IN THE SUPREME COURT OF TEXAS

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

FINAL REPORT OF THE ANCILLARY PROCEEDINGS TASK FORCE

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

TO THE HONORABLE SUPREME COURT:

I. INTRODUCTION

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

The following persons served on the Task Force:

Professor Elaine Carlson, Chair-South Texas College of Law, Houston
Bruce A. Atkins, Law Offices of Bruce Atkins, Houston
Frederick J. Barrow, Littler Mendelson P.C., Dallas
Michael S. Bernstein, Michael S. Bernstein, P.C., Garland
Mark P. Blenden, The Blenden Law Firm, Dallas
Donna Brown, Donna Brown, P.C., Austin
Professor William V. Dorsaneo III, Southern Methodist Univ. School of Law, Dallas

Patrick J. Dyer, Law Offices of Patrick Dyer, Houston
R. David Fritsche, Law Offices of R. David Fritsche, San Antonio
Captain Ryan Gable, Harris County Constable Precinct Four, Houston
Daniel J. Goldberg, Ross, Banks, May, Cron, & Cavin, P.C., Houston
Kent D. Hale, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock
O. Carl Hamilton, Jr., Atlas & Hall, L.L.P., McAllen
John T. Huffaker, Sprouse Shrader Smith P.C., Amarillo
Woody Hughes, Titus County Sheriff's Office, Mount Pleasant
The Honorable Tom Lawrence, Harris County JP Precinct 4-2, Humble
Clyde Lemon, Harris County District Clerk's Office
Chief Deputy Carlos Lopez, Travis County Constable Precinct Five, Austin
Raul Noriega, Texas RioGrande Legal Aid, San Antonio
Ronald Rodriguez, Law Offices of Ronald Rodriguez, Laredo
Stuart R. Schwartz, Scott, Hulse, Marshall, Feuille, Finger, & Thurmond P.C., El Paso
Carl Weeks, Chair, Process Server Review Board, Austin
The Honorable Randy Wilson, 157th Civil District Court, Houston
Dulcie Wink, The Wink Law Firm, Houston
Bonnie Wolbrueck, former Williamson County District Clerk (retired)
Christopher K. Wrampelmeier, Underwood Wilson, Berry, Stein, & Johnson, P.C., Amarillo
The Honorable Stephen Yelenosky, 345th Civil District Court, Austin
Staff Attorney: Kennon Peterson, Rules Attorney, Texas Supreme Court

II. PROCESS OF REVIEW

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

III. RECOMMENDATIONS

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

IV. CONCLUSION

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

Table of Contents

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

PART VI. Rules Relating To Ancillary Proceedings

SECTION 1. INJUNCTIONS

Rule INJ 1 (592). Temporary Restraining Orders[1]

(a) *Application.* A temporary restraining order may be sought by a motion or application[2] 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.[3]

---

[1] This rule has been rewritten completely and contains information from existing Rules 680 through 683.

[2] Throughout the injunction rules, the term "application" refers to an application or a motion.

[3] 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.*[4] 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[5]

(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;

[4] 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").

[5] 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.

(e) *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.*[6] 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;

[6] 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[7]

(a) *Requirement of Bond.* Unless otherwise provided by statute,[8] 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.[9]

---

[7] This draft rule is derived from existing Rule 684.

[8] 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.

[9] 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[10]

(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.

[10] 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[11]

(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*.

[11] 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[12]

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[13]

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:

[12] This draft rule is derived from existing Rule 683.

[13] 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.[14]

Rule INJ 9 (600). The Answer[15]

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[16]

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.

---

[14] 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))**.

[15] This draft rule is modeled after existing Rule 690.

[16] This draft rule is modeled after existing Rule 692.

Rule INJ 11 (602). Principles of Equity Applicable[17]

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[18]

[NO RULE CONTENT RECOMMENDED]

[17] This draft rule is modeled after existing Rule 693.

[18] 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 claimaint. The court may require a bond payable to the applicant or respondent, as ordered by the court, in an amount set by the court with sufficient surety or sureties and conditioned that the third-party claimant will pay, up to the amount of the bond, all damages and costs adjudged against the third-party claimant for wrongfully seeking the release of the property. If the court does not order the release of the property to the third-party claimant, the third-party claimant may follow the procedure for the trial of right of property.

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

Rule ATT 9 (612). Judgment

(a) *Judgments on Replevy Bond.*

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

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

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

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

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

Rule ATT 10 (613). Perishable Property

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

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

---

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

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

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

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

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

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

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

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

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

Rule ATT 12 (615). Amendment of Errors

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

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

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

Attachment Statutes
Texas Civil Practice & Remedies Code

§ 61.001. General Grounds

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

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

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

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

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

§ 61.002. Specific Grounds

Attachment is available if:

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

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

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

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

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

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

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

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

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

§ 61.0021. Grounds for Attachment in Suit for Sexual Assault

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

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

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

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

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

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

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

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

§ 61.003. Pending Suit Required

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

§ 61.004. Available for Debt Not Due

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

§ 61.005. Certain Torts and Unliquidated Demands

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

§ 61.006. to 61.020 [Reserved for expansion]

§ 61.021. Who May Issue

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

§ 61.022. Affidavit

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

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

(2) the amount of the demand; and

(3) specific grounds for issuance under Section 61.002.

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

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

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

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

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

§ 61.023. Bond

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

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

(2) is payable to the defendant;

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

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

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

§ 61.024. to 61.040 [Reserved for expansion]

§ 61.041. Subject Property

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

§ 61.042. Attachment of Personalty

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

(1) replevied;

(2) sold as provided by law; or

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

§ 61.043. Attachment of Realty

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

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

§ 61.044. Claim on Attached Personalty by Third Party

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

§ 61.045. Attachment of Personalty Held by Financial Institution

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

§ 61.046. to 61.060 [Reserved for expansion]

§ 61.061. Attachment Lien

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

§ 61.062. Judgment and Foreclosure

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

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

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

§ 61.063. Judgment on Replevied Property

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

§ 61.064. to 61.080 [Reserved for expansion]

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

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

(1) en route to an exhibition; or

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

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

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

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

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

(B) the date that the exhibition ends.

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

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

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

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

(1) held under the auspices or supervision of:

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

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

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

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

§ 61.082. Handling and Transportation

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

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

SECTION 3. GARNISHMENT

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

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

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

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

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

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

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

(d) *Order*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) *Order*.

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

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

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

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

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

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

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

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

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

Rule GARN 4 (619). Case Docketed

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

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

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

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

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

(2) answer under oath:

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

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

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

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

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

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

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

"To _____, Respondent:

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

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

"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE OR MODIFY THIS WRIT."

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

"The State of Texas.

"To _____, Garnishee, greetings:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule GARN 10 (625). Judgment After Answer

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

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

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

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

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

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

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

(b) *Judgment When Garnishee is Indebted.*

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

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

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

(2) *Costs*.

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

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

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

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

(c) *Judgment When Garnishee Has Effects*.

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

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

(3) *Costs*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule GARN 12 (627). Perishable Property

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

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

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

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

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

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

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

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

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

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

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

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

Rule GARN 14 (629). Amendment of Errors

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

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

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

Garnishment Statutes
Texas Civil Practice & Remedies Code

§ 63.001. Grounds

A writ of garnishment is available if:

(1) an original attachment has been issued;

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

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

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

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

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

§ 63.002. Who May Issue

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

§ 63.003. Effect of Service

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

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

§ 63.004. Current Wages Exempt

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

§ 63.005. Place for Trial

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

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

§ 63.006. Administrative Fee for Certain Costs Incurred by Employers

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

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

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

(2) $ 10.

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

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

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

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

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

§ 63.007. Garnishment of Funds Held in Inmate Trust Fund

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

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

§ 63.008. Financial Institution As Garnishee

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

§ 65.001. Application of Equity Principles

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

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

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

§ 65.003. to 65.010 [Reserved for expansion]

SECTION 4. SEQUESTRATION

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

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

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

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

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

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

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

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

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

(d) *Order*.

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

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

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

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

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

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

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

(8) *Respondent's Replevy Bond*.

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

(i) the value of the property; or

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

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

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

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

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

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

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

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

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

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

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

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

Rule SEQ 3 (632). Contents of Writ

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

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

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

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

"To _____, Respondent:

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

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

"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE OR MODIFY THIS WRIT."

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

"The State of Texas.

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

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

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

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

(1) the sheriff or constable; or

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

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

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

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

(c) *Method of Levy*.

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

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

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

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

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

(d) *Return of Writ*.

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

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

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

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

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

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

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

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

(A) not remove the property from the county;

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

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

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

(E) to the extent that the:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) not remove the property from the county;

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

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

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

(E) to the extent that the:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule SEQ 9 (638). Judgment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule SEQ 11 (640). Perishable Property

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

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

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

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

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

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

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

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

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

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

Rule SEQ 13 (642). Amendment of Errors

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

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

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

Sequestration Statutes
Texas Civil Practice & Remedies Code

§ 62.001. Grounds

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

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

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

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

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

§ 62.002. Pending Suit Required

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

§ 62.003. Available for Claim Not Due

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

§ 62.004. to 62.020 [Reserved for expansion]

§ 62.021. Who May Issue

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

§ 62.022. Application

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

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

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

(3) the facts justifying issuance of the writ.

§ 62.023. Required Statement of Rights

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

YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.
(b) The statement must be printed in 10-point type and in a manner intended to advise a reasonably attentive person of its contents

§ 62.024. to 62.040 [Reserved for expansion]

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

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

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

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

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

§ 62.046. Liability for Fruit of Replevied Property

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

§ 62.047. to 62.060 [Reserved for expansion]

§ 62.061. Officer's Liability and Duty of Care

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

§ 62.062. Compensation of Officer

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

§ 62.063. Indemnification of Officer for Money Spent

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

SECTION 5. DISTRESS WARRANT

Rule DW 1 (643). Application for Distress Warrant and Order

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

(b) *Filing*. The application must be filed with a justice of the peace having jurisdiction.

(c) *Application*. An application for a distress warrant must:

(1) state that the amount sued for is rent or advances described by Chapter 54 of the Texas Property Code, or attach a writing signed by the tenant to that effect;

(2) state the amount in controversy of the underlying suit;

(3) state the statutory grounds for issuance of the warrant as provided in Chapter 54 of the Texas Property Code and the specific facts justifying issuance of the warrant; and

(4) identify the underlying suit by court, cause number, and style.

(d) *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.

(e) *Order*.

(1) *Issuance Without Notice*. No distress warrant shall issue except on written order of the justice of the peace 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 warrant is returnable to the court where the underlying suit is pending.

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

(5) *Amount of Property to be Seized.* The order must state the maximum dollar amount of the property to be seized.

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

(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 justice of the peace'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 wrongfully suing out the warrant.

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

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

Rule DW 2 (644). Applicant's Bond or Other Security

(a) *Requirement of Bond*. A distress warrant may not be issued unless the applicant has filed with the 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 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 wrongfully suing out the warrant.

(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. If the warrant has not issued, the motion must be filed with the justice of the peace; after the warrant has issued, the

motion must be filed with the court where the underlying suit is pending. 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 hearing, the court must issue a written order on the motion.

Rule DW 3 (645). Contents of Distress Warrant

(a) *General Requirements*. A distress warrant must be dated and signed by 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 Warrant*. The warrant must command the sheriff or constable to seize so much of the respondent's property subject to the agricultural or building landlord's lien 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 Warrant.* The warrant must be made returnable to the court where the underlying suit is pending within five days from the date service of the warrant is completed.

(d) *Notice to Respondent.* The face of the warrant 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 SEIZED UNDER A DISTRESS WARRANT. 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 WARRANT.

"ANY ANSWER, RESPONSE, OR MOTION RELATING TO THIS WARRANT MUST BE FILED WITH THE _____COURT, CAUSE NUMBER _____, STYLED _____, WHERE THE UNDERLYING SUIT IS PENDING."

Rule DW 4 (646). Delivery, Execution, and Return of Warrant

(a) *Delivery of Warrant.* The justice of the peace issuing a distress warrant must deliver the warrant to:

(1) the sheriff or constable; or

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

(b) *Timing and Extent of Seizure*. The sheriff or constable who receives the warrant must:

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

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

(3) seize an amount of property that the sheriff or constable determines to be sufficient to satisfy the warrant.

(c) *Method of Execution.* The sheriff or constable may execute the warrant by:

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

(2) 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

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

(d) *Return of Warrant.*

(1) The return must be in writing and signed by the sheriff or constable. The return must be filed with the clerk or justice of the peace of the court where the underlying suit is pending within the time stated in the warrant.

(2) The sheriff's or constable's action must be endorsed on or attached to the warrant. In the return, the sheriff or constable must state what action the sheriff took in seizing, describe the property seized 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 of the court where the underlying suit is pending to be filed with the papers of the suit.

Rule DW 5 (647). Service of Distress Warrant on Respondent

As soon as practicable following execution of the warrant, the applicant must serve the respondent with a copy of the distress warrant, the application, accompanying affidavits, and orders of the justice of the peace. Service may be in any manner prescribed for service of citation or as provided in Rule 21a.

Rule DW 6 (648). Response to Distress Warrant

The respondent is not required to file an answer, response, or motion relating the distress warrant, but if one is filed, it must be filed with the court where the underlying suit is pending. Unless replevied or otherwise ordered by the court, the seized property will remain under the control of the court where the underlying suit is pending until final judgment.

Rule DW 7 (649). Respondent's Replevy Rights

(a) *Where Filed*. At any time before judgment, if the seized 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 seized property must be filed with the court where the underlying suit is pending.

(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 underlying 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 seized 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 seized. 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 seized to satisfy the warrant, the court may by written order authorize substitution of one or more items of respondent's property for all or part of the property seized. 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 seized under a warrant shall be deemed released until the property to be substituted is delivered to the location designated in the court's order. The original property seized under a warrant 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 landord's lien on the released property is deemed released, and a new landlord's lien attaches to the substituted property. The new lien is deemed to have been perfected as of the date of seizure of the original property.

