Report to the Supreme Court of Texas
On Proposed Revisions to Texas Rule of Civil Procedure 145,
Affidavits of Indigency

Submitted by the Texas Access to Justice Commission
May 6, 2013

Introduction

The Supreme Court of Texas established the Texas Access to Justice Commission ("Commission") in 2001 to serve as the statewide umbrella organization for all efforts to expand access to justice in civil legal matters for the poor. It is the role of the Commission to assess national and statewide trends on access to justice issues facing the poor, and to develop initiatives that increase access and reduce barriers to the justice system.[1] The Commission is comprised of ten appointees of the Court, seven appointees of the State Bar of Texas, and three ex-officio public appointees.

The Commission created a Self-Represented Litigants Committee[2] ("SRL Committee") in 2010 to address the access issues of pro se litigants. In January 2011, the SRL Committee established a Rules Subcommittee[3] ("Subcommittee") to review legislation, policies and rules that impact pro se litigants. At its initial meeting in March 2011, the Subcommittee discussed various procedural challenges facing pro se litigants. Because many pro se litigants cannot afford filing fees, the conversation included a discussion of Texas Rule of Civil Procedure 145 ("TRCP 145")[4], which governs affidavits of indigency.

At that time, legal aid organizations were reporting continued struggles with counties contesting affidavits of indigency accompanied by an IOLTA Certificate[5], which have been uncontestable under TRCP 145 since 2005. As the Subcommittee proceeded with its review, members became concerned with the inconsistent manner in which affidavits of indigency are handled throughout the state and the high possibility of differing outcomes for affiants in similar financial circumstances, particularly for those

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[1] Supreme Court of Texas Misc. Docket 01-9065, Order Establishing the Texas Access to Justice Commission, April 26, 2001. *See* Exhibit A.

[2] Members of the SRL Committee are: Stewart Gagnon, chair, with Fulbright & Jaworski; Katie Bond with the Office of Court Administration; Randy Chapman with the Texas Legal Services Center; Bobbie Cochran with Houston Volunteer Lawyers; Cristy Arscot with Smith County Bar Association; Lewis Kinard with the American Heart Association; Hon. Lora Livingston, Travis County District Judge; Peggy Montgomery, retired from Exxon Mobile; Hon. Judy Parker, Lubbock County Court At Law Judge; Jay Patterson, retired Dallas judge; Lisa Rush with the Travis County Law Library; Jonathan Vickery with the Texas Access to Justice Foundation and Dianne Wilson, Ft. Bend County Clerk.

[3] Members of the SRL Rules Subcommittee are: Lewis Kinard, chair, with the American Heart Association; Philip Friday at Friday, Friday and Kazen; Hon. Andrew Hathcock, Associate Judge at Travis County District Court; Laurel Holland, reference attorney at the Travis County Law Library and Self-Help Center; Kennon Peterson with Scott Douglass & McConnico; Jonathan Vickery with the Texas Access to Justice Foundation; and Marisa Secco as a resource member.

[4] Tex. R. Civ. Pro 145. See Exhibit B.

[5] In 2005, TCRP 145 was modified to include a provision that an affidavit of indigency accompanied by a certificate stating that a party represented by an attorney providing services through a legal aid program funded by the Interest on Lawyers Trust Accounts program may not be contested ("IOLTA certificate").

without representation. The Subcommittee has received numerous, and increasingly frequent, reports from legal aid attorneys, judges, clerks, court personnel, and law librarians of problems faced by parties who file an affidavit of indigency, including counties that:

- Automatically contest every affidavit of indigency filed, even when the party is receiving means-tested public benefits;
- Delay the filing of a case when it is accompanied by an affidavit of indigency;
- Contest affidavits of indigency accompanied by an IOLTA certificate;
- Assess costs after final orders are rendered and the case is concluded when there has been no successful contest to the affidavit of indigency;
- Determine indigence inconsistently within the same court, county, and across the state;
- Conduct contest hearings before a staff attorney rather than before a judge; and
- Adopt policies and practices that discourage parties from filing affidavits of indigency.

The Subcommittee discussed whether the situation could be handled through education, as is the Subcommittee's preference, rather than a rule revision. Ultimately, they felt that education would not suffice and that TRCP 145 could be improved in a way that made it fairer for litigants while giving more guidance to clerks and judges.

The guiding principles for the Subcommittee were that access to the court is a fundamental right under the Texas Constitution; that TRCP 145 is one way that the Texas Supreme Court has addressed this right; and any changes to TRCP 145 should help all affected parties apply the rule in a way that is consistent with Texas law.

Research and Methodology

During the course of its review, the Subcommittee researched other states' rules governing indigency, Texas case law, various definitions of indigency and eligibility requirements used by government entitlement programs and legal aid providers, and the relatively recent revision of Texas Rule of Appellate Procedure 20 ("TRAP 20"). The Subcommittee was also mindful of the balance between the revenue needs of counties and the consequences to litigants who cannot afford court costs.

Pauper's Rules in Other States

The Subcommittee began by researching rules governing indigency in other states.[6] Some states had very cursory rules while others were more detailed. The majority of rules had the same basic elements as our current TRCP 145: a process for a party to proceed without incurring certain costs; a presumption that a party receiving public benefits was indigent; and a means of contesting a party's claim of indigence. However, other states had greater specificity in terms of the definition of indigence, the costs waived, and the means of contesting a claim of indigence. The Subcommittee did not rely on a rule from any particular state, although pros and cons of concepts from the rules of some states were discussed at various stages of drafting.

Case Law

The Subcommittee also researched Texas case law on both TRCP 145 and the appellate corollary, TRAP 20. The following cases are the most relevant and oft cited.

[6] Research of other state's rules governing waivers of costs based on indigency set forth in Appendix A.

Pinchback v Hockless, 164 S.W.2d 19 (Tex. 1942) sets forth the purpose of the rule and basic test for determining if a party is unable to afford costs. "These rules...were adopted to protect the weak against the strong, and to make sure that no man should be denied a forum in which to adjudicate his rights merely because he is too poor to pay the court costs.... Does the record as a whole show by a preponderance of the evidence that the applicant would be unable to pay the costs, or give security therefor, if he really wanted to and made a good-faith effort to do so?"[7]

Cook v. Jones, 521 S.W. 2nd 335 (Tex. Civ. App. – Dallas 1975, writ ref'd n.r.e.) held that court costs included the fee for service of citation by publication.[8]

Equitable General Insurance Company of Texas v. Yates, 684 S.W.2d 669 (Tex. 1984) held that an uncontested affidavit of inability to pay costs is conclusive as a matter of law."[9]

Higgins v. Randall County Sheriff's Office (Higgins II), 257 S.W.2d 684 (Tex. 2008) dealt with TRAP 20 and held that an appeal may not be dismissed for a formal procedural defect unless the party is provided a reasonable opportunity to correct the defect.[10]

In re Villanueva, 292 S.W.3d 236 (Tex. App. Texarkana 2009) held that "...without reference to the exact nature of the cost or fee at issue, *Rule 145 of the Texas Rules of Civil Procedure* removes any financial obstacles to the indigent litigant's access to the courts....We conclude that the trial court abused its discretion when it ordered Villanueva to pay the costs and fees associated with the attorney ad litem and the social study administrator when Villanueva is indigent as a matter of law [her affidavit of indigency was uncontested] and when such orders effectively deny her a forum in which to dissolve her marriage and resolve custody issues."[11]

Additional case law has been provided in Appendix B to this report.

Definitions of Indigence

One of the most vexing issues faced by the Subcommittee was how to determine if a party is unable to pay costs. No uniform definition of indigence exists throughout the 254 counties in Texas. A person may qualify as indigent in one county but not in another. In fact, there are multiple definitions of indigence operating within our state and nation.

