#### **§ 65.018. to 65.020 [Reserved for expansion]**

#### **§ 65.021. Jurisdiction of Proceeding**

(a) The judge of a district or county court in term or vacation shall hear and determine applications for writs of injunction.

(b) This section does not limit injunction jurisdiction granted by law to other courts.

#### **§ 65.022. Return of Writ; Hearing by Nonresident Judge**

(a) Except as provided by this section, a writ of injunction is returnable only to the court granting the writ.

(b) A district judge may grant a writ returnable to a court other than his own if the resident judge refuses to act or cannot hear and act on the application because of his absence, sickness, inability, inaccessibility, or disqualification. Those facts must be fully set out in the application or in an affidavit accompanying the application. A judge who refuses to act shall note that refusal and the reasons for refusal on the writ. A district judge may not grant the writ if the application has been acted on by another district judge.

(c) A district judge may grant a writ returnable to a court other than his own to stay execution or restrain foreclosure, sale under a deed of trust, trespass, removal of property,

or an act injurious to or impairing riparian or easement rights if satisfactory proof is made to the nonresident judge that it is impracticable for the applicant to reach the resident judge and procure the action of the resident judge in time to put into effect the purposes of the application.

(d) A district judge may grant a writ returnable to a court other than his own if the resident judge cannot be reached by the ordinary and available means of travel and communication in sufficient time to put into effect the purpose of the writ sought. In seeking a writ under this subsection, the applicant or attorney for the applicant shall attach to the application an affidavit that fully states the facts of the inaccessibility and the efforts made to reach and communicate with the resident judge. The judge to whom application is made shall refuse to hear the application unless he determines that the applicant made fair and reasonable efforts to reach and communicate with the resident judge. The injunction may be dissolved on a showing that the applicant did not first make reasonable efforts to procure a hearing on the application before the resident judge.

#### **§ 65.023. Place for Trial**

(a) Except as provided by Subsection (b), a writ of injunction against a party who is a resident of this state shall be tried in a district or county court in the county in which the party is domiciled. If the writ is granted against more than one party, it may be tried in the proper court of the county in which either party is domiciled.

(b) A writ of injunction granted to stay proceedings in a suit or execution on a judgment must be tried in the court in which the suit is pending or the judgment was rendered.

#### **§ 65.024. to 65.030 [Reserved for expansion]**

#### **§ 65.031. Dissolution; Award of Damages**

If on final hearing a court dissolves in whole or in part an injunction enjoining the collection of money and the injunction was obtained only for delay, the court may assess damages in an amount equal to 10 percent of the amount released by dissolution of the injunction, exclusive of costs.

#### **§ 65.032. to 65.040 [Reserved for expansion]**

#### **§ 65.041. Bond Not Required for Issuance of Temporary Restraining Order for Certain Indigent Applicants**

A court may not require an applicant for a temporary restraining order to execute a bond to the adverse party before the order may issue if:

(1) the applicant submits an affidavit that meets the requirements of Section 65.043 to the court; and

(2) the court finds that the order is intended to restrain the adverse party from foreclosing on the applicant's residential homestead.

#### **§ 65.042. Bond Not Required for Issuance of Temporary Injunction for Certain Indigent Applicants**

(a) A court may not require an applicant for a temporary injunction to execute a bond to the adverse party before the injunction may issue if:

(1) the applicant submits an affidavit that meets the requirements of Section 65.043 to

the court; and

(2) the court finds that the injunction is intended to enjoin the adverse party from foreclosing on the applicant's residential homestead.

(b) If the affidavit submitted under Subsection (a)(1) is contested under Section 65.044, the court may not issue a temporary injunction unless the court finds that the applicant is financially unable to execute the bond.

#### **§ 65.043. Affidavit**

(a) The affidavit must contain complete information relating to each and every person liable for the indebtedness secured by or with an ownership interest in the residential homestead concerning the following matters:

- (1) identity;
- (2) income, including income from employment, dividends, interest, and any other source other than from a government entitlement;
- (3) spouse's income, if known to the applicant;
- (4) description and estimated value of real and personal property, other than the applicant's homestead;
- (5) cash and checking account;
- (6) debts and monthly expenses;
- (7) dependents; and
- (8) any transfer to any person of money or other property with a value in excess of \$ 1,000 made within one year of the affidavit without fair consideration.

(b) The affidavit must state: "I am not financially able to post a bond to cover any judgment against me in this case. All financial information that I provided to the lender was true and complete and contained no false statements or material omissions at the time it was provided to the lender. Upon oath and under penalty of perjury, the statements made in this affidavit are true."

(c) In the event the applicant is married, both spouses must execute the affidavit.

(d) The affidavit must be verified.

#### **§ 65.044. Contest of Affidavit**

(a) A party may not contest an affidavit filed by an applicant for a temporary restraining order as provided by Section 65.041.

(b) A party may contest an affidavit filed by an applicant for a temporary injunction as provided by Section 65.042:

- (1) after service of a temporary restraining order in the case; or
- (2) if a temporary restraining order was not applied for or issued, after service of notice of the hearing on the application for the temporary injunction.

(c) A party contests an affidavit by filing a written motion and giving notice to all parties of the motion in accordance with Rule 21a of the Texas Rules of Civil Procedure.

(d) The court shall hear the contest at the hearing on the application for a temporary injunction and determine whether the applicant is financially able to execute a bond against the adverse party as required by the Texas Rules of Civil Procedure. In making its determination, the court may not consider:

- (1) any income from a government entitlement that the applicant receives; or
- (2) the value of the applicant's residential homestead.

(e) The court may order the applicant to post and file with the clerk a bond as required by the Texas Rules of Civil Procedure only if the court determines that the applicant is financially able to execute the bond.

(f) An attorney who represents an applicant and who provides legal services without charge to the applicant and without a contractual agreement for payment contingent on any event may file an affidavit with the court describing the financial nature of the representation.

**§ 65.045. Conflict with Texas Rules of Civil Procedure**

(a) To the extent that this subchapter conflicts with the Texas Rules of Civil Procedure, this subchapter controls.

(b) Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this subchapter.

(c) The district courts and statutory county courts in a county may not adopt local rules in conflict with this subchapter.

## 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 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.
- (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.<sup>19</sup>

- (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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<sup>19</sup> **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 (indecentcy 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.

## 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 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.
- (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.