Rule DW 8 (650). Applicant's Replevy Rights

(a) *Motion*. If the respondent does not replevy seized personal property within ten days after the execution of the warrant, and if the seized property has not been previously claimed or sold, the applicant may, at any time before judgment in the underlying suit, 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 where the underlying suit is pending, 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 underlying suit. 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 property is:

(A) 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 seized 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 DW 9 (651). Dissolution or Modification of Order or Distress Warrant

(a) *Motion.* Any party, or any person who claims an interest in the seized property, may move the court to dissolve or modify the order or warrant, 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 warrant. If the movant is unable to admit or deny a finding, the movant must set forth the reasons why the movant cannot do so.

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

(c) *Stay of Proceedings.* The filing of the motion stays any further proceedings under the warrant, 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 warrant. If the applicant fails to carry its burden, the warrant 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 warrant. If the movant seeks to modify the order or warrant based upon the value of the property, the movant has the burden to prove that the reasonable value of the property seized 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 warrant, 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 the order or the warrant, 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 warrant must release the replevy bond and discharge the sureties thereon. If the warrant is dissolved, the order must be set aside, the property seized 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 underlying suit claims all or part of the seized property, the court, on motion and hearing, may order the release of the property to that third-party claimant. The court may require a bond payable to the applicant or respondent, as ordered by the court, in an amount set by the court, with sufficient surety or sureties and conditioned that the third-party claimant will pay, up to the amount of the bond, all damages and costs adjudged against the third-party claimant for wrongfully seeking the release of the property. If the court does not order the release of the property to the third-party claimant, the third-party claimant may follow the procedure for the trial of right of property.

Rule DW 10 (652). 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 property seized under a distress warrant, final judgment must be rendered against all of the obligors on the respondent's replevy bond, jointly and severally, for the lesser of the amount of the judgment plus interest and costs, or the 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.

(2) *Judgment Against Applicant on Replevy Bond.* If the underlying suit is decided against an applicant who replevied the property seized under a distress warrant, 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.*

(1) *Expenses Associated with Storage.* In any judgment, all expenses associated with storage of the property may be taxed as costs against the non-prevailing party.

(2) *Disposition of Property.* The final judgment must dispose of the property seized under a distress warrant.

Rule DW 11 (653). 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 seized under a distress warrant.

(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 it has been seized under a distress warrant, the applicant, or other party claiming an interest in the property, may file a motion in the underlying suit, 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 personal property and must set the amount of the movant's bond, if required.

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

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

(g) *Procedure for Sale of Perishable Personal 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 where the underlying suit is pending. The sheriff or constable must sign and file in the underlying suit 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 DW 12 (654). Report of Disposition of Property

When property seized under a distress warrant is claimed, replevied, or sold, or otherwise disposed of after the warrant 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 where the underlying suit is pending.

Rule DW 13 (655). Amendment of Errors

(a) *Before Order.* Before the court issues an order on an application for a distress warrant, 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 justice of the peace at a time that will not operate as a surprise to the respondent.

(b) *After Order, Before Execution of Warrant.* After the court issues an order for the issuance of a distress warrant but before the distress warrant is executed, 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 justice of 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 distress warrant and the distress warrant may also be corrected by the court, without notice.

(c) *After Execution of Order and Execution of Warrant.* After the distress warrant is executed, on motion, notice, and hearing, the court where the underlying suit is filed may grant leave to amend clerical errors in the application, any supporting affidavits, the bond, the distress warrant, or the sheriff or constable's return, for good cause, provided the amendment does not change or add to the grounds for issuance of a distress warrant stated in the original application.

Distress Warrant Statutes
Texas Civil Practice & Remedies Code

§ 54.001. Lien

A person who leases land or tenements at will or for a term of years has a preference lien for rent that becomes due and for the money and the value of property that the landlord furnishes or causes to be furnished to the tenant to grow a crop on the leased premises and to gather, store, and prepare the crop for marketing.

§ 54.002. Property to Which Lien Attaches

(a) Except as provided by Subsections (b) and (c), the lien attaches to:

(1) the property on the leased premises that the landlord furnishes or causes to be furnished to the tenant to grow a crop on the leased premises; and

(2) the crop grown on the leased premises in the year that the rent accrues or the property is furnished.

(b) If the landlord provides everything except labor, the lien attaches only to the crop grown in the year that the property is furnished.

(c) The lien does not attach to the goods of a merchant, trader, or mechanic if the tenant sells and delivers the goods in good faith in the regular course of business.

(d) A law exempting property from forced sale does not apply to a lien under this subchapter on agricultural products, animals, or tools.

§ 54.003. Exceptions

The lien does not arise if:

(1) a tenant provides everything necessary to cultivate the leased premises and the landlord charges rent of more than one-third of the value of the grain and one-fourth of the value of the cotton grown on the premises; or

(2) a landlord provides everything except the labor and directly or indirectly charges rent of more than one-half of the value of the grain and cotton grown on the premises.

§ 54.004. Duration of Lien

The lien exists while the property to which it is attached remains on the leased premises and until one month after the day that the property is removed from the premises. If agricultural products to which the lien is attached are placed in a public or bonded warehouse regulated by state law before the 31st day after the day that they are removed from the leased premises, the lien exists while they remain in the warehouse.

§ 54.005. Removal of Property

(a) If an advance or rent is unpaid, a tenant may not without the landlord's consent remove or permit the removal of agricultural products or other property to which the lien is attached from the leased premises.

(b) If agricultural products subject to the lien are removed with the landlord's consent from the leased premises for preparation for market, the lien continues to exist as if the products had not been removed.

§ 54.006. Distress Warrant

(a) The person to whom rent or an advance is payable under the lease or the person's agent, attorney, assign, or other legal representative may apply to an appropriate justice of the peace for a distress warrant if the tenant:

(1) owes any rent or an advance;

(2) is about to abandon the premises; or

(3) is about to remove the tenant's property from the premises.

(b) The application for a warrant must be filed with a justice of the peace:

(1) in the precinct in which the leasehold is located or in which the property subject to the landlord's lien is located; or

(2) who has jurisdiction of the cause of action.

§ 54.007. Judgment on Replevin Bond

If a final judgment is rendered against a defendant who has replevied property seized under a distress warrant, the sureties on the defendant's replevy bond are also liable under the judgment, according to the terms of the bond.

§ 54.008. to 54.020 [Reserved for expansion]

§ 54.021. Lien

A person who leases or rents all or part of a building for nonresidential use has a preference lien on the property of the tenant or subtenant in the building for rent that is due and for rent that is to become due during the current 12-month period succeeding the date of the beginning of the rental agreement or an anniversary of that date.

§ 54.022. Commercial Building

(a) The lien is unenforceable for rent on a commercial building that is more than six months past due unless the landlord files a lien statement with the county clerk of the county in which the building is located.

(b) The lien statement must be verified by the landlord or the landlord's agent or attorney and must contain:

(1) an account, itemized by month, of the rent for which the lien is claimed;

(2) the name and address of the tenant or subtenant, if any;

(3) a description of the leased premises; and

(4) the beginning and termination dates of the lease.

(c) Each county clerk shall index alphabetically and record the rental lien statements filed in the clerk's office.

§ 54.023. Exemptions

This subchapter does not affect a statute exempting property from forced sale.

§ 54.024. Duration of Lien

The lien exists while the tenant occupies the building and until one month after the day that the tenant abandons the building.

§ 54.025. Distress Warrant

The person to whom rent is payable under a building lease or the person's agent, attorney, assign, or other legal representative may apply to the justice of the peace in the precinct in which the building is located for a distress warrant if the tenant:

(1) owes rent;

(2) is about to abandon the building; or

(3) is about to remove the tenant's property from the building.

SECTION 6. EXECUTION [20]

Rule EXE 1 (656). Enforcement of Judgment

(a) *Execution or Other Appropriate Process.* The judgments of the district, county, and justice courts shall be enforced by execution or other appropriate process.

(b) *Judgment Creditor and Judgment Debtor Defined.* For purposes of **Rules EXE 1- 15 (621-670)**, "judgment creditor" is defined as the party for whom judgment was rendered or the current owner of the judgment, and "judgment debtor" is defined as the party against whom judgment was rendered.[21]

(c) *Successor Rights*. The rights of the parties regarding the judgment shall inure to their successors or assigns.

Rule EXE 2 (657). Post-Judgment Discovery[22]

(a) *Aid in Enforcement of Judgment.* At any time after a judgment has been signed, a judgment creditor may aid the enforcement of judgment by conducting, in the same suit in which the judgment was rendered, any form of pretrial discovery[23] authorized by these rules, unless the judgment has been superseded or has become dormant as provided by section 34.001 of the Texas Civil Practice and Remedies Code.[24]

(b) *For Appellate Motions.* At any time after a judgment has been signed, a party may conduct, in the same suit in which the judgment was rendered, any form of pretrial discovery authorized by these rules for the purpose of obtaining

---

[20]

[21] The Execution Rule Subcommittee has proposed defining "judgment creditor" as "the party for whom judgment was rendered" and "judgment debtor" as "the party against whom judgment was rendered." Additionally, in light of the prevalence of transfers of debts and judgments, the definition of "judgment creditor" specifically includes the current owner of the judgment. For consistency, the term "judgment creditor" has replaced "plaintiff," and the term "judgment debtor" has replaced "defendant" and "defendant in execution" in all rules relating to executions.

[22] This draft rule is modeled after existing Rule 621a.

[23] The term "form of discovery" or merely "discovery" has replaced the term "discovery proceeding" in existing Rule 621a. The term "form of discovery" is defined in Rule 192.1 of the Texas Rules of Civil Procedure.

[24] The reference to Section 34.001 of the Texas Civil Practice and Remedies Code replaces the outdated reference to "Article 3773, V.A.T.S." in existing Rule 621a.

information relevant to motions allowed by Texas Rule of Appellate Procedure 24.[25]

(c) *Pretrial Discovery Rules Apply.* The rules and law governing pretrial discovery and judicial supervision thereof apply to post-judgment discovery and proceedings, insofar as applicable; provided, however, that post-judgment depositions of the parties may be scheduled by notice, without requiring service of a subpoena.

(d) *Service.* If no notice of appeal has been filed in county or district court, or if the case is in a justice of the peace court no appeal bond or affidavit of inability has been filed, service of post-judgment discovery and motions shall be made upon both the judgment debtor and the judgment debtor's trial counsel pursuant to Rule 21a. If an appeal has been perfected from county or district court, service shall be made as provided in Texas Rule of Appellate Procedure 6.3.

Rule EXE 3 (658). Issuance of Writ[26]

(a) *Issuance of Writ.* Upon the request of a judgment creditor, or the judgment creditor's agent or attorney, a writ of execution to enforce the judgment and collect the costs shall be prepared only by the clerk or the justice of the peace that rendered the judgment. The clerk or justice of the peace must deliver the writ to:

(1) the sheriff or constable designated by the judgment creditor, or the judgment creditor's agent or attorney; or

(2) the judgment creditor, or the judgment creditor's agent or attorney, who must then deliver the writ to the sheriff or constable.[27]

(b) *Multiple Writs.* Multiple writs may be prepared at the same time, or in succession, without requiring return of the prior writ or writs. Writs may be sent

[25] The reference to Texas Rule of Appellate Procedure 24 replaces the outdated references to Texas Rules of Appellate Procedure "47 and 49" in existing Rule 621a of the Texas Rules of Civil Procedure. Subdivision (d) includes suggested language to address the issue of service of post-judgment discovery on counsel for the judgment debtor or appellate counsel for the appellant in the case of an inquiry under Texas Rule of Appellate Procedure 24.

[26] Rule **EXE 3 (658)** is based on existing Rule 622. The title has changed from "Execution" to "Issuance of Writs of Execution." Existing Rules 627 ("Time for Issuance") and 628 ("Execution Within Thirty Days") have been incorporated into Rule **EXE 3 (658)**. For consistency, the term "request" has replaced the term "application" that appeared in these rules relating to execution.

[27] The Execution Rule Subcommittee proposed adding a footnote here, reading: *See* TEX. CIV. PRAC. & REM. CODE § 34.001; *Williams v. Short*, 730 S.W.2d 98 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (holding that "issuance" pursuant to the statute requires both the clerical preparation of the writ and actual delivery to an officer for enforcement).

to different counties for service by the sheriffs or constables. In the event multiple writs are issued, the judgment creditor, or the judgment creditor's agent or attorney, must inform the officers to whom the writs are delivered that multiple writs are outstanding.[28]

(c) *Time for Issuance from District and County Courts.*

(1) *Enforcement of Judgment Not Suspended.* If enforcement of a judgment has not been suspended in accordance with Texas Rule of Appellate Procedure 24, the clerk shall not prepare a writ until after the expiration of thirty days from the time a final judgment is signed.

(2) *If Motion for New Trial or Motion to Modify, Correct or Reform is Filed.* If a timely motion for new trial or motion to modify, correct, or reform the judgment is filed, the clerk shall not prepare a writ until after the expiration of thirty days from the time the order overruling the motion is signed or from the time the motion is overruled by operation of law.

(3) *Execution within Thirty Days.* A writ of execution may be issued before the thirtieth day after a final judgment is signed upon filing of an affidavit by the judgment creditor, or the judgment creditor's agent or attorney, that the judgment debtor is about to remove the judgment debtor's personal property subject to execution out of the county, or is about to transfer or secrete the judgment debtor's property for the purpose of defrauding creditors.

---

[28] When the judgment debtor has property in more than one county, it is useful for the judgment creditor to be able to obtain multiple writs of execution. Whether by interpretation of existing Rule 622's language referring to "the execution and subsequent executions" or practice, many clerks' offices will not issue multiple writs and will not issue a subsequent writ until the previous writ is returned. Other clerks will issue multiple writs on request.

In light of the changes to Chapter 34 of the Texas Civil Practice and Remedies Code — e.g., Section 34.071(1), which provides that the officer receiving a writ of execution does not have a duty to search for property belonging to the judgment debtor — it appears that the plaintiff will have the duty to search for and identify property of the judgment debtor. This appears to put the burden on the plaintiff of preventing an excessive levy. Therefore, the issuance of multiple writs and their delivery to multiple constables can be controlled by the plaintiff in such a way as to prevent excessive levy and at the same time give the plaintiff the opportunity to collect its judgment by seizer of properties in multiple counties simultaneously. Section 34.071(1) does not excuse the officers handling writs from claims of excessive levy. To further prevent an excessive levy, it would help to put officers on notice of the multiple writs.

A suggestion was made to have the clerk's office note on the writ that multiple writs are outstanding; however, this would not address the issue of successive writs, as the first writ issued would be issued when there was no request for the second writ in hand.