To qualify for legal aid, a person must meet both income and asset eligibility requirements. At a Legal Service Corporation ("LSC") funded provider, a person's income may be up to 200% of the federal poverty guidelines. At a Texas Access to Justice Foundation ("TAJF") funded organization, a person's income must be at or below 125% of the federal poverty guidelines, or up to 187.5% of the federal poverty guidelines if the person is a victim of crime, or up to 200% of the federal poverty guidelines if the person is a veteran. TAJF and LSC funded providers use one of two asset limit tests.[12] Both have a limit on liquid and non-liquid assets and exempt certain non-liquid assets such as the person's homestead, car, and household goods.

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[7] *Pinchback v Hockless, 164 S.W.2d 19 (Tex. 1942),* at 19, 20. *See* Exhibit C.
[8] *Cook v. Jones, 521 S.W. 2nd 335 (Tex. Civ. App. – Dallas 1975, writ ref'd n.r.e.)* at 338. *See* Exhibit D.
[9] *Equitable General Insurance Company of Texas v. Yates, 684 S.W.2d 669 (Tex. 1984)* at 671. *See* Exhibit E.
[10] *Higgins v. Randall County Sheriff's Office (Higgins II), 257 S.W.2d 684 (Tex. 2008)* at 685. *See* Exhibit F.
[11] *In re Villanueva, 292 S.W.3d 236 (Tex. App. Texarkana 2009)* at 246. *See* Exhibit G.
[12] In Texas, all three LSC funded legal aid providers also receive TAJF funding. TAJF requires its grantees to use one of two asset limit tests as set forth on pages 4 and 5 of Exhibit H.

Eligibility requirements for various public benefits[13] differ as well. The Supplemental Nutrition Assistance Program ("SNAP", formerly food stamps) sets income eligibility at or below 130% of the federal poverty guidelines. Temporary Assistance to Needy Families ("TANF) sets it at 187%. Both programs allow for income deductions, including medical expenses, child care, and child support payments, that can bring a household with income over 200% of the federal poverty guidelines to within eligibility range. Additionally, SNAP limits liquid assets to $5,000, whereas the TANF limit is $1,000. Both have asset exemptions, including a person's homestead, car, and several other items.

To qualify for the Children's Health Insurance Program ("CHIPs"), a family's income may be up to 200% of the federal poverty guidelines and allows for multiple income deductions. CHIPs has no liquid asset test for households with income 150% or less of the federal poverty guidelines, but for households with income over 150%, CHIPs has a more liberal liquid asset limit of up to $10,000. CHIPs has the usual non-liquid asset exemptions, including a homestead, car, and household items.

Finally, to qualify for public housing, the project-based Section 8 program, and the Section 8 voucher program, a person's income may not exceed 80% of the median income for the area in which he lives.[14] Statewide housing guidelines are approximately 300% of the federal poverty guidelines for smaller families and less than 200% of the federal poverty guidelines for larger families. A person must also meet asset eligibility requirements. Each county has specific guidelines that may be more or less than the statewide guidelines.

The following chart shows the 2013 federal poverty guidelines per household size:

Household Size	FPG	TAJF Guideline 125% FPG	SNAP* Guideline 130% FPG	TANF* Guideline 185% FPG	TAJF Crime Victim Guideline 187.5% FPG	LSC, TAJF Veterans & CHIPs* Guideline 200% FPG
1	$11,490	$14,363	$14,937	$21,264	$21,543	$22,980
2	$15,510	$19,388	$20,163	$28,704	$29,081	$31,020
3	$19,530	$24,413	$25,389	$36,132	$36,619	$39,060
4	$23,550	$29,438	$30,615	$43,572	$44,156	$47,100
5	$27,570	$34,463	$35,841	$51,012	$51,594	$55,140
6	$31,590	$39,488	$41,067	$58,452	$59,231	$63,180
7	$35,610	$44,513	$46,293	$65,880	$66,769	$71,220
8	$39,630	$49,538	$51,519	$73,320	$74,306	$79,260

*Indicates entities that allow applicants to deduct certain expenses, such as child care or medical expenses from their income prior to applying the income eligibility test.

[13] *See* Texas Works Handbook for information on SNAP, TANF, CHIPs and other medical benefit programs. Part C, Section 100 governs income limits: http://www.dads.state.tx.us/handbooks/texasworks/C/index.htm. Part A, Section 1400 governs income deductions: http://www.dads.state.tx.us/handbooks/texasworks/A/1400/index.htm. Part A, Section 1200 governs allowable assets: http://www.dads.state.tx.us/handbooks/texasworks/A/1200/index.htm.

[14] Per the United States Department of Housing and Urban Development See 24 C.F.R §982.201 (2011) (Section8 housing voucher program); 24 C.F.R. § 960.201 (2011) (public housing); 24 C.F.R. § 5.653 (2011) (project-based section 8)

Fortunately, some general conclusions can be drawn. All have an income test between 125-200% of the federal poverty guidelines and a non-liquid asset test that exempts the homestead, a car, and certain other assets, such as personal property. However, the liquid asset exemption varies widely from a low of $1,000 per household to a high of $10,000 for the individual plus an additional $5,000 per family member.

Texas Rule of Appellate Procedure 20

The Subcommittee reviewed TRAP 20, the appellate corollary to TRCP 145, because it had been revised more recently than the last amendment to TRCP 145 and is more comprehensive than TRCP 145. The Subcommittee initially adopted the structure of TRAP 20, but over months of drafting, ended up discarding parts that clearly did not fit trial court level actions and changed the format to accommodate proposed changes.

Financial Need of Counties versus Ramifications to Party

Throughout the drafting process, the Subcommittee was conscious of the need for counties to secure filing fees and costs from parties who can afford to pay them to cover their expenses, while being mindful of possible ramifications to an indigent litigant's ability to secure a fair hearing by not having those costs covered. It was a difficult challenge, but the Subcommittee crafted a rule that it believes fairly balances those interests and is easy to understand by the court personnel who will most often be called upon to apply it.[15]

Recommendations and Rationale

Because the proposed revision is effectively a rewrite, this report addresses each section of the proposed rule.

Title, Affidavit of Inability to Pay Costs

Title Change: The Subcommittee proposes changing the title of TRCP 145 from Affidavit of Indigency to Affidavit of Inability to Pay Costs. In both the current rule and the proposed rule, the key definition is phrased as whether a party is "unable to afford costs" and is used throughout, so It seemed best to title the rule accordingly. Additionally, many legal aid providers already use this title on their affidavits.

Section (a), Establishing Inability to Pay Costs by Affidavit

Same basic rule. Under the current and proposed rule, Section (a) sets forth the basic rule that allows a party who is unable to pay costs to proceed without advance payment of costs, provided the party files an affidavit attesting to those facts. Most of Section (a) under the present TRCP is encompassed by this section.

[15] The Subcommittee attempted to estimate a financial impact of the proposed revision by seeking information from the four largest counties on the number of cases filed on an affidavit of indigency and cost information. The information was not able to be obtained.

Section (b), Definition of Party Unable to Afford Costs

The Subcommittee believes that many of the problems arising under the current rule stem from a lack of clarity regarding who is unable to afford costs. In an effort to provide greater guidance, the Subcommittee dedicates an entire section to the definition.

Five Categories of Parties Defined as Unable to Afford Costs. In the proposed rule, five different categories of parties are included in the definition of a party who is unable to afford costs: those unable to afford costs under the current rule, a modification of those who are represented by a legal aid provider under the current rule, and two additional categories.

Keeps Public Benefit Recipients and Anyone with No Ability to Pay. The current rule defines a party who is unable to afford costs as those who are currently receiving public benefits and anyone else who has no ability to pay costs. Proposed Section (b)(1) regarding recipients of public benefits is essentially the same as the current rule, except it uses "means-tested government entitlement program" instead of "government entitlement" to underscore that the party has been screened for financial eligibility. Proposed Section (b)(5) has the same catchall category as the current rule.

Modifies Party Represented by IOLTA Funded Program. Under the current rule, a party represented by an attorney providing free legal services through an IOLTA-funded program that has screened the party as financial eligible, is allowed to proceed as a party who is unable to afford costs. Even though they are not technically defined as a party unable to afford costs under the current rule, the effect is the same. In fact, if an "IOLTA certificate" is filed with their affidavit, the affidavit cannot be contested.

Adds Party Represented by Legal Aid to Definition. The proposed rule simply adds this group to the definition of a party who is unable to afford costs. The fact that the party has been screened by a legal aid provider as financially eligible for services that are restricted to low-income individuals is what qualifies the party as unable to afford costs, not the certificate. The certificate is what makes their affidavit unable to be contested.

Changes reference from funding source (IOLTA) to funder or civil legal aid provider. The proposed rule eliminates the reference to IOLTA funds. The Subcommittee felt that it was better to connect the rule back to the entity that provides the funds and establishes the financial eligibility guidelines, such as TAJF or LSC, rather than a particular funding stream. As we have seen with IOLTA, funding streams are not necessarily stable. Additionally, because not all legal aid providers receive funding through TAJF or LSC, the Subcommittee included a provision for nonprofit civil legal aid providers serving people living at or below 200% of the federal poverty guidelines.

Adds Two Categories of Parties to Definition

Party Determined Financially Eligible but Not Represented by Legal Aid. The Subcommittee added a category to the definition for parties who have been determined to be financially eligible for free legal assistance by a legal aid provider but who were declined representation. The Subcommittee felt that those who meet the financial criteria for legal aid should not be penalized for being unable to get representation through legal aid, as

there are consistently far more applicants for legal aid than attorneys to meet that need. Adding this provision will help increase the uniform application of TRCP 145 across the state.

Party Living At or Below 200% of the Federal Poverty Guidelines. The Subcommittee also created a baseline definition of poor so that someone who has not been financially screened for legal aid or public benefits, but who would qualify for those services if they had, is defined as unable to afford costs. Each year, there are thousands of financially eligible people who apply for free legal services above the capacity of legal aid organizations to represent. This category recognizes similar eligibility criteria but does not require the affiant to go through a fruitless and potentially cumbersome application and rejection formality to establish financial eligibility for the fee waiver. It will also help those who do not live near a legal aid provider.

Similar to legal aid and public benefit programs, the baseline definition includes an income and an asset test. The proposed income test is that a party's household income must be at or below 200% of the federal poverty guidelines. It is the same income criteria used by LSC-funded legal aid programs and some public benefit programs. However, it does not allow income deductions for items like medical or child care expenses. Allowing for deductions adds several steps in calculating a party's income and makes the definition more cumbersome to apply. The Subcommittee favored having a rule that is easy to apply and requires little calculation over capturing these deductions.

The proposed asset test addresses both liquid and non-liquid assets. A party is limited to no more than $2,000 in cash or easily convertible cash equivalents, such as certificates of deposit. This liquid asset cap is used by most means-tested government entitlement programs although legal aid programs allow a higher amount. The Subcommittee felt that the liquid asset test should be set fairly low because court costs are typically significantly less than the value of services provided by legal aid or an ongoing public benefit. The proposed non-liquid asset test exempts a party's homestead, car, and other items exempt under Chapter 42 of the Texas Property Code,[16] similar to the non-liquid asset provisions for legal aid and means-tested government entitlement programs.

The Subcommittee spent a great deal of time discussing the benefits and challenges of creating a baseline definition. While a baseline definition creates a measurable, bright line floor to help ensure that people in similar financial situations are treated equally across the state, it may be cumbersome for clerks to apply. However, it also offers objective criteria for clerks to use when deciding if an affidavit should be contested, as opposed to the current situation where affidavits are often reviewed on a subjective basis.

Ultimately, the Subcommittee felt that it was better to create the baseline definition. The Subcommittee eliminated some of the steps used by public benefit and legal aid programs to determine eligibility, which makes the definition is easier to apply. At a minimum, it provides more guidance to clerks and courts on who the Court views as unable to afford costs. The greater goal is to have a more uniform application of the rule.

[16] *See* Chapter 42 of the Texas Property Code. Exhibit I.

Section (c), Contents of Affidavit

Keeps Current Rule and TRAP 20 Requirements and Adds Four New. Section (c)(1) lays out what is required in each affidavit. Enough guidance is needed so that parties can create their own affidavits and clerks can evaluate whether the criteria have been met. Because TRAP 20 does a much better job of stating what must be included in an affidavit, it mirrors TRAP 20 language more closely than the current rule.

The proposed rule incorporates all the requirements found in the current rule and in TRAP 20. However, it also requires affiants to provide contact information in the affidavit so that the court can communicate with them as needed. Finally, it requires affiants to state if they are currently receiving public benefits or free legal services through a legal aid provider, or if they financially qualified for legal aid but were declined representation. These statements provide a mechanism for parties to notify the court of these situations in the event that they fail to attach proof or confirmation of these facts.

Adds Privacy Provision. Section (c)(2) addresses privacy concerns by stating that a party cannot be required to provide personally identifying information about the party or the party's family members. It is by no means a comprehensive list, but the Subcommittee felt that although privacy issues would likely be addressed under another rule at some point in the near future, some guidance was needed now.

Section (d), Affidavits Not Contestable

The current rule provides that an affidavit may not be contested if a party attaches confirmation that he is represented by an IOLTA-funded legal aid provider and has been found financially eligible by that provider. The underlying principle is to exempt parties that have been determined indigent by an approved entity from having to be screened again if they attach proof of these facts to their affidavit.

Affidavits of Two Additional Categories of Parties Uncontestable. The proposed rule maintains the uncontestable provision in the current rule, although it drops the IOLTA language for reasons previously discussed. It also applies this principle to the affidavits of two additional categories of parties: current recipients of a means-tested government entitlement program and parties found eligible for free legal services by an approved legal aid provider but who were declined representation.

Section (e), Clerk to Provide Affidavit

Under the proposed rule, the clerk is required to provide an Affidavit of Inability to Pay Costs upon request. The Subcommittee added this provision after receiving reports, confirmed by emails, that clerks are removing the Affidavit of Indigency form from the Divorce Set One forms packet. Although clerks are willing to provide people with the divorce forms, they remove the affidavit form to discourage people from using it.

If the Court decides to adopt any or all of the proposed revisions, the Subcommittee recommends that the Affidavit of Indigency form in Divorce Set One be modified to reflect those changes. The Subcommittee further recommends that this form be made available for affiants to use in all contexts.

Section (f), Contests

Section (f) of the proposed rule and Section (d) of the current rule discuss what happens when affidavit is contested.

Effect of No Contest. Although the current rule is silent on what happens if no contest is filed, it is presumed that the party is allowed to proceed without payment of costs. TRAP 20 clarifies the issue by incorporating this presumption. It states that unless a contest is timely filed, no hearing will be held, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without payment of costs. Section (f)(1) of the proposed rule adopts TRAP 20 language except the language that no hearing will be held. The Subcommittee originally included that language until a judge pointed out that it was inconsistent with Section (g)(2) of the proposed rule, which allows a judge who believes a party's financial circumstance have changed to order that party to pay costs at the final hearing.

Filing a Contest. Section (f)(2) sets out who can file a contest, what the contest must include, and when a contest must be filed.

Who Can File. The current rule states that only the clerk or defendant can file a contest. TRAP 20 expands it to any party. The proposed rule follows TRAP 20 because the Subcommittee felt that any party with knowledge of the affiant's ability to pay should be allowed to file a contest. An opposing party will often have better knowledge of the financial circumstances of the affiant than a clerk or court.

Good Faith, Sworn Certificate, and Specificity in Filing Requirements. The proposed rule requires that every contest must be made in good faith, must state the grounds of the contest with specificity and must contain a sworn certification that the contestant has reason to believe that the affidavit is not sufficient. The certification is subject to the requirements of TRCP 13, even though the contestant may not be a party to the case.

The Subcommittee added these requirements because many clerks have a practice of contesting every affidavit filed, despite the clear intent of the current rule that each affidavit is to be reviewed for sufficiency on an individual basis. Clerks contest affidavits even when documentation is attached that the party is receiving public benefits. The practice is particularly burdensome on those who are unrepresented but otherwise meet the criteria under the current rule. These parties must arrange for time off of work, child care, or transportation to appear and simply confirm the contents of their affidavit. The unrepresented are also the most likely to miss the contest hearing and have their case dismissed when they should have been allowed to proceed without paying costs. Additionally, while the clerk has a vested interest in ensuring only those who are truly unable to afford costs proceed without paying costs, opposing parties do not share this interest and typically file contest hearings for harassment purposes. The Subcommittee believes that clear language stating attendant consequences is needed to stop these practices.