(d) *Time for Issuance from Justice Courts.*

(1) *Enforcement of Judgment Not Suspended.* If a judgment has not been appealed to county court in accordance with the Texas Rules of Civil Procedure, the justice of the peace shall not prepare a writ until after the expiration of ten days from the time a final judgment is signed or five days from the time a final judgment is signed in a forcible detainer action.

(2) *If Motion for New Trial or Motion to Modify, Correct or Reform is Filed.* If a timely motion for new trial or motion to modify, correct, or reform the judgment is filed, the justice of the peace shall not prepare a writ until after a request of the judgment creditor, or the judgment creditor's agent or attorney, after the expiration of ten days from the time the order overruling the motion is signed or from the time the motion is overruled by operation of law.

(3) *Execution within Ten Days.* A writ of execution may be issued at any time before the tenth day after a final judgment is signed upon filing of an affidavit by the judgment creditor, or the judgment creditor's agent or attorney, that the judgment debtor is about to remove the judgment debtor's personal property subject to execution out of the county, or is about to transfer or secrete the judgment debtor's property for the purpose of defrauding the judgment debtor's creditors. In forcible detainer and forcible entry and detainer actions, a writ of execution may be prepared at any time before the fifth day after a final judgment is signed upon filing an affidavit as described in the sentence above.

Rule EXE 4 (659). Contents of Writ[29]

(a) *General Requirements*. A writ of execution 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. The writ must require the sheriff or constable to execute it according to its terms, and to collect the amounts which have been adjudged against the judgment debtor and the further costs of executing the writ. It must describe the judgment by cause number, court number, the date the judgment was signed, and the names of the parties in whose favor and against whom the judgment was rendered. A correct copy of the bill of costs taxed against the judgment debtor must be attached to the writ.[30]

[29] Existing Rules 630 through 633 have been collapsed into Rule **EXE 4 (659)**.

[30] In subdivision (a), the term "justice" has been changed to "justice of the peace." This is the first of many changes from "justice" to "justice of the peace" in the execution rules. Interestingly enough, a reading of the Justice Court Rules (numbered 523-91) reveals that the term "justice of the peace" is used only twice in those rules.

(b) *Command of Writ.*

(1) *Money Judgment.* When a writ of execution is prepared for satisfaction of a money judgment, it must state the sum recovered or directed to be paid, the post-judgment rate of interest provided in the judgment, and the dates and amounts of any credits to the judgment identified by the judgment creditor, the judgment creditor's agent or attorney. It must command the sheriff or constable to satisfy the judgment and costs out of the property of the judgment debtor subject to execution. If the judgment fails to specify the rate of post-judgment interest numerically, the clerk or justice of the peace must include the rate of post-judgment interest in effect on the date the judgment was signed.[31]

(2) *Judgment for Sale of Particular Property.* A writ of execution prepared upon a judgment for the sale of particular tangible or intangible personal property or real property must describe the property with specificity, and must command the sheriff or constable to conduct the sale by giving the public prior notice of the time and place of sale required by law and these rules.

Additionally, the requirement that the clerk or justice of the peace sign "officially" has been eliminated. The rule now provides simply that the clerk or justice of the peace must sign the writ.

[31] Existing Rule 630 requires the writ to specify "the sum recovered or directed to be paid and the sum actually due when it is issued and the rate of interest upon the sum due." It is rare that a writ state "the sum actually due when it is issued"; rather, the writ lists "credits to the judgment." The Execution Rule Subcommittee has proposed replacing the phrase "the sum actually due when it is issued" with "the dates and amounts of credits to the judgment." This will provide the officer handling the writ an exact means of calculating the balance to be collected upon receipt of the writ.

Although the judgment-interest statute provides that judgments "shall" state a rate of interest, they often do not state it at all or state it in a manner other than a numerical rate of interest. While the Execution Rule Subcommittee did not think the burden of providing a rate of interest should be on the clerk or on the officer executing the writ, the Task Force thought the clerk would be in a position to include the post-judgment interest rate as published by the Office of Consumer Credit Commissioner. The Execution Rule Subcommittee suggested that the language "the rate of interest upon the sum due" be replaced with "the post-judgment rate of interest," and that a comment direct the clerk to the Office of Consumer Credit Commissioner when a numerical rate is not stated in the judgment.

The "sum recovered or directed to be paid" will be reflected on the face of the judgment; however, the dates and amounts of credits to the judgment will be known only to the plaintiff, or the agent or attorney requesting the writ. Therefore, the Execution Rule Subcommittee suggested these items be "provided by the judgment creditor, the judgment creditor's agent or attorney requesting the writ."

Finally, it was decided that if the judgment fails to provide for post-judgment interest that case law supports, the judgment nevertheless bears interest at the post-judgment rate; accordingly, the clerk is now charged with including the post-judgment rate in effect at the time of the judgment. See the last sentence of paragraph (b)(1).

(3) *Judgment for Delivery of Possession.* A writ of execution prepared upon a judgment for the delivery of the possession of tangible or intangible personal property or real property shall describe the property with specificity and designate the party to whom possession was awarded. The writ must command the sheriff or constable to deliver the possession of the property to that party.

(4) *Judgment for Possession or Value.* A writ of execution issued upon a judgment for the possession of personal property or its value must command the sheriff or constable to levy and collect the personal property, or in case possession cannot be obtained, to levy and collect the specified value for which the judgment was recovered out of any property of the judgment debtor that is subject to execution.

(c) *Return of Writ*. The writ must be made returnable to the court within thirty, sixty, or ninety days from the date of preparation,[32] as directed by the judgment creditor, or the judgment creditor's agent or attorney. If the request for the writ fails to specify a return date, the writ must be returnable in ninety days.[33]

Rule EXE 5 (660). Levy of Writ[34]

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

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

(2) if the sheriff or constable receives more than one writ on the same day against the same person, the officer must number them in the order received; and

---

[32] The term "issued" has been changed to "prepared." Forms currently used by the clerks and justices of the peace may need to be modified accordingly.

[33] It is rare that a request for a writ of execution specifies the return date. The clerks would like clarification that a 90-day return date be the default, which is the current practice. The provision regarding return dates has been moved from existing Rule 621 to Rule **EXE 4 (659)**.

[34] Existing Rules 637, 639, 640, and 641 are collapsed into Rule **EXE 5 (660)**.

Existing Rule 638 has been omitted. The rule is in conflict with Section 34.004 of the Texas Civil Practice and Remedies Code, which provides: "Property that the judgment debtor has sold, mortgaged, or conveyed in trust may not be seized in execution if the purchaser, mortgagee, or trustee points out other property of the debtor in the county that is sufficient to satisfy the execution." Further, the judgment debtor has a duty to claim property as exempt and clearly may elect not to claim a particular exemption and designate otherwise "exempt" property for levy.

(3) as soon as practicable,[35] proceed to levy on property subject to the writ that is found within the officer's county and is not exempt from execution, unless otherwise directed by the judgment creditor, or the judgment creditor's agent or attorney.

(b) *Judgment Debtor's Opportunity to Designate Property.* Immediately prior to levy, the sheriff or constable shall make a reasonable attempt to contact the judgment debtor, or its attorney or agent, and provide the judgment debtor the opportunity to designate property for levy. The levy shall first be made upon the property designated by the judgment debtor or its agent or attorney. If in the opinion of the sheriff or constable the property designated will not sell for enough to satisfy the judgment, execution and costs of sale, the officer must require an additional designation by the judgment debtor. If no property or insufficient property has been designated by the judgment debtor or its agent or attorney, the officer shall levy upon any property of the judgment debtor that is subject to execution.

(c) *Method of Levy on Particular Property.*

(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 to which Judgment Debtor is Entitled to Possession.* When the judgment debtor has an interest in personal property and is entitled to possession, levy on personal property is made by taking possession. If the property is bulky or taking possession is otherwise impractical, the sheriff or constable may levy by seizing the property in place, in which case the sheriff or constable must affix a notice of seizure to or near the property.[36]

(3) *Personal Property to which Judgment Debtor is Not Entitled to Possession.* When the judgment debtor has an interest in personal property, but is not entitled to possession, levy is made on the property by giving notice to the person who is entitled to possession, or one of them when there are several. The notice of levy shall be given by the sheriff or constable in person or by certified mail.[37]

---

[35] Section 34.072(b) of the Texas Civil Practice and Remedies Code specifically overrides the requirement in existing Rule 637 to levy "without delay" and merely provides that the officer handle the writ in a timely manner so that the sale can occur before its expiration. The Execution Rule Subcommittee omitted the "without delay" requirement in Rule **EXE 5 (660)**. Another option is to add a footnote providing that Section 34.072(b) has modified the officer's duties.

[36] The provision for levy in place is new, although it is a common practice.

[37] Existing Rule 639 provides that if property in which the debtor has no current right to possession is subject to levy, notice of levy is given to the person who is entitled to possession of the property. The rule

(4) *Livestock Running at Large on the Range.* Levy upon livestock running at large on the range, and which cannot be herded and penned without great inconvenience and expense, may be made by designating a reasonable estimate of the number of animals and describing them by their marks and brands, or either. The levy shall be made in the presence of two or more credible persons, and notice of the levy shall be given in writing to the owner or the owner's herder or agent, if residing within the county and known to the officer.

(5) *Shares of Stock.* A levy upon shares of stock of any corporation or joint stock company for which a certificate is outstanding is made by the sheriff or constable seizing and taking possession of the certificates. Provided, however, that nothing herein shall be constructed as restricting any rights granted under section 8.112 of the Texas Business and Commerce Code.[38]

(d) *Persons Attending Levy.* Neither the judgment creditor nor the judgment creditor's agent or attorney shall be required to attend a levy or to be physically present to designate property for seizure. The sheriff or constable conducting the levy may, in the officer's discretion, allow or prohibit the presence of the judgment creditor, or the judgment creditor's agent or attorney, when levy is made.[39]

Rule EXE 6 (661). Levy on Mortgaged or Pledged Property[40]

A judgment debtor's interest in real or personal property previously sold, pledged, assigned, mortgaged, or conveyed in trust for any debt or contract, may be levied upon

---

does not specify the manner of giving notice. The Execution Rule Subcommittee proposed specifying the manner in paragraph (c)(3).

[38] The reference to Section 8.112 of the Texas Business and Commerce Code replaces the outdated reference in existing Rule 641 to Section 8.317 of the Texas Uniform Commercial Code.

[39] Some officers attempt to require the judgment creditor's attorney to accompany them on a levy. This is impractical and can be unsafe. Others prefer that the attorney not go, and should be able to do their job without the burden of protecting the attorney if the judgment debtor is unruly. New subdivision (d) addresses these issues.

[40] The Execution Rule Subcommittee has proposed revising or clarifying existing Rule 643 to address the problems created by *Grocer's Supply v. Intercity Investments*, in which the judgment creditor was assessed damages for levying on pledged goods. *Grocer's Supply* referred to existing Rule 643 and then Section 9.311 of the Texas Business and Commerce Code, but did not address them and instead relied on out-of-state case law. The case did not mention Section 34.004 of the Texas Civil Practice and Remedies Code. Revised Article 9 at 9.401, fn 6 leaves the issue "to the courts." Section 34.004 of the Texas Civil Practice and Remedies Code provides: "Property that the judgment debtor has sold, mortgaged, or conveyed in trust may not be seized in execution if the purchaser, mortgagee, or trustee points out other property of the debtor in the county that is sufficient to satisfy the execution." Because Section 34.004 addresses "property," not just "goods," rewritten Rule **EXE 6 (661)** relates to all property.

and sold at execution unless the purchaser, secured party, assignee, mortgagee, or trustee points out other property of the judgment debtor that is located in the county and is sufficient to satisfy the execution.

(a) *Notice of Levy to Non-Parties*. As soon as practical after levy, the judgment creditor, or the judgment creditor's attorney or agent, must give written notice of levy to all persons whose existing interests appear of public record or are known to the judgment creditor; the notice must be given by certified mail, return receipt requested. If the existing interest appears of public record, the notice shall be sent to the most recent address found in the public records that reflect the interest; otherwise, the notice shall be sent to the last-known address.

(b) *Effect of Sale*. If sufficient other property cannot be substituted, the property under levy shall be sold at execution. The purchaser of that property takes the property subject to any pre-existing sale, pledge, mortgage or conveyance.

PROPOSED COMMENT TO RULE **EXE 6 (661)**: A judgment debtor may have significant equity in encumbered assets. This does not render the assets exempt from the claims of judgment creditors. The rule has been rewritten to take into account the provisions of Section 34.004 of the Civil Practice and Remedies Code and to clarify the rights of judgment creditors to reach the equity in the property via the execution process.

Rule EXE 7 (662). Execution Superseded[41]

(a) *County or District Court.* In the event enforcement of a judgment is suspended pursuant to the Texas Rules of Appellate Procedure, the clerk shall immediately issue a writ of supersedeas suspending all further proceedings under any execution previously issued.

(b) *Justice Court*. Upon the perfection of an appeal from justice court, enforcement of the writ of execution is suspended.

Rule EXE 8 (663). Replevy Rights[42]

(a) *Replevy Bond.* After notice, hearing and order of the court,[43] the judgment debtor may obtain the return of personal property seized in execution by posting a bond

[41] Rule **EXE 7 (662)** is modeled after existing Rule 634. See also Texas Rule of Appellate Procedure 24.1(f).

Existing Rule 635 has been deleted because it was never used per subcommittee members and per an informal survey of justices of the peace.

[42] Existing Rules 644-46 have been collapsed into renamed Rule **EXE 8 (663)**.

with the clerk or justice of the peace, payable to the judgment creditor, with one or more good and sufficient sureties, and conditioned that the judgment debtor will:

(1) deliver the property for execution sale to the sheriff or constable at the time and place stated in the bond; and

(2) to the extent the property is not delivered to the sheriff or constable, pay the officer the property's stated fair value, which shall not exceed the amount of the judgment.

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

(c) *Property May be Sold by Judgment Debtor.* Where property has been replevied, the judgment debtor may sell or dispose of the property and must pay the sheriff or constable the value stated in the bond.