Time for Filing. The current rule is silent on when a contest hearing must be filed. TRAP 20 states that the contest must be filed within 10 days if the affidavit was filed in the trial court or by a date set by the clerk if the affidavit was filed in the appellate court. The proposed rule requires a contest by the clerk to be filed within 10 days of the date the affidavit was filed, and a

contest by an opposing party to be filed within 10 days of the date that the opposing party filed an answer or entered an appearance.

The Subcommittee felt that it was important to have the time frame on filing contests close to the date that the affidavit is filed. As the case progresses, the possibility that the affiant's circumstances may change increases and the court, rather than the clerk, is in a better position to determine if that has happened. If so, the court can order the affiant to pay costs in the final order.

Notice and Hearing. Section (f)(3) covers how much notice must be provided, when the contest hearing must be held, the effect of filing a contest on a hearing, and what happens if a contestant does not appear at the contest hearing.

Required Notice. The current rule and TRAP 20 are silent on how much notice must be given to a party. The presumption is three days under TRCP 21. The proposed rule provides that the affiant have at least 10 day notice of the contest hearing. Because most people who file an affidavit without an IOLTA certificate (or, under the proposed rule, free legal service provider certificate) are pro se and presumably indigent, the Subcommittee felt it was important to allow additional time for them to gather needed information, such as documentation from a government agency, and to make work, child care and transportation arrangements.

When Contest Hearing Held. The current rule suggests that the contest hearing will be held at the first hearing of the case but it is not clearly stated as such. Most courts follow this practice. The proposed rule clarifies that the contest hearing must be held at the first hearing in the case that occurs after the 10 day notice period. The Subcommittee debated whether to require the hearing to be held within 10 days after the notice period but that would have required affiants to come to court just for the contest hearing. The Subcommittee felt that it would be less burdensome on everyone to hold the contest hearing at the first hearing, and that it would also decrease the chances that the affiant would default for reasons unrelated to the issue of indigency.

Effect of Filing Contest on Other Hearings. The current rule states that temporary order hearings cannot be continued because a contest is pending. The proposed rule applies this concept to any hearing in the case, except that the court may continue a final hearing until after the 10 day notice period. This provision also reconciles the court's ability to continue a final hearing in Section (g)(1)(E).

No Appearance by Contestant. The current rule and TRAP 20 are silent on what happens if the contestant does not appear at the contest hearing. The proposed rule clarifies that the effect of the contestant's failure to appear results in the affidavit's allegations to be deemed true and the affiant is allowed to proceed without payment of costs.

Burden of Proof. Section (f)(4) maintains the provisions under the current rule, TRAP 20 and case law[17] that the affiant has the burden of proving that the affidavit's allegations are true. The Subcommittee debated on whether to treat affidavits of inability to pay costs like sworn accounts and change the burden of proof from the affiant to the contestant. The Subcommittee was concerned with the practice adopted by many clerks of automatically contesting every affidavit and

[17] *Supra* at note 6.

felt that shifting the burden of proof would curtail that practice. However, the Subcommittee recognized that the affiant is the only person in possession of the evidence needed to prove the affidavit true or false. The Subcommittee decided to address the issue by strengthening the requirements for filing a contest instead of shifting the burden of proof.

Incarcerated Parties. The proposed rule incorporates language from TRAP 20 on incarcerated parties. Because incarcerated parties are less likely to be present at a hearing, the provision clarifies that their affidavits must be considered as evidence sufficient to meet their burden of presenting evidence at the hearing.

Recipient of Government Entitlement Program. The proposed rule maintains the language under the current rule stating that if a party files an affidavit claiming receipt of a means-tested government entitlement program, the only issue that can be contested is whether the party is actually receiving the entitlement. The proposed rule adds that these affidavits can only be contested if proof of receipt is not attached. The proposed rule also adds that the party can provide other evidence of inability to pay costs if proof is unable to be provided because such proof can be difficult to obtain from a state or federal agency in a timely manner.

Decision. Section (f)(5) guides the court through the contest hearing and order. It incorporates current case law that the court must look at the record as a whole in determining if a party is able to pay costs[18] and that a contest cannot be sustained due to a procedural defect unless the affiant has been given notice of the specific defect and an opportunity to cure it.[19] As with the current rule, the proposed rule requires the court to state the reasons why a contest is sustained. Finally, the proposed rule requires the court to sign an order sustaining a contest within five days of the contest hearing. If not, the affidavit's allegations will be deemed true and the affiant will be allowed to proceed without paying costs.

Section (g), Costs

Section (g) lays out the court's options for payment of costs, including what to do when a party becomes able to pay costs during the course of the action. It also addresses when costs can be awarded in a final judgment and when a clerk can seek reimbursement of costs.

Payment of Costs.

Party Unable to Afford Costs. Section (g)(1)(A) states that a party who has been found unable to pay costs by the court, or by effect of the rule itself, has no costs to pay. The party cannot be ordered to pay costs during or after the case except as otherwise provided in the rule. The Subcommittee added this language to clarify that the costs are waived, not deferred, for a party who is found unable to pay costs. As such, a clerk or court cannot require costs to be paid at a later moment in time, as has recently happened in a few counties.

Parties Able to Afford Costs. Section (g)(1)(B) incorporates the TRAP 20 concept that a court may order partial payment of costs. Under the proposed rule, the court may allow a party who is technically able to afford costs to pay partial costs when special circumstances, such as medical expenses, exist that would make it burdensome for the party to pay full costs. Section

[18] *Supra* at note 6.
[19] *Supra* at note 9.

(g)(1)(C) simply states that if no special circumstances exist, the party must pay costs. Section (g)(1)(D) follows the current rule that allows the court to order another party in the suit to pay costs.

Installment Payments. Section (g)(1)(E) states that the court may allow a party to pay costs in installments but may not penalize a party who is current on his payment plan, including delaying the case until the costs are paid. However, the court may delay the final hearing until the costs are paid, provided no undue harm is caused.

The Subcommittee received reports of courts allowing a party to pay costs on an installment plan but delaying action in the case until the party had paid in full, regardless of whether the party was making payments according to schedule. The Subcommittee wished to clarify that parties who are current on their payment plan should not be penalized for paying according to court order or agreement. Many cases, such as family law cases, are time sensitive and delay can cause significant problems.

Later Ability to Pay Costs. Section (g)(2) borrows the TRAP 20 provision regarding parties who become able to pay costs during the course of the action. The court may order such a party to pay costs in the final order. The Subcommittee felt that it was best to have the issue addressed in the final order when the court would have knowledge of the total costs involved. Additionally, as under the current rule, the proposed rule allows the court to order a party to pay some or all of the costs if the case results in a monetary award believed by the court to be collectible and sufficient to cover the costs.

Reimbursement of Costs. Section (g)(3) makes clear that a clerk cannot attempt to collect costs from an affiant unless a contest was properly filed and sustained by written order. This provision clarifies that a clerk cannot attempt to collect costs from an affiant whose affidavit was not subject to a contest hearing or whose affidavit was deemed true as a matter of law.

Costs in Final Judgment. Section (g)(4) states that a final judgment cannot require a party to pay costs unless a contest was sustained or the party was later found able to pay by the court at the final hearing. This provision was added to counter the situation where the final orders contain boilerplate language that each party is responsible for paying their own costs, and clerks interpreting this language as a judgment that allows them to collect costs from indigent parties. The change should clarify any existing confusion regarding the matter, which is the subject of current litigation in some counties.

Attorney Fees and Costs. The proposed rule maintains the provision under the current rule that attorneys can still attempt to recover fees and expenses regardless of whether the party is unable to pay costs under the rule.

Section (h), Additional Definitions

Section (h) defines terms that are used throughout the rule. Most are self-explanatory. These comments are designed to highlight specific definitions and the reasons behind them.