(d) *Forfeiture of the Replevy Bond or Other Security.* If the property is not delivered according to the terms of the bond or other security, and the property's value is not paid, the sheriff or constable must notify the clerk or justice of the peace, who shall then endorse the bond "Forfeited." Upon forfeiture, if the judgment remains unsatisfied in whole or in part, the clerk or justice of the peace must issue a writ of execution against the judgment debtor and sureties on the bond, if any, for the amount due, not exceeding the value of the property stated. After forfeiture, no further replevy shall be allowed for the underlying property that was not returned, and the writ shall be endorsed accordingly.

PROPOSED COMMENT TO RULE **EXE 8 (663)**: The term "replevy bond" is used instead of "delivery bond." The change is made solely for consistency among the terms used in the rules in general, rather than for substantive purposes.

Rule EXE 9 (664). Sale After Levy[44]

(a) *Sale of Real Property.*

(1) *Time and Place of Sale.* Real property under levy of execution shall be sold at public auction, on the first Tuesday of the month, between the hours of 10:00 a.m. and 4:00 p.m. The sale shall take place at the

[43] The Task Force was concerned about the officer setting the delivery bond, so the Execution Rule Subcommittee changed the term "officer" in subdivision (a) to "court" and added the notice and hearing requirements to provide a means for the judgment creditor to have input when the bond amount is set.

[44] The Execution Rule Subcommittee collapsed existing Rules 646a, 647, 649, and 650 into Rule **EXE 9 (664)**.

courthouse door of the county, unless the court orders that the sale be at the place where the property is situated.

(2) *Notice.* The time and place of sale of real property under execution, order of sale, or venditioni exponas, shall be advertised by the sheriff or constable by publishing the notice in the English language once a week for three consecutive weeks preceding the sale, in some newspaper published in the county. The first of the publications shall appear not less than twenty days immediately preceding the day of sale. The notice shall state the authority by which the sale is to be made, the time of levy, and the time and place of sale. The notice shall also contain a brief description of the property to be sold, and shall give the number of acres, original survey, locality in the county, and the name by which the land is most generally known, but it shall not be necessary for it to contain field notes. Publishers of newspapers shall be entitled to charge for the publication at a rate equal to but not in excess of the published word or line rate of that newspaper for the same class of advertising. If there is no newspaper published in the county, the officer shall then post the written notice in three public places in the county, one of which shall be at the courthouse door of the county, for at least twenty successive days before the day of sale. The sheriff or constable making the levy must give a copy of the notice, either in person or by mail, to the judgment debtor, or the judgment debtor's attorney or agent, and to the judgment creditor, or the judgment creditor's attorney or agent.

(3) *If Not Sold.* If the real property is not sold pursuant to the levy, the sheriff or constable who made the levy must file for record a release of levy with the county clerk of each county in which the property is located. The cost of filing the release shall be taxed as a cost of executing the writ.

(4) *Expenses*. The officer is entitled to retain from the proceeds of a sale of real property an amount equal to the reasonable expenses incurred in making the levy and keeping the property.

(b) *Sale of Personal Property.*

(1) *Time and Place of Sale.* Personal property under levy of execution shall be offered for sale on the premises where it is taken in execution, or at the courthouse door of the county. The sale may be held at some other place if, given the nature of the property, it is more convenient to exhibit it to purchasers at such place. Personal property that can be readily exhibited shall not be sold unless the property is present and visible to sale attendees. However, the following property need not be present at the time of sale:

(A) interests in business organizations;[45]

(B) property in which the judgment debtor has only an interest without right to exclusive possession; and

(C) livestock running at large on the range. The purchaser of livestock at the sale is authorized to gather and pen the livestock and select the livestock up to the number purchased.

(2) *Notice of Sale of Personal Property.*[46] The time and place of sale of personal property under execution, order of sale, or venditioni exponas, along with a brief description of the property to be sold, must be posted for ten consecutive days immediately preceding the date of sale at both the courthouse door of the county and at the place where the sale is to be made. The sheriff or constable making the levy must give a copy of the notice, either in person or by mail, to the judgment debtor, or the judgment debtor's attorney or agent, and to the judgment creditor, or the judgment creditor's attorney or agent, as well as any person who received notice of the levy.[47] The time and manner of notice and sale of personal property may be revised by court order upon determination that the property is perishable.[48]

(3) *Expenses*. The officer is entitled to retain from the proceeds of a sale of personal property an amount equal to the reasonable expenses incurred in making the levy and keeping the property.

PROPOSED COMMENT TO RULE **EXE 9(b) (664(b))**: Revisions to Section 34.073(b) of the Civil Practice and Remedies Code clarified that an officer does not have a duty to

[45] Existing Rule 649 refers to "shares of stock in joint stock or incorporated companies[.]" The more inclusive language here accounts for the ever-changing types of business entities and their governances by the Texas Business Organizations Code.

[46] Existing Rule 649 refers to "[p]revious notice[.]" The Execution Rule Subcommittee struck the term "previous" from the rule.

[47] In practice, most constables also give notice to the judgment debtor of the sale of personal property. The Execution Rule Subcommittee suggested, in the interest of fairness to the defendant, that a provision for notice be added for sales of personal property, which tracks the notice for sales of real estate. The Subcommittee also suggested that the judgment creditor, or the judgment creditor's attorney, should receive notice of all sales to ensure coordination with the officers handling one or more executions. Accordingly, the Subcommittee recommended that all sales provide: "The officer making the levy shall give the judgment creditor, or the judgment creditor's attorney, and the judgment debtor, or the judgment debtor's attorney, written notice of such sale, either in person or by mail, which notice shall substantially conform to the foregoing requirements." As indicated, the Subcommittee's language has been modified to an extent in this draft.

[48] The Execution Rule Subcommittee added this sentence to paragraph (b)(2) because all of the other ancillary rules address the sale of perishable personal property.

levy on or sell property that is not within the officer's county unless it is real property that is located in part in the officer's county and located in part in a contiguous county.

Rule EXE 10 (665). "Courthouse Door" Defined[49]

The "courthouse door" of a county means either the principal entrance to the building provided by the county commissioners' court as the county courthouse or any other location or area of the courthouse as the county commissioners' court shall designate. If for any reason there is no such building, the door of the building where the district court was last held in that county shall be deemed to be the courthouse door. Where the courthouse, or building used by the court, has been destroyed by fire or other cause, and another has not been designated by the proper authority, the place where the building stood shall be deemed to be the courthouse door.[50]

Rule EXE 11 (666). Extension of Return Date

On request of the judgment creditor, the judgment creditor's agent or attorney, or on request of the officer who has levied on property under a writ of execution, the clerk must issue a writ of venditioni exponas which shall extend the return date on the existing writ of execution by thirty, sixty, or ninety days as requested by the judgment creditor, the judgment creditor's agent or attorney, or the sheriff or constable who has made the levy.[51]

---

[49] This draft rule stems from existing Rule 648.

[50] The term "courthouse door" is important in execution for purposes of posting notice and for purposes of sale location. The Execution Rule Subcommittee thought the definition in existing Rule 648 may be antiquated and suggested amended it as provided in Rule **EXE 10 (665)**. This proposal was based on the understanding of several constables (both on and off the Task Force) that the place for sale is determined by the commissioners' court. The term appears to be defined in the Texas Rules of Civil Procedure alone; the Subcommittee found no definition elsewhere. Under Section 51.002(a) of the Texas Property Code, the role of the commissioners' court in designating "the area at the courthouse" where foreclosures should take place is not the same as the designation of "courthouse door." Thus, defining it relative to the commissioners' court may not accomplish the Subcommittee's goal.

[51] The term "venditioni exponas" is referenced in existing Rule 647, yet it is not defined in the rules or in any statute. The writ of venditioni exponas is used to extend the return date of a writ of execution on property under levy that cannot be sold before the return date of the writ of execution. While its only reference is in existing Rule 647, relating to notices of sales of real state, the writ has been used per case law to extend the life of the writ of execution on personal property as well. Regardless of the efforts of the officer and the plaintiff, sometimes real or personal property levied on cannot be sold before the writ expires — *i.e.*, discovery of errors in publication, delay in seizure of property due to acts of the defendant, etc.

Rule EXE 12 (667). Post-Execution Sale Matters[52]

(a) *When Judgment is Not Satisfied.* When the proceeds of the sale of property sold in execution are insufficient to satisfy the judgment, the sheriff or constable must levy on additional property, if any, sufficient to satisfy the balance owing on the judgment.

(b) *Purchaser Failing to Comply.* If any successful bidder at execution sale fails to comply with the terms of the sale, upon the judgment creditor's motion and five days' notice to the purchaser, the purchaser shall be liable to pay the judgment creditor twenty percent of the value of the property determined by the court, in addition to costs. Should the property on a second sale bring a lower price, the purchaser shall be liable to pay to the judgment debtor all loss which the judgment debtor sustains thereby, to be recovered on motion as provided above.

(c) *Resale of Property.* When the bidder fails to comply with the terms of the sale, the levying officer shall proceed to sell the same property again on the same day, if there is sufficient time. Otherwise, the officer shall re-advertise and sell the property as provided by these execution rules.

(d) *Return of Execution.* The levying sheriff or constable must file a written return, signed by the sheriff or constable, stating concisely the officer's actions taken pursuant to the writ and the law. The return shall be filed with the clerk or justice of the peace. The execution shall be returned promptly if satisfied by the collection of the money or if ordered by the judgment creditor or the judgment creditor's attorney endorsed thereon.

Rule EXE 13 (668). Permanent Record of Execution

The clerk of each court shall keep a permanent record of all executions as issued by the clerk and all returns thereon, which record shall be indexed and cross-indexed in the name of each judgment creditor and judgment debtor named therein.[53]

---

[52] Existing Rules 651-654 were collapsed into one rule — Rule **EXE 12 (667)** —for matters after sale. In subdivisions (a) and (b), minor revisions were made to modernize the language. The Execution Rule Subcommittee suggested omitting existing Rule 655 because it is unnecessary and antiquated.

[53] Some clerks do not maintain the execution docket, even though they are required to do so. Some of the new electronic-filing software does not include the execution docket. The execution docket is considered a permanent record and therefore not subject to destruction. The Execution Rule Subcommittee found no cases citing existing Rule 656 (and by the way, many of the execution rules were not cited in any cases!). The Subcommittee did, however, search for the term "execution docket" in case law and found several cases in which the parties accessed the execution docket for information regarding land titles as affected by sheriff's sales and others where the docket was accessed for purposes of determining whether a judgment had been renewed. The key seems to be that events related to executions on judgments be part of a permanent record. Rule **EXE 13 (668)** addresses this permanent recordkeeping with a more modern approach.

Rule EXE 14 (669). Effect of Death on the Execution Process[54]

(a) *Death or Termination of Representative.* When an executor, administrator, guardian, or trustee of an express trust dies, or ceases to be the executor, administrator, guardian, or trustee after judgment, execution shall issue in the name of the representative's successor, upon an affidavit of the death or termination being filed with the clerk or the justice of the peace, together with the certificate of the appointment of the successor under the hand and seal of the clerk of the court wherein the appointment was made.

(b) *Death of Nominal Plaintiff.* When a nominal plaintiff dies after judgment, execution shall issue in the name of the party for whose use the suit was brought upon an affidavit of the death being filed with the clerk or the justice of the peace.[55]

(c) *Death of Money Judgment Debtor.* If a sole judgment debtor dies after judgment for money against the judgment debtor, execution shall not issue thereon, but the judgment may be proved up and paid in due course of administration.

(d) *Death of Judgment Debtor Involving Non-Money Judgment.* In any case of judgment other than a money judgment, where the sole judgment debtor, or one or more of several joint judgment debtors, dies after judgment, upon an affidavit of the death being filed with the clerk, together with the certificate of the appointment of a representative of the decedent under the hand and seal of the clerk of the court wherein the appointment was made, the execution on the judgment shall issue against the representative.

Rule EXE 15 (670). Scire Facias to Revive Judgment

On application of the judgment creditor, or the judgment creditor's agent or attorney, and subsequent order of the court, the clerk shall issue a scire facias for service

---

It was suggested that execution records of justice courts have the same importance as those of county and district courts, especially with the increased jurisdiction. Thus, the Task Force considered and agreed to add the execution-docket requirement to the duties of the justice of the peace. When researching the justice-court rules, the Execution Rule Subcommittee found that Rule 524 provides that the justice "shall keep a civil docket in which he shall enter . . . [t]he time of issuing execution, to whom directed and delivered, and the amount of debt, damages and costs; and when any execution is returned, he shall note such return on said docket, with the manner in which is was executed." Therefore, it appears that the specific rule for justice courts relating to their dockets already addresses executions.

[54] Existing Rules 623-626 are collapsed into one rule — Rule **EXE 14 (669)** — dealing with effect of death on the execution process. The rule's title is a modified version of the title to existing Rule 623: "On Death of Executor[.]"

[55] The language in subdivision (b) was modified to make the text consistent with the usual reference to nominal plaintiffs and the existing title. Additionally, because these rules deal with execution, the term "execution" was substituted for the term "proper process."

on the judgment debtor requiring the judgment debtor to appear and show cause why the judgment creditor's judgment should not be revived, as provided in section 31.006 of the Texas Civil Practice and Remedies Code.[56]

[56] Writs of scire facias are addressed in existing Rules l51, 152, and 154 as they relate to the death of a plaintiff or defendant requiring the heirs, administrators, or executors to appear and prosecute or defend the pending suit. To the extent that the issuance and due-diligent service of writs of execution are required to extend the life of a judgment under Section 34.001 of the Texas Civil Practice and Remedies Code, the writ of scire facias as a means of reviving judgments per Section 31.006 of that Code may need to be included among the rules relating to writs of execution. If not among these rules, then it would be useful to the practitioner that this use of the scire facias and its contents be addressed elsewhere.

Rule **EXE 15 (670)** is couched in terms of a show-cause notice. Alternatively, it could be couched in terms of requiring an appearance as in the case of a citation, as provided in Texas Rule of Civil Procedure 154.

Execution Statutes
Texas Civil Practice & Remedies Code

§ 31.001. Passage of Title

A judgment for the conveyance of real property or the delivery of personal property may pass title to the property without additional action by the party against whom the judgment is rendered.

§ 31.002. Collection of Judgment Through Court Proceeding

(a) A judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that:

(1) cannot readily be attached or levied on by ordinary legal process; and

(2) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.

(b) The court may:

(1) order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control, together with all documents or records related to the property, to a designated sheriff or constable for execution;

(2) otherwise apply the property to the satisfaction of the judgment; or

(3) appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.

(c) The court may enforce the order by contempt proceedings or by other appropriate means in the event of refusal or disobedience.

(d) The judgment creditor may move for the court's assistance under this section in the same proceeding in which the judgment is rendered or in an independent proceeding.

(e) The judgment creditor is entitled to recover reasonable costs, including attorney's fees.

(f) A court may not enter or enforce an order under this section that requires the turnover of the proceeds of, or the disbursement of, property exempt under any statute, including Section 42.0021, Property Code. This subsection does not apply to the enforcement of a child support obligation or a judgment for past due child support.

(g) With respect to turnover of property held by a financial institution in the name of or on behalf of the judgment debtor as customer of the financial institution, the rights of a receiver appointed under Subsection (b)(3) do not attach until the financial institution receives service of a certified copy of the order of receivership in the manner specified by Section 59.008, Finance Code.

(h) A court may enter or enforce an order under this section that requires the turnover of nonexempt property without identifying in the order the specific property subject to turnover.

§ 31.006. Revival of Judgment

A dormant judgment may be revived by scire facias or by an action of debt brought not later than the second anniversary of the date that the judgment becomes dormant.

§ 31.010. Turnover by Financial Institution

(a) A financial institution that receives a request to turn over assets or financial information of a judgment debtor to a judgment creditor or a receiver under a turnover order or receivership under Section 31.002 shall be provided and may rely on:

(1) a certified copy of the order or injunction of the court; or

(2) a certified copy of the order of appointment of a receiver under Section 64.001, including a certified copy of:

(A) any document establishing the qualification of the receiver under Section 64.021;

(B) the sworn affidavit under Section 64.022; and

(C) the bond under Section 64.023.

(b) A financial institution that complies with this section is not liable for compliance with a court order, injunction, or receivership authorized by Section 31.002 to:

(1) the judgment debtor;

(2) a party claiming through the judgment debtor;

(3) a co-depositor with the judgment debtor; or

(4) a co-borrower with the judgment debtor.

(c) A financial institution that complies with this section is entitled to recover reasonable costs, including copying costs, research costs, and, if there is a contest, reasonable attorney's fees.

(d) In this section, "financial institution" means a state or national bank, state or federal savings and loan association, state or federal savings bank, state or federal credit union, foreign bank, foreign bank agency, or trust company.

§ 34.001. No Execution on Dormant Judgment

(a) If a writ of execution is not issued within 10 years after the rendition of a judgment of a court of record or a justice court, the judgment is dormant and execution may not be issued on the judgment unless it is revived.

(b) If a writ of execution is issued within 10 years after rendition of a judgment but a second writ is not issued within 10 years after issuance of the first writ, the judgment becomes dormant. A second writ may be issued at any time within 10 years after issuance of the first writ.

(c) This section does not apply to a judgment for child support under the Family Code.

§ 34.002. Effect of Plaintiff's Death

(a) If a plaintiff dies after judgment, any writ of execution must be issued in the name of the plaintiff's legal representative, if any, and in the name of any other plaintiff. An affidavit of death and a certificate of appointment of the legal representative, given under the hand and seal of the clerk of the appointing court, must be filed with the clerk of the court issuing the writ of execution.

(b) If a plaintiff dies after judgment and his estate is not administered, the writ of execution must be issued in the name of all plaintiffs shown in the judgment. An affidavit showing that administration of the estate is unnecessary must be filed with the clerk of the court that rendered judgment. Money collected under the execution shall be paid into the registry of the court, and the court shall order the money partitioned and paid to the parties entitled to it.

(c) Death of a plaintiff after a writ of execution has been issued does not abate the execution, and the writ shall be levied and returned as if the plaintiff were living.

§ 34.003. Effect of Defendant's Death

The death of the defendant after a writ of execution is issued stays the execution proceedings, but any lien acquired by levy of the writ must be recognized and enforced by the county court in the payment of the debts of the deceased.

§ 34.004. Levy on Property Conveyed to Third Party

Property that the judgment debtor has sold, mortgaged, or conveyed in trust may not be seized in execution if the purchaser, mortgagee, or trustee points out other property of the debtor in the county that is sufficient to satisfy the execution.

§ 34.005. Levy on Property of Surety

(a) If the face of a writ of execution or the endorsement of the clerk shows that one of the persons against whom it is issued is surety for another, the officer must first levy on the principal's property that is subject to execution and is located in the county in which the judgment is rendered.

(b) If property of the principal cannot be found that, in the opinion of the officer, is sufficient to satisfy the execution, the officer shall levy first on the principal's property that can be found and then on as much of the property of the surety as is necessary to satisfy the execution.

§ 34.006. to 34.020 [Reserved for expansion]

§ 34.021. Recovery of Property Before Sale

A person is entitled to recover his property that has been seized through execution of a writ issued by a court if the judgment on which execution is issued is reversed or set aside and the property has not been sold at execution.

§ 34.022. Recovery of Property Value After Sale

(a) A person is entitled to recover from the judgment creditor the market value of the person's property that has been seized through execution of a writ issued by a court if the judgment on which execution is issued is reversed or set aside but the property has been sold at execution.

(b) The amount of recovery is determined by the market value at the time of sale of the property sold.

§ 34.023. to 34.040 [Reserved for expansion]

§ 34.041. Sale at Place Other Than Courthouse Door

If the public sale of land is required by law to be made at a place other than the courthouse door, sales under this chapter shall be made at the place designated by that law.

§ 34.042. Sale of City Lots

If real property taken in execution consists of several lots, tracts, or parcels in a city or town, each lot, tract, or parcel must be offered for sale separately unless not susceptible to separate sale because of the character of improvements.

§ 34.043. Sale of Rural Property

(a) If real property taken in execution is not located in a city or town, the defendant in the writ who holds legal or equitable title to the property may divide the property into lots of not less than 50 acres and designate the order in which those lots shall be sold.

(b) The defendant must present to the executing officer:

(1) a plat of the property as divided and as surveyed by the county surveyor of the county in which the property is located; and

(2) field notes of each numbered lot with a certificate of the county surveyor certifying that the notes are correct.

(c) The defendant must present the plat and field notes to the executing officer before the sale at a time that will not delay the sale as advertised.

(d) When a sufficient number of the lots are sold to satisfy the amount of the execution, the officer shall stop the sale.

(e) The defendant shall pay the expenses of the survey and the sale, and those expenses do not constitute an additional cost in the case.

§ 34.044. Stock Shares Subject to Sale

Shares of stock in a corporation or joint-stock company that are owned by a defendant in execution may be sold on execution.

§ 34.0445. Persons Eligible to Purchase Real Property

(a) An officer conducting a sale of real property under this subchapter may not execute or deliver a deed to the purchaser of the property unless the purchaser exhibits to the officer an unexpired written statement issued to the person in the manner prescribed by Section 34.015, Tax Code, showing that the county assessor-collector of the county in which the sale is conducted has determined that:

(1) there are no delinquent ad valorem taxes owed by the person to that county; and

(2) for each school district or municipality having territory in the county there are no known or reported delinquent ad valorem taxes owed by the person to that school district or municipality.

(b) An individual may not bid on or purchase the property in the name of any other individual. An officer conducting a sale under this subchapter may not execute a deed in the name of or deliver a deed to any person other than the person who was the successful bidder.

(c) The deed executed by the officer conducting the sale must name the successful bidder as the grantee and recite that the successful bidder exhibited to that officer an unexpired written statement issued to the person in the manner prescribed by Section 34.015, Tax Code, showing that the county assessor-collector of the county in which the sale was conducted determined that:

(1) there are no delinquent ad valorem taxes owed by the person to that county; and

(2) for each school district or municipality having territory in the county there are no known or reported delinquent ad valorem taxes owed by the person to that school district or municipality.
(d) If a deed contains the recital required by Subsection (c), it is conclusively presumed that this section was complied with.
(e) A person who knowingly violates this section commits an offense. An offense under this subsection is a Class B misdemeanor.
(f) To the extent of a conflict between this section and any other law, this section controls.
(g) This section applies only to a sale of real property under this subchapter that is conducted in:
(1) a county with a population of 250,000 or more; or
(2) a county with a population of less than 250,000 in which the commissioners court by order has adopted the provisions of this section.

§ 34.045. Conveyance of Title After Sale
(a) When the sale has been made and its terms complied with, the officer shall execute and deliver to the purchaser a conveyance of all the right, title, interest, and claim that the defendant in execution had in the property sold.
(b) If the purchaser complies with the terms of the sale but dies before the conveyance is executed, the officer shall execute the conveyance to the purchaser, and the conveyance has the same effect as if it had been executed in the purchaser's lifetime.

§ 34.046. Purchaser Considered Innocent Purchaser Without Notice
The purchaser of property sold under execution is considered to be an innocent purchaser without notice if the purchaser would have been considered an innocent purchaser without notice had the sale been made voluntarily and in person by the defendant.

§ 34.047. Distribution of Sale Proceeds
(a) An officer shall deliver money collected on execution to the entitled party at the earliest opportunity.
(b) The officer is entitled to retain from the proceeds of a sale of personal property an amount equal to the reasonable expenses incurred by him in making the levy and keeping the property.
(c) If more money is received from the sale of property than is sufficient to satisfy the executions held by the officer, the officer shall immediately pay the surplus to the defendant or the defendant's agent or attorney.

§ 34.048. Purchase by Officer Void
If an officer or his deputy conducting an execution sale directly or indirectly purchases the property, the sale is void.

§ 34.049. to 34.060 [Reserved for expansion]

§ 34.061. Duty Toward Seized Personalty; Liability

(a) The officer shall keep securely all personal property on which he has levied and for which no delivery bond is given.

(b) If an injury or loss to an interested party results from the negligence of the officer, the officer and his sureties are liable for the value of the property lost or damaged.

(c) The injured party has the burden to prove:

(1) that the officer took actual possession of the injured party's property; and

(2) the actual value of any property lost or damaged.

§ 34.062. Duty of Successor Officer

If the officer who receives a writ of execution dies or goes out of office before the writ is returned, his successor or the officer authorized to discharge the duties of the office shall proceed in the same manner as the receiving officer was required to proceed.

§ 34.063. Improper Endorsement of Writ

(a) If an officer receives more than one writ of execution on the same day against the same person and fails to number them as received or if an officer falsely endorses a writ of execution, the officer and the officer's sureties are liable to the plaintiff in execution only for actual damages suffered by the plaintiff because of the failure or false endorsement.

(b) The plaintiff in execution has the burden to prove:

(1) the officer failed to properly number or endorse the writ of execution;

(2) the officer's failure precluded the levy of executable property owned by the judgment debtor;

(3) the executable property owned by the judgment debtor was not exempt from execution or levy; and

(4) the plaintiff in execution suffered actual damages.

§ 34.064. Improper Return of Writ

(a) An officer may file an amended or corrected return after the officer has returned a writ to a court.

(b) Once an officer receives actual notice of an error on a return or of the officer's failure to file a return, the officer shall amend the return or file the return not later than the 30th day after the date of the receipt of notice.

(c) An officer who fails or refuses to amend or file the return may be subject to contempt under Section 7.001(b).

§ 34.065. Failure to Levy or Sell

(a) If an officer fails or refuses to levy on or sell property subject to execution and the levy or sale could have taken place, the officer and the officer's sureties are liable to the party entitled to receive the money collected on execution only for actual damages suffered.

(b) The judgment creditor seeking relief under this section has the burden to prove:

(1) the judgment creditor has a valid judgment against the judgment debtor;

(2) the writ of execution was issued to the judgment creditor;

(3) the writ was delivered to the officer;
(4) the judgment creditor's judgment was unpaid and unsatisfied;
(5) the property to be levied on was subject to execution;
(6) the officer failed or refused to levy under the writ; and
(7) the amount of actual damages suffered.

(c) Property to be levied on is subject to execution for purposes of this section if the judgment creditor proves that the judgment debtor owned the property at issue, the property was accessible to the officer under the law, the property was situated in the officer's county, and the property was not exempt from execution.

(d) Before a court may find that an officer failed or refused to levy under the writ for purposes of this section, the court must find that the judgment creditor specifically informed the officer that the property was owned by the judgment debtor and was subject to execution and that the creditor directed the officer to levy on the property.

(e) In this section, "actual damages" is the amount of money the property would have sold for at a constable or sheriff's auction minus any costs of sale, commissions, and additional expenses of execution.

§ 34.066. Improper Sale

(a) If an officer sells property without giving notice as required by the Texas Rules of Civil Procedure or sells property in a manner other than that prescribed by this chapter and the Texas Rules of Civil Procedure, the officer shall be liable only for actual damages sustained by the injured party.

(b) The injured party has the burden to prove that the sale was improper and any actual damages suffered.

§ 34.067. Failure to Deliver Money Collected

If an officer fails or refuses to deliver money collected under an execution when demanded by the person entitled to receive the money, the officer and the officer's sureties are liable to the person for the amount collected and for damages at a rate of one percent a month on that amount if proven by the injured party.

§ 34.068. Rules Governing Actions Under This Chapter

(a) This section applies to any claim for damages brought under Section 7.001, 34.061, 34.063, 34.065, 34.066, or 34.067 or under Section 86.023, Local Government Code.

(b) Suit shall be brought in the form of a lawsuit filed against the officer in the county in which the officer holds office.

(c) All suits must be filed not later than the first anniversary of the date on which the injury accrues.

(d) An officer or a surety may defend the action by stating and proving any defenses provided by law, including any defense that would mitigate damages.

§ 34.069. Payment of Damages

A county, at the discretion of the commissioners court, may pay any judgment taken against an officer under Section 7.001, 34.061, 34.063, 34.064, 34.065, 34.066, or 34.067 or under Section 86.023, Local Government Code, provided that this section does not apply if the officer is finally convicted under Section 39.02 or 39.03, Penal Code.

§ 34.070. Right of Subrogation

An officer against whom a judgment has been taken under Section 7.001, 7.002, 34.061, 34.063, 34.064, 34.065, 34.066, or 34.067 or under Section 86.023, Local Government Code, or a county that has paid the judgment on behalf of the officer under Section 34.069, has a right of subrogation against the debtor or person against whom the writ was issued.