Costs. The proposed list of costs includes those under the current rule, TRAP 20 and current case law as well as two additional categories.

Legal Process and Official Notices. The proposed rule specifies that income withholding orders, which notify employers to withhold child support, are covered as costs under the rule. Most courts and domestic relation offices do not charge for issuing these orders but some do, which often causes a delay in getting child support withholding started, despite strong public policy interests in promptly effecting such orders.

Service of Citation. The proposed rule confirms that service of process executed in another county is covered under the rule. This has always been the case, as it is covered in TRCP 126. Because problems continue to arise, the Subcommittee felt is should be stated directly in the rule itself. Additionally, the proposed rule incorporates service of citation by publication as allowed under *Cook v. Jones*.[20]

Certified Copy of Final Order. The proposed rule includes the cost of one certified copy of a final order. Several counties provide a certified copy of the final order to parties who have filed under TRCP 145 but others do not. This provision was added because the expense associated with providing a certified copy of the final order is fairly minimal when weighed against the necessity of having one to obtain post-decree relief, especially in family law cases where the orders can be lengthy and certification expensive. It is also an important means of preventing indigence from being an obstacle to effecting the decrees and judgments of the court.

Court-Appointed Officers and Professionals. The proposed rule includes fees associated with court-appointed officers, such as a guardian ad litem, or other professionals. A party who is unable to pay costs simply cannot afford these expenses, yet the appointment or presence of these professionals may be critical to the outcome of that party's case. For example, in a family law case, the appointment of a guardian ad litem to help the court determine where the children will live, or whether supervised visitation should be ordered, is no less critical when a party cannot afford to pay costs. In some courts, the appointment of officers or experts has created de facto road blocks to resolving pending actions when the indigent party cannot pay the fees.

The Subcommittee recognizes the significance of these expenses but believes that courts do not appoint officers or professionals on a whim. They do so only when it is needed, and as such, should be covered for a party who is unable to pay costs by the county or another party to the case. To do otherwise, merely creates a barrier to the resolution of the case solely based on indigence, which is the antithesis of the purpose of TRCP 145. The inclusion is not without precedent. As previously discussed, fees for an attorney ad litem and a social study professional were deemed as costs to be covered under an affidavit of indigency in *In re Villanueva* in 2009.

Means-Tested Government Entitlement Program. At the recommendation of several judges, the definition of a means-tested government entitlement program includes a fairly comprehensive list of existing programs. The judges preferred an inclusive list to help them discern which public benefits are means-tested and which are not.

Current Recipient. The definition of a "current recipient" includes those that are receiving, or have been deemed eligible to receive but have not yet started receiving, a means-tested government entitlement.

[20] *Supra* at note 7.

Proof. This section discusses what counts as proof when someone is receiving a means-tested government benefit. It may be the first instance in which a Texas rule allows a screenshot of a website as acceptable proof.

Household. Household is defined as people who are related by blood or by law, rather than those who are living in the same abode, as is allowed under some means-tested entitlement programs. The Subcommittee felt that a party should only be required to count the income of those who are related to them by blood or by law rather than anyone else who may be living in the household, such as a tenant.

Income. The definition of income makes clear that "income" includes earned and unearned income.

Available. The proposed rule adopts the guidelines suggested by the Texas Access to Justice Foundation, which holds a party accountable only for income or assets to which they have access or control and which does not require the consent or cooperation of another person over whom they have no control. The proposed definition specifically states that a victim of domestic violence shall not be considered to have access to any income or asset that would require contact with the alleged abuser.

Conclusion

The Self-Represented Litigants Subcommittee of the Texas Access to Justice Commission believes the proposed revision to TRCP 145 will help resolve many of the issues that are seen under the current rule. It provides much greater guidance on the definition of a party who is unable to pay costs, which should result in a more uniform application of the rule across courts and counties. It specifies that a case cannot be delayed solely due to the filing of an affidavit or when a party has been allowed to pay costs in installments and is current on his account. It clarifies that affidavits must be individually reviewed and contested based on the contents of that particular affidavit, which should eliminate the practice of automatically contesting every affidavit filed. It reduces the burden on courts to review affidavits, and on affiants to confirm the contents of the affidavit, in situations where the affiant has already be found indigent by a means-tested government agency or legal aid provider. Finally, it gives direction to clerks and courts on when costs can be collected from a party determined to be unable to pay costs.

Exhibit A

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 01- 9065

ORDER ESTABLISHING TEXAS ACCESS TO JUSTICE COMMISSION

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1. In 1999, a statewide planning process for legal services to the poor was initiated in Texas. The Texas planning group consisted of a broad range of individuals representing this Court, the State Bar of Texas, the Texas Equal Access to Justice Foundation, the Texas Bar Foundation, and the network of legal-service providers throughout the state.

2. During the statewide planning process, the following problems were identified:

- many gaps exist in developing a comprehensive, integrated statewide civil legal-services delivery system in Texas;
- many poor people in Texas are underrepresented, in that they receive limited advice from a legal-services provider when they would in fact be better served by full representation on a civil legal matter;
- inadequate funding and well-intentioned but uncoordinated efforts stand in the way of a fully integrated civil legal-services delivery system;
- achieving a committed and active justice community in Texas is essential to the effective delivery of civil legal services;
- while many organizations throughout the state share a commitment to improving access to justice, no single group is widely accepted as having ultimate responsibility for progress on the issues; and
- leadership that is accepted by the various stakeholder organizations committed to achieving full access, and empowered to take action, is essential to realizing equal justice for all in Texas.

3. At the conclusion of the statewide planning process, the planning group adopted an action plan with a broad range of goals and strategies. The cornerstone of the recommendations was that

an Access to Justice Commission be established by this Court to serve as the umbrella organization for all efforts to expand access to justice in civil matters in Texas. The organization would serve as a coordinator to assist all participants in developing strategic alliances to effectively move ideas to action. The Commission would report semi-annually on its progress to both the Court and the State Bar of Texas. The Court, having reviewed the report of the planning group and having received the endorsement of the Board of Directors of the State Bar of Texas, **HEREBY ORDERS**:

1. The Texas Access to Justice Commission is created to develop and implement policy initiatives designed to expand access to and enhance the quality of justice in civil legal matters for low-income Texas residents.

2. The Texas Access to Justice Commission will:

- identify and assess current and future needs for access to justice in civil matters by low-income Texans;
- develop and publish a strategic plan for statewide delivery of civil legal services to low-income Texans;
- foster the development of a statewide integrated civil legal-services delivery system;
- work to increase resources and funding for access to justice in civil matters and to ensure that the resources and funding are applied to the areas of greatest need;
- work to maximize the wise and efficient use of available resources, including the development of local, regional, and statewide coordination systems and systems that encourage the coordination or sharing of resources or funding;
- develop and implement initiatives designed to expand civil access to justice;
- work to reduce barriers to the justice system by addressing existing and proposed court rules, procedures, and policies that negatively affect access to justice for low-income Texans; and
- monitor the effectiveness of the statewide system and services provided and periodically evaluate the progress made by the Commission in fulfilling the civil legal needs of low-income Texans.

3. The Texas Access to Justice Commission consists of fifteen members appointed by this Court and by the State Bar of Texas. A member of the Commission serves a three-year term. The terms of the members are staggered. A member may not be appointed to serve more than two successive full three-year terms. A member who has served two successive full terms is not eligible for reappointment until the third anniversary of the date that the member's last full term on the Commission expired.

4. This Court will appoint eight members to the Texas Access to Justice Commission as follows:

- a justice of the Supreme Court of Texas;
- a judge or justice from a county with a population of 650,000 or more;
- a judge or justice from a county with a population of less than 650,000;
- a member of the Texas Equal Access to Justice Foundation Board of Directors;
- two representatives of a state or federally funded legal-services program; and
- two at-large members who have demonstrated a commitment to and familiarity with access-to-justice issues in Texas.

5. The State Bar of Texas will appoint seven members to the Texas Access to Justice Commission as follows:

- two members of the State Bar of Texas Board of Directors;
- an attorney member of the State Bar of Texas;
- a member of the Texas Bar Foundation Board of Directors;
- two representatives of a state or federally funded legal-services program; and
- an at-large member who has demonstrated a commitment to and familiarity with access-to-justice issues in Texas.

6. This Court and the State Bar of Texas will coordinate appointments to the Texas Access to Justice Commission to assure that:

- at least three members of the Commission are nonattorney public representatives;
- members of the Commission appointed to represent a state or federally funded legal-services program reflect a diversity among Legal Service Corporation funded programs and programs funded from other sources, staff and pro bono based programs, and general civil legal-services programs and specific service- or client-based programs; and
- the members of the Commission reflect the diverse ethnic, gender, legal, and geographic communities located in Texas.

7. This Court will designate the presiding officer of the Texas Access to Justice Commission, after consultation with the President of the State Bar of Texas.

8. The Governor is invited to designate a person to serve as an ex-officio member of the Commission. The Speaker of the House and the Lieutenant Governor each are invited to designate one member of that presiding officer's chamber to serve as an ex-officio member of the Texas Access to Justice Commission. A member appointed by the Governor, Speaker, or Lieutenant Governor serves at the pleasure of the appointing officer.

9. In making initial appointments to the Texas Access to Justice Commission, this Court will designate three members as having a one-year term, three members as having a two-year term, and two members as having a full three-year term.

10. In making initial appointments to the Texas Access to Justice Commission, the State Bar of Texas will designate two members as having a one-year term, two members as having a two-year term, and three members as having a full three-year term.

11. The Texas Access to Justice Commission will submit any strategic plan for statewide delivery of legal services to low-income Texans to this Court and the Executive Committee of the State Bar Board for approval.

12. The State Bar of Texas has agreed to provide staff and financial support for the Texas Access to Justice Commission. Proposed budgets of the Texas Access to Justice Commission will be subject to the State Bar's annual budgetary process for presentation to the Board of Directors and ultimate approval by this Court. Supervision of the budget of the Commission is the responsibility of the State Bar of Texas. The Commission and staff supporting the Commission will comply with the fiscal policies of the State Bar of Texas.

13. The Texas Access to Justice Commission is subject to sections 81.033 and 81.034 of the Texas Government Code, and is also subject to other relevant provisions of Chapter 81 of the Texas Government Code.

14. The Texas Access to Justice Commission may adopt rules as necessary for the performance of the Commission's duties.

15. The Texas Access to Justice Commission will file, at least every six months, a status report on the progress of the Commission's duties. The Commission will send a copy of the report to both this Court and the State Bar of Texas. The initial progress report will be filed not later than December 1, 2001. The Commission will also provide an oral progress report at each State Bar board meeting.

BY THE COURT, IN CHAMBERS, this 26th day of April, 2001.

Thomas R. Phillips, Chief Justice

Nathan L. Hecht, Justice

Craig T. Enoch, Justice

Priscilla R. Owen, Justice

James A. Baker, Justice

Greg Abbott, Justice

Deborah G. Hankinson, Justice

Harriet O'Neill, Justice

Wallace B. Jefferson, Justice

Misc. Docket No. 01-9065

Exhibit B

RULE 145. AFFIDAVIT OF INDIGENCY

(a) Affidavit. In lieu of paying or giving security for costs of an original action, a party who is unable to afford costs must file an affidavit as herein described. A "party who is unable to afford costs" is defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs. Upon the filing of the affidavit, the clerk must docket the action, issue citation and provide such other customary services as are provided any party.

(b) Contents of the Affidavit. The affidavit must contain complete information as to the party's identity, nature and amount of governmental entitlement income, nature and amount of employment income, other income, (interest, dividends, et.), spouse's income if available to the party, property owned (other than homestead), cash or checking account, dependents, debts, and monthly expenses. The affidavit shall contain the following statements: "I am unable to pay court costs. I verify that the statements made in this affidavit are true and correct." The affidavit shall be sworn before a notary public or other officer authorized to administer oaths. If the party is represented by an attorney on a contingent fee basis, due to the party's indigency, the attorney may file a statement to that effect to assist the court in understanding the financial condition of the party.

(c) IOLTA Certificate. If the party is represented by an attorney who is providing free legal services, without contingency, because of the party's indigency and the attorney is providing services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts (IOLTA) program, the attorney may file an IOLTA certificate confirming that the IOLTA-funded program screened the party for income eligibility under the IOLTA income guidelines. A party's affidavit of inability accompanied by an attorney's IOLTA certificate may not be contested.

(d) Contest. The defendent or the clerk may contest an affidavit that is not accompanied by an IOLTA certificate by filing a written contest giving notice to all parties and, in an appeal under Texas Government Code, Section 28.052, notice to both the small claims court and the county clerk. A party's affidavit of inability that attests to receipt of government entitlement based on indigency may be contested only with respect to the veracity of the attestation. Temporary hearings will not be continued pending the filing of the contest. If the court finds at the first regular hearing in the course of the action that the party (other than a party receiving a governmental entitlement based on indigency) is able to afford costs, the party must pay the costs of the action. Reasons for such a finding must be contained in an order. Except with leave of court, no further steps in the action will be taken by a party who is found able to afford costs until payment is made. If the party's action results in monetary award, and the court finds sufficient evidence monetary award to reimburse costs, the party must pay the costs of the action.

If the court finds that another party to the suit can pay the costs of the action, the other party must pay the costs of the action.

(e) Attorney's Fees and Costs. Nothing herein will prejudice any existing right to recover attorney's fees, expenses or costs from any other party.

Exhibit C

R. T. PINCHBACK ET AL V. MINNIE HOCKLES ET AL.

Motion No. 15558 (Cause No. 7736.)

THE SUPREME COURT OF TEXAS

139 Tex. 536*; *164 S.W.2d 19*; *1942 Tex. LEXIS 265

July 22, 1942

PRIOR HISTORY: **[***1]** This case was determined upon its merits in *138 Texas 306*, and it is now before the court on a motion of respondents to issued mandate without payment of costs, having filed affidavits of inability to pay the costs as provided in Rule 508, Texas Rules of Civil Procedure, which motion has been contested by petitioners as permitted under Rule355. Facts regarding their inability to pay the costs are set forth in the opinion.

Motion overruled.

COUNSEL: *P. D. Renfro, A. C. Keen* and *David L. Broadus,* all of Beaumont, for petitioners Minnie Hockless and others, defendants in error.

Nelson Jones and *R. E. Seagler,* both of Houston, and *Orgain, Carroll & Bell* and *Will E. Orgain,* all of Beaumont, for contestants, plaintiffs in error.

OPINION BY: ALEXANDER

OPINION

[19]** **[*537]** MR. CHIEF JUSTICE ALEXANDER delivered the opinion of the Court.

In the above cause the respondents, Minnie Hockles and W. B. West, have filed herein a motion to issue the mandate without the payment of costs. They have filed affidavits of inability to pay the costs as provided in Rule 508, Texas Rules of Civil Procedure. The motion was duly contested by petitioners as authorized by Rule 355, **[***2]** Texas Rules of Civil Procedure.

The affidavit filed in support of the motion and the contest show that the respondent West is a practicing attorney of long experience and considerable practice, who has his own office, and owns his office equipment, an automobile, and his homestead. He had dealt considerably in real estate. In 1939 he was paid a cash consideration of $3,000.00 for an oil and gas mining lease on an undivided interest in the land in question. No showing is made as to the credit rating of either of the parties, nor as to their ability to borrow funds with which to pay the costs.

It is asserted by West that since he is the head of a family, and all of his property is exempt to him as such, he cannot be required to mortgage or sell any of such property in order to secure funds with which to pay the costs, and since he has no cash on hand he is entitled to the issuance of a mandate without the payment of costs.

This Court has frequently passed on the question of the right of a party to have the mandate issued without the payment of costs, but as such question arises only on motion, it has not been customary to publish an opinion on the question.