§ 34.071. Duties of Executing Officer

An officer receiving a writ of execution does not have a duty to:

(1) search for property belonging to the judgment debtor;

(2) determine whether property belongs to a judgment debtor;

(3) determine whether property belonging to the judgment debtor is exempt property that is not subject to levy;

(4) determine the priority of liens asserted against property subject to execution; or

(5) make multiple levies for cash or multiple levies at the same location.

§ 34.072. Timing of Execution and Return

(a) An officer receiving a writ of execution may return the writ after the first levy, or attempted levy, if the judgment creditor cannot designate any more executable property currently owned by the judgment debtor at the time of the first levy or first attempted levy.

(b) Notwithstanding Rule 637, Texas Rules of Civil Procedure, an attempt to levy on property may begin any time during the life of the writ, provided that the officer shall allow enough time for completing the sale of the property.

§ 34.073. Transfer of Writ; No Duty to Levy Outside of County

(a) An officer receiving a writ may transfer the writ to another officer in another precinct, or to another law enforcement agency authorized to perform executions, within the county of the first officer who received the writ.

(b) An officer does not have a duty to levy on or sell property not within the officer's county, unless it is real property that is partially in the officer's county and partially within a contiguous county.

§ 34.074. Officer's Surety

(a) An officer's surety may only be liable for the penal sum of the surety bond minus any amounts already paid out under the bond. In no event may an officer's surety be liable for more than the penal sum of the officer's surety bond.

(b) If the officer and the officer's surety are both defendants in an action brought under this chapter, the surety may deposit in the court's registry the amount unpaid under the surety bond and the court shall determine the proper disposition of this sum or order the return of the deposit to the surety in the court's final judgment.

(c) A surety is not a necessary party to an action brought under this chapter or under Section 7.001. Instead, a prevailing party under these provisions may bring a separate action against a surety failing to pay the amount remaining under the bond on a final

judgment. This action must be brought on or before 180 days after the date all appeals are exhausted in the underlying action.

§ 34.075. Wrongful Levy

Whenever a distress warrant, writ of execution, sequestration, attachment, or other like writ is levied upon personal property, and the property, or any part of the property, is claimed by any claimant who is not a party to the writ, the only remedy against a sheriff or constable for wrongful levy on the property is by trial of right of property under Part VI, Section 9, Texas Rules of Civil Procedure.

§ 34.076. Exclusive Remedy

This subchapter is the exclusive remedy for violations of an officer's duties with regard to the execution and return of writs without regard to the source of the duty prescribed by law.

SECTION 7. RECEIVERS AND TURNOVERS

Rule REC 1 (671). No Receiver of Immovable Property Appointed Without Notice[57]

(a) *Notice Required.* Except where otherwise provided by statute, no receiver shall be appointed under Chapter 64 of the Texas Civil Practice and Remedies Code without notice to take charge of property which is fixed and immovable.

(b) *Application*. When an application for appointment of receiver is filed, the court shall schedule same for hearing.

(c) *Notice of Hearing*. Notice of the hearing shall be given to the adverse party by serving notice thereof not less than three days prior to the hearing.

(d) *Substitute Service.* If the order contains a finding that the defendant is a nonresident, or that the defendant's whereabouts are unknown, the notice may be served by affixing the same in a conspicuous manner and place upon the property or if that is impracticable it may be served in any other manner as the court or judge may require.

PROPOSED COMMENT TO RULE **REC 1 (671)**: No substantive change to the existing rule is intended by the proposed changes. The intent is to clarify that the rule applies to receiverships under Chapter 64 of the Texas Civil Practice and Remedies Code and not to receiverships under §31.002, CPRC. Also, the rule is reformatted to be consistent with other rules. The rule applies when a receiver is appointed for land, or mineral interests under Chapter 64.

Rule REC 2 (672). Bond and Bond in Divorce Case

(a) *Receiver's Bond.* No receiver shall be appointed under Chapter 64 of the Texas Civil Practice and Remedies Code without authority to take charge of property until the party applying therefore has filed with the court a good and sufficient bond, to be approved by the court, payable to the defendant in the amount set by the court, conditioned for the payment of all damages and cost in the suit, in case it should be decided that the receiver was wrongfully appointed to take charge of the property. The amount of the bond shall be set at a sum sufficient to cover all probable damages and costs.

---

[57] Rule **REC 1 (671)** is based on existing Rule 695.

Existing Rule 695 could not have been intended for use in a turnover receivership when it was enacted because there would not be a turnover statute — Section 31.002 of the Texas Civil Practice and Remedies Code — until 30 years later. Existing Rules 695 and 695a (numbered **REC 1 (671)** and **REC 2 (672)** in this draft) have not been applied to a turnover receivership in a reported case. However, Section 31.010 of the Civil Practice and Remedies Code protects a financial institution that relies on documents including an affidavit or bond under Chapter 64 of the Code.

(b) *Receiver's Bond in a Divorce Case.* In a divorce case in which a receiver is sought under Chapter 64 of the Texas Civil Practice and Remedies Code the court or judge, as a matter of discretion, may dispense with the necessity of a bond.

PROPOSED COMMENT TO RULE **REC 2 (672)**: No substantive change to the existing rule is intended by the proposed changes. The intent of the proposed changes is to clarify that the rule applies to receiverships under Chapter 64 of the Texas Civil Practice and Remedies Code and not to receiverships under §31.002. Also, the rule is reformatted to be consistent with other rules. A receiver may be appointed in a divorce case under Chapter 64, CPRC, to which this rule applies. But if a receiver is appointed in a divorce case pursuant to §31.002, CPRC, Rule **REC 2 (672)** does not apply.

Rule TRN 1 (673). Application for Turnover Order[58]

(a) *In General.* A judgment creditor is entitled to aid from the court to satisfy a judgment, including the appointment of receivers; turnover of nonexempt property to the court, sheriffs, constables, and receivers; and injunctive relief.

(b) *When Filed.* An application for turnover order may be filed at any time after a final judgment is signed.

(c) *Where Filed.*

(1) *Post-judgment Motion.* An application may be filed as a post-judgment motion in the same cause in which the judgment was signed, with or without service on the judgment debtor.

(2) *Independent Proceeding.* An application may be filed as an independent proceeding in a court of competent jurisdiction, provided that citation issues and is served on the judgment debtor.

(d) *Application.* An application for turnover order must be in writing and shall:

(1) identify the parties to the proceeding;

(2) describe the judgment by date and amount;

(3) state the ownership of the judgment and, if applicable, explain the chain of title;

[58] Currently, there are no rules of procedure governing turnover proceedings. Turnover relief is a statutory, post-judgment remedy created to allow a judgment creditor to obtain the court's aid in collecting a judgment.

(4) state that the judgment remains wholly unsatisfied, or state the amount of credits, if any, to the judgment;

(5) state that the judgment debtor owns nonexempt property that cannot readily be levied on by ordinary legal process; and

(6) state the relief requested.

(e) *Verification.* An application does not require verification. However, a verified application, or an application supported by affidavits, may be submitted to the court to establish prima facie entitlement to turnover relief at the hearing. A verified application and any supporting affidavits must be made 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.

(f) *Response.* A judgment debtor need not file a response. If a response is filed, it need not be verified.

(g) *Third Parties*. An application may be directed to a third party only if that third party has property owned by the judgment debtor or subject to the judgment debtor's possession or control. A turnover proceeding may not be used to determine the substantive rights of third parties.

(h) *No Bond Required.* No bond shall be required of an applicant for turnover relief.

Rule TRN 2 (674). Hearing on Application

(a) *Notice.* The court may order turnover relief only after a hearing, which may be ex parte. Notice of a hearing, if given, shall comply with Rule 21a.

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

(1) *Burden of Judgment Creditor.* The judgment creditor must prove that the judgment debtor owns nonexempt property that cannot readily be levied on by ordinary legal process. The judgment creditor need not prove that collection of the judgment has been attempted by other means.

(2) *Burden of Judgment Debtor.* The judgment debtor bears the burden of proving the existence and extent of any claimed exemption, which may be urged for the first time at the hearing. If the hearing on the application is ex parte, an exemption may be established at a later hearing.

(3) *Hearing.* The court's determination may be based on affidavits, if uncontroverted, setting forth facts admissible in evidence; otherwise, the

parties must submit oral testimony or other evidence at the hearing. If a debtor appears at the hearing and opposes the application without having filed a response, the judgment creditor is entitled to a continuance, if requested, to address the issues raised by the judgment debtor.

(c) *Costs and Fees.* The judgment creditor who prevails in a turnover proceeding is entitled to recover reasonable costs, including attorney fees, incurred in the turnover proceeding.

Rule TRN 3 (675). Contents of Turnover Order

(a) *Generally*. An order for turnover relief may do any or all of the following:

(1) order the judgment debtor to turnover nonexempt property in the judgment debtor's possession or subject to its control, to a sheriff, constable, receiver, or the registry of the court;

(2) order the judgment debtor to turnover all documents or records related to the property;

(3) appoint a receiver;

(4) grant injunctive relief;

(5) authorize the sale of the property by a sheriff or constable as in execution; or

(6) otherwise apply the property to satisfy the judgment.

The order is not required to identify the specific property subject to turnover. The order must not require the turnover of property to the creditor.

(b) *Notice to Debtor*. An order for turnover relief must include the following notice addressed to the judgment debtor: "Your funds or other property may be exempt under federal or state law."

(c) *Third Parties*. An order for turnover relief may be directed to a third party only if that third party has property owned by the judgment debtor or subject to the judgment debtor's possession or control.

(d) *Receiverships*. An order for turnover relief that appoints a receiver must specify the powers of the receiver, which may include the authority to take possession of nonexempt property, sell it, and subject to the approval of the court, deliver the proceeds to the judgment creditor. The order must require the receiver to file, prior to assuming receivership duties, an oath that the receiver shall perform the

receivership duties faithfully. The order may also state how the receiver's fee is calculated.

(e) *Costs.* An order for turnover relief may tax against the judgment debtor the reasonable costs, including attorney's fees, incurred by the prevailing judgment creditor in the turnover proceeding, and the reasonable fees and expenses incurred by the receiver.

Rule TRN 4 (676). Service of Order[59]

(a) *Order Directed to Judgment Debtor or Otherwise Applying the Property.* A turnover order directed to the judgment debtor and requiring the turnover of nonexempt property in the judgment debtor's possession or subject to the judgment debtor's control, or a turnover order which otherwise applies the property to the satisfaction of the judgment, shall be served on the judgment debtor pursuant to Rule 21a as soon as practicable after the order is signed.

(b) *Order Appointing a Receiver.* A turnover order appointing a receiver shall be served on the judgment debtor pursuant to Rule 21a as soon as practicable after the order is signed; however, if service of the order would prejudice the judgment creditor's right to collect the judgment then service shall be made as soon as service will no longer prejudice the judgment creditor's rights. An order appointing a receiver shall be delivered to the receiver promptly by the party or attorney obtaining the order.

(c) *Order Including Other Injunctive Relief.* A turnover order providing injunctive relief other than turnover shall be served on the judgment debtor pursuant to Rule 21a as soon as practicable after the order is signed if the application for turnover relief is filed as a post-judgment motion. If the application for turnover relief is filed as an independent action, and a temporary restraining order issues, it shall be served on the judgment debtor as provided for in the Texas Rules of Civil Procedure governing injunctive relief.

(d) *Orders Directed to Financial Institutions.* Service of a turnover order on a financial institution is governed by the Texas Civil Practice and Remedies Code and the Texas Finance Code.

Rule TRN 5 (677). Receiverships in Turnover Proceedings

The following rules shall apply to receivers appointed pursuant to a turnover order:

[59] See Sections 31.002 and 31.010 of the Texas Civil Practice and Remedies Code and Section 59.008 of the Texas Finance Code.

(a) *In General.* Receiverships under these rules are referred to as post-judgment receiverships authorized under Chapter 31 of the Texas Civil Practice and Remedies Code. Chapter 64 of the Texas Civil Practice and Remedies Code and Rules 695 and 695a do not apply to post-judgment receiverships.[60]

(b) *Qualifications.* A receiver appointed in a turnover proceeding must be a resident of Texas and must not be a party, attorney or other person interested in the action giving rise to the judgment. The court, in its discretion, may impose additional reasonable qualifications based on the circumstances of the case.[61]

(c) *Bond.* No bond is required of a receiver appointed in a turnover proceeding.

(d) *Receiver's Fees and Expenses.* The receiver shall be entitled to reasonable fees and expenses in an amount determined by the court.

(e) *Real Property.* An agreement for the sale of nonexempt real property of the judgment debtor is contingent upon notice, hearing, and order of the court. A motion to approve the agreement must attach a copy of the agreement.

(f) *Disposition of Receivership Property; Notice and Hearing.*

(1) *In General*. Unless otherwise provided in the order appointing the receiver, or subsequent orders, the receiver shall not distribute the proceeds of receivership property or pay the receiver's fees and expenses without either:

---

[60] Chapter 64 of the Texas Civil Practice and Remedies Code is inapplicable. Chapter 64 governs prejudgment actions and actions "in any other case in which a receiver may be appointed under the rules of equity." Application of the Chapter to statutory post-judgment turnover actions is neither expressly required nor consistent with the stated purpose of the turnover statute to aid a judgment creditor in the collection of a judgment. Nonetheless, Section 31.010 of the Civil Practice and Remedies Code, governing the turnover of assets and information by a financial institution, refers to several provisions of Chapter 64 in describing the type of receivership documentation a financial institution may rely on in complying with a turnover order. The Receiver/Turnover Rule Subcommittee did not think these references were intended to expand the scope of Chapter 64 to post-judgment receiverships. Section 64.001(a)(2), for example, allows appointment of a receiver based on a creditor's claim. In contrast, a post-judgment turnover receivership is not based on a claim but on a judgment.

[61] An attorney who practices before the court is not thereby disqualified from serving as receiver. Turnover orders have sometimes been obtained appointing an individual to act both as receiver and as master in chancery under Rule 171 of the Texas Rules of Civil Procedure. The Receiver/Turnover Rule Subcommittee thought that appointing the same person as both receiver and master constitutes an apparent, if not actual, conflict of interest. In addition, Rule 171 permits the appointment of a master in chancery only in exceptional cases, and the Subcommittee does not think post-judgment discovery is the exceptional case contemplated by the rule. The Subcommittee determined, therefore, that a master in chancery may be appointed only if the judgment creditor otherwise satisfies the requirements of Rule 171 and its interpretive case law. The Subcommittee also recommended consideration of revisions to Rule 171, which appears antiquated and provides little guidance to the practitioner concerning the exceptional matters that justify appointment of a master in chancery.