[*538] However, **[***3]** in view of the frequency with which questions arise in trial and appellate courts concerning the rights of parties under the various rules permitting the filing of an affidavit of inability to pay costs, or give security therefor, we deem it proper to publish an opinion on these questions for the guidance of trial and appellate courts.

There are numerous rules in force in this State which permit a party to prosecute his suit through its various phases without being required to pay the costs, or give security therefor, upon his making affidavit of his inability to do so. *Texas Rules of Civil Procedure, 145*, 333, 355, 361, 444, 508, and **[**20]** *572*. These rules are all intended to accomplish the same purpose and are entitled to substantially the same construction. they were adopted to protect the weak against the strong, and to make sure that no man should be denied a forum in which to adjudicate is rights merely merely because he is too poor to pay the court costs.

Where, from the record as a whole, it really appears that a party is unable to pay the costs, or give security therefor, the court should unhesitatingly grant the relief prayed for. On the other hand, it must be **[***4]** remembered that if a party is relieved of the necessity of paying the costs for which he is otherwise liable, those who file that papers, serve the process, or prepare the statement of facts or transcript may have to do their work without pay. Likewise, the witnesses who are compelled to leave their employment in order to attend court may have to go uncompensated for the time lost by them. Some of them may be as poor as the party who seeks to be exempted from the payment of the costs. No man should be allowed the privilege of requiring others to thus work for him without pay if he is really able to pay the costs, or give security therefor. The rules which exempt the poor from the payment of costs serve a useful purpose, but if the courts allow the privilege granted thereby to be abused by those who, in fact, ought to pay, this may lead to the abolition of the exemption.

There are authorities which hold that a party in order to secure the benefit of the various rules permitting him to prosecute a suit and to secure his right under an affidavit of inability to pay the costs, or give security therefor, is not required to either sell or encumber exempt property for the purpose of **[***5]** procuring money for the payment of such costs. *Rutherford v. Vandygriff (Texas. Civ. App.), 73 S.W. (2d) 69*; *Willians*

[*539] *v. Jones (Texas Civ. App.), 5 S.W. (2d) 867*; *Boone v. McBee (Texas Civ. App.), 280 S.W. 295*; *Blck v. Snedecor, 60 Texas Civ. App. 215, 127 S.W. 570*; *Murray v. Robuck (Texas Civ. App.), 89 S.W. 781*; *Texas Bank & Trust Co. v. Teich (Texas Civ. App.), 287 S.W. 666*; 3 Tex. Jur. 354, 1285. We do not think that such a rule can be laid down as a hard and fast one applicable alike in all cases. In passing on the ability to pay costs, or give security therefor, and the rights of a party to be exempted therefrom, the court must look to the facts as a whole in the light of the objects intended to be accomplished. Obviously, if a laborer was barely earning the necessities of life for himself and family, ordinarily he should not be required to mortgage his hand tools or household furniture in order to raise funds to pay the court costs. On the other hand, if a party has a credit rating that will enable him to borrow the money, or if he is earning a substantial income, although he is expending it as rapidly as it comes in, or if he owns an automobile or truck or other **[***6]** valuable property, although exempt from execution, which he could mortgage or otherwise dispose of and thereby secure the necessary funds without depriving himself and his family of the necessities of life, he should be required to pay the costs, or give security therefor.

Where a party files such an affidavit and it is contested, the burden of proof is on the applicant. Texas rules of Civil Procedure, No. 355. Under such circumstances the real criterion is: Does the record as a whole show by a preponderance of the evidence that the applicant would be unable to pay the costs, or a part thereof, or give security therefor, if he really wanted to and made a good faith effort to do so?

Under the facts shown by the affidavits in this case we are of the opinion that the respondents have not met the burden of proof placed on them by Rule 355, and for that reason their motion to have the mandate issued without the payment of costs is overruled.

Opinion delivered July 22, 1942.

Pinchback v. Hockless, 139 Tex. 536, 164 S.W.2d 19, 1942 Tex. LEXIS 265 (Tex. 1942)

Restrictions: *Unrestricted*
FOCUS(TM) Terms: *No FOCUS terms*
Print Format: *FULL*
Citing Ref. Signal: *Hidden*

SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary

No negative case history.

Citing References:

	Positive Analyses:	**Followed (11)**
	Neutral Analyses:	Dissenting Op. (6), Explained (3)
	Other Sources:	Law Reviews (3), Treatises (3), Court Documents (13)

LexisNexis Headnotes: HN1 (8), HN2 (6), HN3 (1), HN4 (3), HN5 (4), HN6 (39)

CASE HISTORY (2 citing references)

1. **Same case at:**
   Pinchback v. Hockless, 138 Tex. 306, 158 S.W.2d 997, 1942 Tex. LEXIS 339 (Tex. 1942)

2. **Same case at:**
   Pinchback v. Hockless, 137 S.W.2d 864, 1940 Tex. App. LEXIS 69 (Tex. Civ. App. 1940)

CITING DECISIONS (65 citing decisions)

TEXAS SUPREME COURT

3. **Followed by:**
   In re C.H.C., 331 S.W.3d 426, 2011 Tex. LEXIS 77, 54 Tex. Sup. Ct. J. 520 (Tex. 2011) **LexisNexis Headnotes HN1, HN6**
   331 S.W.3d 426 *p.429*

4. **Cited in Dissenting Opinion at, Cited by:**

Higgins v. Randall County Sheriff's Office, 257 S.W.3d 684, 2008 Tex. LEXIS 455, 51 Tex. Sup. Ct. J. 911 (Tex. 2008) **LexisNexis Headnotes HN1, HN6**

Cited in Dissenting Opinion at:
257 S.W.3d 684 *p.692*
Cited by:
257 S.W.3d 684 *p.686*

5. **Cited in Dissenting Opinion at, Cited by:**
Griffin Indus. v. Honorable Thirteenth Court of Appeals, 934 S.W.2d 349, 1996 Tex. LEXIS 159, 40 Tex. Sup. Ct. J. 96 (Tex. 1996) **LexisNexis Headnotes HN3, HN6**

Cited in Dissenting Opinion at:
934 S.W.2d 349 *p.356*
Cited by:
934 S.W.2d 349 *p.351*

6. **Cited by:**
Equitable General Ins. Co. v. Yates, 684 S.W.2d 669, 1984 Tex. LEXIS 301, 28 Tex. Sup. Ct. J. 172 (Tex. 1984) **LexisNexis Headnotes HN2**

684 S.W.2d 669 *p.671*

7. **Followed by:**
Allred v. Lowry, 597 S.W.2d 353, 1980 Tex. LEXIS 315, 23 Tex. Sup. Ct. J. 322 (Tex. 1980) **LexisNexis Headnotes HN6**

597 S.W.2d 353 *p.355*

8. **Explained by:**
Goffney v. Lowry, 554 S.W.2d 157, 1977 Tex. LEXIS 246, 20 Tex. Sup. Ct. J. 377 (Tex. 1977) **LexisNexis Headnotes HN1, HN2, HN6**

554 S.W.2d 157 *p.159*

9. **Cited by:**
King v. Payne, 156 Tex. 105, 292 S.W.2d 331, 1956 Tex. LEXIS 569 (Tex. 1956) **LexisNexis Headnotes HN6**

156 Tex. 105 *p.112*
292 S.W.2d 331 *p.336*

10. **Explained by:**
Slay v. Burnett Trust, 143 Tex. 621, 187 S.W.2d 377, 1945 Tex. LEXIS 174 (Tex. 1945)

143 Tex. 621 *p.629*
187 S.W.2d 377 *p.382*

TEXAS COURT OF CRIMINAL APPEALS

11. **Cited by:**

Whitehead v. State, 130 S.W.3d 866, 2004 Tex. Crim. App. LEXIS 568 (Tex. Crim. App. 2004) **LexisNexis Headnotes HN5**
130 S.W.3d 866 *p.878*

TEXAS COURT OF APPEALS

12. **Cited by:**
Coyne v. Allstate Ins. Co., 2012 Tex. App. LEXIS 3853 (Tex. App. Dallas May 16, 2012) **LexisNexis Headnotes HN6**
2012 Tex. App. LEXIS 3853