(A) notice to the judgment debtor and judgment creditor, hearing, and order of the court; or

(B) a written agreement executed by the judgment debtor and the judgment creditor, filed with the court, allowing the receiver to distribute without a court order receivership funds and pay specified fees and expenses.

(2) *Application and Notice*. An application for distribution of proceeds must detail the proposed distribution and must contain a notice that the court may grant the relief requested in the application if no objection is filed within seven days after the filing of the application.

(3) *Application for Receiver's Fees.* The receiver may apply for the recovery of the receiver's reasonable fees and expenses.

(4) *Order.* The court must enter a written order on the application for distribution of the receivership proceeds. If requested, the order shall also state the receiver's reasonable and necessary fees and expenses.

(g) *Termination.* The receivership proceedings shall be terminated upon payment in full of the judgment and distribution of all sums collected, or as otherwise ordered by the court.

Rule TRN 6 (678). Enforcement of Turnover Order

A court may punish disobedience of a turnover order as contempt.

Rule TRN 7 (679). Dissolution or Modification of Order

(a) *Motion.* Any party, or any person who claims an interest in the property subject to the turnover order, may move the court to dissolve or modify the turnover order for good cause. The motion must be served on all parties and the receiver pursuant to Rule 21a.

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

(c) *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.

(d) *Orders Permitted.* The court may order the dissolution or modification of the turnover order, and may enter any other orders concerning the care, preservation, or disposition of the property (or proceeds if the property has been sold), as justice may require.

RECEIVER STATUTES
Texas Civil Practice & Remedies Code

§ 64.001. Availability of Remedy

(a) A court of competent jurisdiction may appoint a receiver:
(1) in an action by a vendor to vacate a fraudulent purchase of property;
(2) in an action by a creditor to subject any property or fund to his claim;
(3) in an action between partners or others jointly owning or interested in any property or fund;
(4) in an action by a mortgagee for the foreclosure of the mortgage and sale of the mortgaged property;
(5) for a corporation that is insolvent, is in imminent danger of insolvency, has been dissolved, or has forfeited its corporate rights; or
(6) in any other case in which a receiver may be appointed under the rules of equity.

(b) Under Subsection (a)(1), (2), or (3), the receiver may be appointed on the application of the plaintiff in the action or another party. The party must have a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured.

(c) Under Subsection (a)(4), the court may appoint a receiver only if:
(1) it appears that the mortgaged property is in danger of being lost, removed, or materially injured; or
(2) the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt.

(d) A court having family law jurisdiction or a probate court located in the county in which a missing person, as defined by Article 63.001, Code of Criminal Procedure, resides or, if the missing person is not a resident of this state, located in the county in which the majority of the property of a missing person's estate is located may, on the court's own motion or on the application of an interested party, appoint a receiver for the missing person if:
(1) it appears that the estate of the missing person is in danger of injury, loss, or waste; and
(2) the estate of the missing person is in need of a representative.

§ 64.002. Persons Not Entitled to Appointment

(a) A court may not appoint a receiver for a corporation, partnership, or individual on the petition of the same corporation, partnership, or individual.

(b) A court may appoint a receiver for a corporation on the petition of one or more stockholders of the corporation.

(c) This section does not prohibit:
(1) appointment of a receiver for a partnership in an action arising between partners; or
(2) appointment of a receiver over all or part of the marital estate in a suit filed under Title 1 or 5, Family Code.

§ 64.003. Foreign Appointment

A court outside this state may not appoint a receiver for:
(1) a person who resides in this state and for whom appointment of a receiver has been applieD for in this state; or
(2) property located in this state.

§ 64.004. Application of Equity Rules

Unless inconsistent with this chapter or other general law, the rules of equity govern all matters relating to the appointment, powers, duties, and liabilities of a receiver and to the powers of a court regarding a receiver.

§ 64.021. Qualifications; Residence Requirement

(a) To be appointed as a receiver for property that is located entirely or partly in this state, a person must:
(1) be a citizen and qualified voter of this state at the time of appointment; and
(2) not be a party, attorney, or other person interested in the action for appointment of a receiver.

(b) The appointment of a receiver who is disqualified under Subsection (a)(1) is void as to property in this state.

(c) A receiver must maintain actual residence in this state during the receivership.

§ 64.022. Oath

Before a person assumes the duties of a receiver**,** he must be sworn to perform the duties faithfully.

§ 64.023. Bond

Before a person assumes the duties of a receiver**,** he must execute a good and sufficient

bond that is:
(1) approved by the appointing court;
(2) in an amount fixed by the court; and
(3) conditioned on faithful discharge of his duties as receiver in the named action and obedience to the orders of the court.

§ 64.031. General Powers and Duties

Subject to the control of the court, a receiver may:

(1) take charge and keep possession of the property;
(2) receive rents;
(3) collect and compromise demands;
(4) make transfers; and
(5) perform other acts in regard to the property as authorized by the court.

§ 64.032. Inventory

As soon as possible after appointment, a receiver shall return to the appointing court an inventory of all property received.

§ 64.033. Suits by Receiver

A receiver may bring suits in his official capacity without permission of the appointing court.

§ 64.034. Investments, Loans, and Contributions of Funds

(a) Except as provided by Subsection (b), on an order of the court to which all parties consent, a receiver may invest for interest any funds that he holds.

(b) A receiver appointed for a missing person under Section 64.001(d) who has on hand an amount of money belonging to the missing person in excess of the amount needed for current necessities and expenses may, on order of the court, invest, lend, or contribute all or a part of the excess amount in the manner provided by Subpart L, Part 4, Chapter XIII, Texas Probate Code, for investments, loans, or contributions by guardians. The receiver shall report to the court all transactions involving the excess amount in the manner that reports are required of guardians.

§ 64.035. Deposit of Certain Railroad Funds

If a receiver operates a railroad that lies wholly within this state, the receiver shall

deposit all money that comes into his hands, from operation of the railroad or otherwise, in a place in this state directed by the court. The money shall remain on deposit until properly disbursed. If any portion of the railroad lies in another state, the court shall require the receiver to deposit in this state a share of the funds that is at least proportionate to the value of the property of the company in this state.

§ 64.036. Receivership Property Held by Financial Institution

Service or delivery of a notice of receivership, or a demand or instruction by or on behalf of a receiver**,** relating to receivership property held by a financial institution in the name of or on behalf of a customer of the financial institution is governed by Section 59.008, Finance Code.

§ 64.051. Application of Funds; Preferences

(a) A receiver shall apply the earnings of property held in receivership to the payment of the following claims in the order listed:

(1) court costs of suit;

(2) wages of employees due by the receiver;

(3) debts owed for materials and supplies purchased by the receiver for the improvement of the property held as receiver;

(4) debts due for improvements made during the receivership to the property held as receiver;

(5) claims and accounts against the receiver on contracts made by the receiver, personal injury claims and claims for stock against the receiver accruing during the receivership, and judgments rendered against the receiver for personal injuries and for stock killed; and

(6) judgments recovered in suits brought before the receiver was appointed.

(b) Claims listed in this section have a preference lien on the earnings of the property held by the receiver**.**

(c) The court shall ensure that the earnings are paid in the order of preference listed in this section.

TURNOVER STATUTES
Texas Civil Practice & Remedies Code

§ 31.002. Collection of Judgment Through Court Proceeding

(a) A judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that:

(1) cannot readily be attached or levied on by ordinary legal process; and

(2) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.

(b) The court may:

(1) order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control, together with all documents or records related to the property, to a designated sheriff or constable for execution;

(2) otherwise apply the property to the satisfaction of the judgment; or

(3) appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.

(c) The court may enforce the order by contempt proceedings or by other appropriate means in the event of refusal or disobedience.

(d) The judgment creditor may move for the court's assistance under this section in the same proceeding in which the judgment is rendered or in an independent proceeding.

(e) The judgment creditor is entitled to recover reasonable costs, including attorney's fees.

(f) A court may not enter or enforce an order under this section that requires the turnover of the proceeds of, or the disbursement of, property exempt under any statute, including Section 42.0021, Property Code. This subsection does not apply to the enforcement of a child support obligation or a judgment for past due child support.

(g) With respect to turnover of property held by a financial institution in the name of or on behalf of the judgment debtor as customer of the financial institution, the rights of a receiver appointed under Subsection (b)(3) do not attach until the financial institution receives service of a certified copy of the order of receivership in the manner specified by Section 59.008, Finance Code.

(h) A court may enter or enforce an order under this section that requires the turnover of nonexempt property without identifying in the order the specific property subject to turnover.

§ 31.010. Turnover by Financial Institution

(a) A financial institution that receives a request to turn over assets or financial information of a judgment debtor to a judgment creditor or a receiver under a turnover order or receivership under Section 31.002 shall be provided and may rely on:

(1) a certified copy of the order or injunction of the court; or

(2) a certified copy of the order of appointment of a receiver under Section 64.001, including a certified copy of:

(A) any document establishing the qualification of the receiver under Section 64.021;

(B) the sworn affidavit under Section 64.022; and
(C) the bond under Section 64.023.

(b) A financial institution that complies with this section is not liable for compliance with a court order, injunction, or receivership authorized by Section 31.002 to:
(1) the judgment debtor;
(2) a party claiming through the judgment debtor;
(3) a co-depositor with the judgment debtor; or
(4) a co-borrower with the judgment debtor.

(c) A financial institution that complies with this section is entitled to recover reasonable costs, including copying costs, research costs, and, if there is a contest, reasonable attorney's fees.

(d) In this section, "financial institution" means a state or national bank, state or federal savings and loan association, state or federal savings bank, state or federal credit union, foreign bank, foreign bank agency, or trust company.

SECTION 8. TRIAL OF RIGHT OF PROPERTY

Rule TRP 1 (680). Verified Application to Obtain Possession of Personal Property

(a) *Basis for Application*. Whenever a distress warrant or writ of execution, sequestration, attachment, garnishment or other like writ is levied upon personal property, and any portion of the property is claimed by any claimant who is not a party to the writ, the claimant may file in the court in which the suit is pending an application to obtain possession of the personal property.

(b) *Application*. An application to obtain possession of personal property must:

(1) state the legal and factual grounds on which the claimant asserts superior right to possession or title to the property as against the plaintiff in the writ or distress warrant;

(2) state the value of all property subject to the levy or distress warrant against which the claim is asserted;

(3) state that the claim is made in good faith; and

(4) admit or deny each finding of any order directing the issuance of the writ or distress warrant; however, if the claimant is unable to admit or deny any finding, the claimant must set forth the reasons why the claimant cannot admit or deny.

(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) *Effect of Filing Application*. The filing of the application stays any further proceedings under the writ or distress warrant, except for any orders concerning the care, preservation, or sale of any perishable property, until the claim is tried.

(e) *Docketing Cause.* The clerk or justice of the peace shall docket the cause in the name of the plaintiff in the writ or distress warrant as the plaintiff, and the claimant of the property as intervening claimant.

(f) *Notification of Officer*. The clerk or justice of the peace shall promptly notify the officer executing the original writ or distress warrant that an application to obtain possession of personal property has been filed.

Rule TRP 2 (681). Preliminary Hearing and Order on Application

(a) *Preliminary Hearing*.

(1) Unless the parties agree to an extension of time, the application must be heard promptly, after reasonable notice to the parties (which may be less than three days), and be determined at a preliminary hearing not later than 10 days after it is filed.

(2) At the preliminary hearing, the court must determine the amount in controversy based upon the value of the property subject to the claim.

(3) The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively.

(4) At the preliminary hearing, the burden of proof is on the claimant to show superior right to possession or title to the property claimed as against the parties to the writ or distress warrant.

(5) The court's determination on the application may be made upon the basis of uncontroverted affidavits setting forth facts as would be admissible in evidence, but additional evidence, if tendered by either party, may be received and considered at the preliminary hearing.

(b) *Transfer.* If the court determines at the preliminary hearing that the value of the property subject to the claim exceeds the jurisdictional limit of the court, the court or justice of the peace shall immediately issue an order transferring the proceeding to a court of competent jurisdiction and delivering the transcript of all docket entries and original papers to the clerk of the court having jurisdiction. After the proceeding has been transferred, the clerk of the transferee court shall docket the cause in the name of the plaintiff in the writ or distress warrant as the plaintiff and the claimant of the property as intervening claimant, mail notification to the parties that transfer of the proceeding has been completed, that the filing fee in the transferee court is due and payable within five days from the mailing of the notification and that the proceeding may be dismissed if the filing fee is not timely paid. A preliminary hearing in the transferee court shall be conducted in accordance with 2(a).

(c) *Temporary Order Following Preliminary Hearing.*

(1) Following the preliminary hearing, the court must issue a written order that:

(A) includes specific findings of fact to support the legal grounds for the temporary order;

(B) sets the amount of bond required to release custody of the property to the claimant in an amount of at least the value of the property;

(C) describes the property to be released to the claimant with sufficient certainty that it may identified and distinguished from property of like kind;

(D) sets a deadline by which each party must file a written signed statement of the party's right to title or possession of the property at issue; and

(E) sets a date for the expedited trial of the claim, not to exceed 21 days from the deadline by which the parties are to file their written statements. For good cause shown, or by agreement of the parties, the court may continue the trial of the claim by a period not to exceed 14 days. Thereafter, any further continuance must be by agreement of the parties.

(2) The court may make additional orders, including orders concerning the possession, care, preservation, or disposition of the property, or the proceeds therefrom if the same has been sold, as justice may require.

(3) The court may order reasonable discovery. Discovery is limited to that considered appropriate and permitted by the court and must be expedited. In accordance with Rule 215, the court may impose any appropriate sanctions on any party who fails to respond to a court order for discovery.

(4) The temporary order will remain in effect until the court issues its judgment in the trial of right of property.

(d) *Modification of Underlying Order.* If the court modifies its order or the writ or distress warrant issued pursuant to the order, it shall make such further orders with respect to the bond as may be consistent with its modification.

Rule TRP 3 (682). Bond

(a) *Requirement of Bond.* Property may not be released to the claimant unless the claimant has filed with the clerk or the justice of the peace a bond:

(1) payable to the plaintiff on the writ or distress warrant in the amount set by the court;

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

(3) conditioned that, in the event the claimant fails to establish a right to the property:

(A) the claimant will return the property to the officer making the levy, or the officer's successor, in as good a condition as when the claimant received it, and pay the reasonable value of the use, hire, increase and fruits thereof from the date of the bond; or

(B) the claimant will pay the plaintiff the value of the property in the event the claimant fails to return the property, with legal interest thereon from the date of the bond, and will also pay all damages and costs that may be awarded against the claimant for wrongfully suing out the claim.

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

(c) *Review of Claimant's Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the claimant's bond. Any party may move the court to increase or reduce the amount of the bond, or to question the sufficiency of the sureties in the court in which the trial of right of property is pending. 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 TRP 4 (683). Claimant's Right to Immediate Possession

If the claimant files a proper bond in the amount set by the court, the officer in possession of the personal property subject to the writ or distress warrant must release the property described in the court's temporary order to the claimant within a reasonable period of time after receipt of a certified copy of the temporary order and bond.

Rule TRP 5 (684). Return of Original Writ or Distress Warrant

Upon notification that an application has been filed, the officer executing the original writ or distress warrant, if it is in the officer's possession, shall endorse on the writ or distress warrant:

(a) the date and time of the notification;

(b) the manner of the notification; and

(c) if the notification was not by the clerk or justice of the peace, the date and time the officer confirmed with the clerk or justice of the peace that the application had been filed.

The officer shall promptly return the original writ or distress warrant to the court from which it issued.

Rule TRP 6 (685). Trial

(a) *Failure of Claimant to File a Written Statement or Appear*. If the claimant fails to file a written statement by the deadline set by the court, or if the claimant fails to appear for trial and the plaintiff in the original writ or distress warrant appears for trial, the plaintiff shall have judgment against the claimant by default as to the trial of right of property.

(b) *Failure of Plaintiff to File a Written Statement or Appear*. If the plaintiff in the writ or distress warrant fails to file a written statement by the deadline set by the court, or if the plaintiff fails to appear for trial and the claimant appears for trial, then the plaintiff shall be non-suited as to the trial of right of property.

(c) *Governing Rules*. The proceedings and practice on the trial shall be governed by the Texas Rules of Civil Procedure and the Texas Rules of Evidence.

(d) *Burden of Proof.*

(1) *Property Originally in Possession of Claimant*. If the property was taken from the possession of the claimant pursuant to the original writ or distress warrant, the burden of proof shall be on the plaintiff in the writ or distress warrant.

(2) *Property Originally in Possession of Others*. If the property was taken from the possession of any person other than the claimant, the burden of proof shall be on the claimant.

Rule TRP 7 (686). Judgment Following Trial

(a) *If Claimant Prevails.* If the claimant prevails at the trial of right of property, the judgment shall:

(1) order the property released to the claimant, or that the property remain in possession of the claimant if the claimant obtained possession pursuant to the temporary order; and

(2) discharge the principal and sureties on the claimant's surety bond, or, if other security was posted, direct that the other security be released or returned to the claimant.

(b) *If Claimant Does Not Prevail.*

(1) *Claimant Not in Possession of Property.* If the claimant is not in possession of the property at the time of the trial of right of property, and the claimant fails to establish a superior right to possession or title the property, judgment shall be entered against the claimant.

(2) *Claimant in Possession of Property.* If the claimant is in possession of the property at the time of the trial of right of property, and the claimant fails to establish a superior right to possession or title to the property, judgment shall be entered against the claimant and the sureties on claimant's bond, or for recovery from other security posted, for:

(A) the value of the property, with legal interest from the date of posting of the bond or other security;

(B) loss of the use, hire, increase, and fruits thereof from the date of the posting of the bond or other security; and

(C) additional statutory damages under section 25.002 of the Texas Property Code.

(c) *Satisfaction of the Judgment.*

(1) *Property Returned.* If, within ten days of the date the judgment determining the trial of right of property is signed, the claimant returns the property in as good a condition as when the claimant received it, and pays the reasonable value of the use, hire, increase, and fruits thereof from the date of posting of the bond or other security, and costs, then the delivery and payment shall operate as a satisfaction of the judgment.

(2) *Execution Shall Issue if Property Not Returned.*[62] If the judgment is not satisfied by the delivery or return of the property, then after ten days from the date of the judgment, execution shall issue thereon in the name of the plaintiff or defendant for the amount of the claim, or all of the plaintiffs or defendants for their several claims, provided the amount of the judgment shall inure to the benefit of any person who shall show superior right or title to the property claimed as against the claimant; but if the judgment be for a less amount than the sum of the several plaintiffs' or defendants'

[62] This rule remains in substantially in the form in existing Rule 731. Please advise your recommendations, if any, concerning any modification to this subparagraph.

claims, then the respective rights and priorities of the several plaintiffs or defendants shall be fixed and adjusted in the judgment.

Rule TRP 8 (687). Claim is a Release of Damages

A claim made to the property, under the provisions of this section, shall operate as a release of all damages by the claimant against the officer who levied upon the property or seized the property pursuant to a distress warrant.

Rule TRP 9 (688). Levy on Other Property

Proceedings for the trial of right of property under these rules do not prevent the plaintiff in the original writ or distress warrant from having a levy made upon any other property of the defendant.

Trial of Right of Property Statutes
Texas Property Code

§ 25.001. Jurisdiction

A trial of the right of property is an action that applies only to personal property. A trial of the right of property must be tried in a court with jurisdiction of the amount in controversy.

§ 25.002. Damages

If a claimant in a trial of the right of property does not establish a right to the property, the court shall adjudge damages against the obligors in the claimant's bond equal to 10 percent of the lesser of:

(1) the property's value; or

(2) the amount claimed under the writ levied against the property.

SECTION 9. MANDAMUS

Rule MAN 1 (689). No Mandamus Without Notice[63]

No mandamus shall be granted by the district or county court on ex parte hearing, and any peremptory mandamus granted without notice shall be abated on motion.

[63] This is existing Rule 694, renumbered to be consistent with the numbering scheme in this draft. The Task Force discussed existing Rule 694, did not perceive a continuing need for it, and seemed inclined to delete it altogether.

ATTACHMENT A

M E M O R A N D U M
Date: July 2, 2008

To: Ancillary Task Force, Injunctive Rule Subcommittee

From: Dulcie Green Wink

Subject: History of Rules 691 and 693a

This memorandum preserves the research performed in an attempt to determine the history of: (1) Rule 691's "double bond" provision that applies only upon the dissolution of an injunction that restrains the collection of money; and (2) Rule 693a, which specifies that a court has discretion in a divorce case to dispense with the necessity of a bond in connection with an ancillary injunction for one spouse against the other.

In light of this research, I recommend that we keep Rule 693a, *as is*. Additionally, I recommend that we consider eliminating Rule 691 completely, which leaves Rule 684 as the sole rule pertaining to the setting of the bond. If we elect to keep the intent of Rule 691's additional safeguards in cases involving injunctions to restrain the collection of money (even in an amount less than a "double bond"), that language could be inserted in Rule 684.

Rule 691. Bond on Dissolution

This rule requires a bond for "double the amount of the sum enjoined" upon dissolution of an injunction that restrains the collection of money. It seems to apply only when an apparent debtor "beats the creditor to the courthouse."

A. Legislative History of the Statute that is the Source of Rule 691

The source of Rule 691 is old article 4659 of the Texas Revised Civil Statutes (now repealed, for the obvious reason that it is in the injunctive procedural rules). I reviewed <u>all</u> of the cases interpreting the application of old article 4659 to facts presented therein; absolutely none of those cases explain the underlying rationale for the statute. I went to the law library at South Texas College of Law and checked the old statutes books, along with all notes of decisions. That research did not produce any explanations for either (a) the double bond provision or (b) the decision to craft a rule that was specific to

interlocutory injunctions restraining the collection of money. My quick search of law review articles was equally unproductive.

I then made an inquiry to the Texas State Library to see whether there is any legislative history to article 4659. A librarian at the Reference & Circulation desk explained that the content of article 4659 has never been amended, but has been moved around seven or eight times. She noted that the first occurrence of the statute's language arose in the publication of the Laws of Texas from fifth session of the Republic of Texas. Any further history (if any) would be in the State Library and Archives. Given the remote likelihood of finding anything, I do not recommend sending anyone over there. As we all know, legislative history in Texas is terribly slim, especially when we go back to the 1930s, 1940s and the 1800s in general. So, I doubt that we will learn anything new.

B. Supreme Court Rulemaking History for Rule 691

Rule 691 placed the statute's language, verbatim, in amendments that became effective September 1, 1941, by an order of the Supreme Court on October 29, 1940. There is a 1940 Texas Bar Journal article that printed all of the new rules, but it gave no comment as to the underlying reasons the rules were adopted/revised, etc. Furthermore, the law librarians at South Texas have been putting together an extensive bibliography of articles addressing the Texas Rules of Civil Procedure. I pulled the articles published from the 1940s that were listed in the bibliography that seemed like they might be relevant, but none of them provided any pertinent information.

The law librarians have assured me that there is no formal history for the Supreme Court's rulemaking deliberations that dates back to the 1940s. The movement to preserve the Court's rule-promulgation history did not begin until the 1980s. This does not mean that absolutely no history exists; it's just unlikely that any could be found unless one looked through heaps of documents stuffed away in boxes that are not organized in any particular fashion.

One of our subcommittee members mentioned that it was common practice for courts to set injunctive bonds for double the amount enjoined. It is noteworthy that, at one time, the "double bond" issue also applied to a bond to restrain the collection of a debt, as well as a bond to restrain the collection of a debt or the enforcement of a money judgment.[64]

---

[64] A San Antonio Court of Civil Appeals opinion stated:

> Appellants, the judgment creditors, first contend that the injunction is to restrain the "execution of a money judgment or the collection of a debt," as contemplated in article 4650, R.S., in which it is further provided that in such case the injunction bond shall be "fixed in double the amount of such judgment or debt," and appellants insist that the bond for a less amount is insufficient to support the injunction, which is therefore void. We overrule the contention, for it is held that the purpose and effect of an injunction to restrain a sale of real estate under execution is not to restrain the execution of a moneyed judgment or the collection of a debt, and that in such case the court may fix bond in such amount as seems appropriate under the facts of the case.

Today, a supersedeas bond is generally[65] required to be only in an amount "equal [to] the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment." TEX. R. APP. P. 24.2(a). Accordingly, although past legislative and Supreme Court rulemaking history suggests a preference for a higher bond in circumstances in which a party seemed to have an apparent right or agreement to collect money, the Supreme Court's lowering of supersedeas bonds suggests that it would be equally permissible to lower the amount of the bond in Rule 691, if not to eliminate the provision completely.

Rule 691 only seems to apply when an apparent debtor beats the creditor to the courthouse.[66] It may seem appropriate to require a more sizeable bond in such cases. Yet, it does not seem necessary to permit collection *only if the creditor posts a <u>double</u> bond*. Regardless, any election to keep the intent of Rule 691's additional safeguards in such cases, whether at a "double bond" or some lower amount, the rules would be cleaner if we delete Rule 691 and insert into Rule 684 any language relating to the amount of bonds to be posted upon dissolving an injunction restraining the collection of money.

Rule 693a. Bond in Divorce Case.

This rule gives courts the discretion to dispense with a bond for an ancillary injunction on behalf of one spouse against another.

The rule became effective on December 31, 1943, by an order of the Supreme Court of Texas on June 15, 1943. It was a wholly new rule, and thus, the Supreme Court of Texas saw need for its adoption. There was a 1943 Texas Bar Journal article that discussed many of the amendments/revisions that became effective at that time, but the article did not discuss Rule 693a. A search of law review articles failed to produce any further information.

Pacheco v. Allala, 261 S.W.148, 149 (Tex. Civ. App.—San Antonio 1924, no writ (citing article 4650 of the Texas Revised Civil Statutes and multiple cases).

[65] The bond must not exceed the lesser of: (A) 50 percent of the judgment debtor's current net worth; or (B) 25 million dollars." TEX. R. APP. P. 24.2(a).

[66] Example: Desperate Debtor, upon finding that none of the usual lending institutions will extend further credit to her business, is convinced to enter into a contract with Conniving Creditor, who loans money in exchange for Debtor's agreement to repay the principal and extreme interest over time in fixed amounts. The debt is secured by a lien on all of Debtor's *personal* assets, because the business assets are already burdened by prior liens. The contract does not contain a merger clause. Debtor stops paying, and because Debtor learns that the actual effective interest is beyond the agreed amount, Debtor believes she was fraudulently induced into the contract. Debtor knows that Creditor might file a lawsuit, and Debtor is growing close to insolvency. So, Debtor files first and gains an injunction restraining Creditor's right to collect; thus, Debtor was required to post a bond for that injunction under Rule 684. Upon Creditor's motion, the court dissolves the injunction *as well as the bond that supported it*, thereby permitting Creditor to collect payments pursuant to the contract pending trial. Current rule 691 requires Creditor to post a double bond.

The cases applying Rule 693a to the facts do not give the background reasoning for the rule's exception to the requirement of a bond. Yet, the cases as a whole reveal the interplay between the Family Code provisions and the injunctive rules within the Texas Rules of Civil Procedure. For example, section 6.502 of the Texas Family Code addresses temporary injunctions and other temporary orders that may be issued pending a suit to dissolve a marriage. The sixteenth note of decision under section 6.504—entitled "Bond, temporary support"—lists only one case: *Hopkins v. Hopkins*, 539 S.W.2d 242 (Tex. Civ. App.—Fort Worth 1976, writ dism'd). In that case, Bell Helicopter International, Inc. had been enjoined from paying L. D. Hopkins certain amounts comprising child support and alimony *pendente lite*. Mrs. Hopkins was never ordered to post a bond to support the injunction. Bell did not pay these amounts to Mr. Hopkins, as ordered, but instead preserved the withheld wages by placing them into a fund. *Hopkins*, 539 S.W.2d at 243. On appeal, Bell argued that the proceedings against it amounted to an improper mandatory injunction or garnishment. The appellate court agreed, because Rule 693a only gives the court the discretion to dispense with a bond for an "ancillary injunction in behalf of one spouse *against the other*." *Id.* at 246 (emphasis supplied).

The Family Code does not contain a Rule 693a equivalent. Therefore, having reviewed the *Hopkins* case as well as more than ten others, I recommend that we *leave this rule as is* and *not* delete it from the rules of procedure.