13. **Cited by:**
In re Rombough, 2012 Tex. App. LEXIS 3716 (Tex. App. Fort Worth May 10, 2012) **LexisNexis Headnotes HN6**
2012 Tex. App. LEXIS 3716

14. **Cited by:**
In the Interest of N.E.Y., 2012 Tex. App. LEXIS 2635 (Tex. App. Dallas Apr. 2, 2012) **LexisNexis Headnotes HN6**
2012 Tex. App. LEXIS 2635

15. **Cited by:**
Moreno v. Perez, 363 S.W.3d 725, 2011 Tex. App. LEXIS 8831 (Tex. App. Houston 1st Dist. 2011) **LexisNexis Headnotes HN6**
363 S.W.3d 725 *p.742*

16. **Cited by:**
In the Interest of A.L.V.Z., 352 S.W.3d 568, 2011 Tex. App. LEXIS 8270 (Tex. App. Dallas 2011)
352 S.W.3d 568 *p.570*

17. **Cited by:**
Kastner v. Tex. Bd. of Law Examiners, 2011 Tex. App. LEXIS 6669 (Tex. App. Austin Aug. 18, 2011) **LexisNexis Headnotes HN6**
2011 Tex. App. LEXIS 6669

18. **Cited by:**
Eggers v. Van Zandt, 2011 Tex. App. LEXIS 6479 (Tex. App. Amarillo Aug. 15, 2011) **LexisNexis Headnotes HN6**
2011 Tex. App. LEXIS 6479

19. **Cited by:**
Roblin v. Briggs, 2011 Tex. App. LEXIS 5405 (Tex. App. Corpus Christi July 14, 2011) **LexisNexis Headnotes HN6**
2011 Tex. App. LEXIS 5405

20. **Cited by:**
Balistreri-Amrhein v. AHI, 2011 Tex. App. LEXIS 5068 (Tex. App. Dallas July 6, 2011) **LexisNexis Headnotes HN1, HN6**
2011 Tex. App. LEXIS 5068

21. **Cited by:**
Chambers v. Tex. Dep't of Pub. Safety, 2011 Tex. App. LEXIS 1640 (Tex. App. Dallas Mar. 8, 2011)
2011 Tex. App. LEXIS 1640

22. **Cited by:**
Roblin v. Briggs, 2010 Tex. App. LEXIS 8655 (Tex. App. Corpus Christi Oct. 28, 2010) **LexisNexis Headnotes HN1, HN6**
2010 Tex. App. LEXIS 8655

23. **Followed by:**
Morris v. Aguilar, 366 S.W.3d 208, 2010 Tex. App. LEXIS 5365 (Tex. App. Austin 2010) **LexisNexis Headnotes HN6**
366 S.W.3d 208 *p.211*

24. **Followed by:**
Conner v. Johnson, 2010 Tex. App. LEXIS 3586 (Tex. App. Amarillo May 11, 2010) **LexisNexis Headnotes HN6**
2010 Tex. App. LEXIS 3586

25. **Cited by:**
Foster v. Comal County Sheriff, 2009 Tex. App. LEXIS 6370 (Tex. App. Austin Aug. 13, 2009) **LexisNexis Headnotes HN6**
2009 Tex. App. LEXIS 6370

26. **Cited by:**
Kastner v. Tex. Bd. of Law Examiners, 2009 Tex. App. LEXIS 6381 (Tex. App. Austin Aug. 12, 2009) **LexisNexis Headnotes HN6**
2009 Tex. App. LEXIS 6381

27. **Cited by:**
Kastner v. Martin & Drought, P.C., 2009 Tex. App. LEXIS 2321 (Tex. App. San Antonio Apr. 8, 2009) **LexisNexis Headnotes HN4**
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28. **Followed by:**
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29. **Cited by:**
In re Kubankin, 257 S.W.3d 852, 2008 Tex. App. LEXIS 5136 (Tex. App. Waco 2008) **LexisNexis Headnotes HN6**
257 S.W.3d 852 *p.856*

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246 S.W.3d 353 *p.355*

31. **Cited by:**
In the Interest of S.T., 239 S.W.3d 452, 2007 Tex. App. LEXIS 9252 (Tex. App. Waco 2007)
239 S.W.3d 452 *p.457*

32. **Cited by:**
Teague v. Southside Bank, 257 S.W.3d 726, 2003 Tex. App. LEXIS 4964 (Tex. App. Tyler 2003) **LexisNexis Headnotes HN1, HN2**
257 S.W.3d 726 *p.728*

33. **Cited by:**
Baughman v. Baughman, 65 S.W.3d 309, 2001 Tex. App. LEXIS 8151 (Tex. App. Waco 2001)
65 S.W.3d 309 *p.315*

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White v. Bayless, 40 S.W.3d 574, 2001 Tex. App. LEXIS 296 (Tex. App. San Antonio 2001) **LexisNexis Headnotes HN6**
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Arevalo v. Millan, 983 S.W.2d 803, 1998 Tex. App. LEXIS 7883, 98:51 Tex. Civil Op. Serv. 105 (Tex. App. Houston 1st Dist. 1998)
983 S.W.2d 803 *p.810*

36. **Cited in Dissenting Opinion at:**
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39. **Cited by:**
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913 S.W.2d 752 *p.755*

40. **Cited by:**
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852 S.W.2d 31 *p.37*

41. **Cited in Dissenting Opinion at, Cited by:**
Cronen v. Smith, 812 S.W.2d 69, 1991 Tex. App. LEXIS 1550 (Tex. App. Houston 1st Dist. 1991) **LexisNexis Headnotes HN6**
Cited in Dissenting Opinion at:
812 S.W.2d 69 *p.72*
Cited by:
812 S.W.2d 69 *p.70*

42. **Followed by:**
Underwood v. Cartwright, 795 S.W.2d 34, 1990 Tex. App. LEXIS 2081 (Tex. App. Houston 1st Dist. 1990) **LexisNexis Headnotes HN6**
795 S.W.2d 34 *p.35*

43. **Cited by:**
Adams v. Coussons, 1989 Tex. App. LEXIS 2734 (Tex. App. Houston 1st Dist. Oct. 27, 1989) **LexisNexis Headnotes HN6**

44. **Cited by:**
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769 S.W.2d 373 *p.375*

46. **Cited by:**
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47. **Followed by:**
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652 S.W.2d 542 *p.543*

48. **Cited by:**
Abdnor v. Ovard, 635 S.W.2d 864, 1982 Tex. App. LEXIS 4716 (Tex. App. Dallas 1982)
635 S.W.2d 864 *p.868*

49. **Cited by:**
Galvan v. United States Fire Ins. Co., 629 S.W.2d 209, 1982 Tex. App. LEXIS 5667 (Tex. App. Amarillo 1982) **LexisNexis Headnotes HN6**
629 S.W.2d 209 *p.212*

TEXAS COURT OF CIVIL APPEALS

50. **Cited by:**
Ranier v. Brown, 623 S.W.2d 682, 1981 Tex. App. LEXIS 4600 (Tex. Civ. App. Houston 1st Dist. 1981) **LexisNexis Headnotes HN6**
623 S.W.2d 682 *p.686*

51. **Cited by:**
Brown v. Clapp, 613 S.W.2d 78, 1981 Tex. App. LEXIS 3342 (Tex. Civ. App. Tyler 1981) **LexisNexis Headnotes HN6**
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52. **Cited by:**
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587 S.W.2d 541 *p.542*

53. **Followed by:**
Ex parte Deckert, 559 S.W.2d 847, 1977 Tex. App. LEXIS 3520 (Tex. Civ. App. Houston 1st Dist. 1977) **LexisNexis Headnotes HN6**
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54. **Followed by:**
Jones v. Milburn, 553 S.W.2d 779, 1977 Tex. App. LEXIS 3050 (Tex. Civ. App. El Paso 1977) **LexisNexis Headnotes HN2**
553 S.W.2d 779 *p.780*

55. **Followed by:**

In re G.L.G. , 550 S.W.2d 716, 1977 Tex. App. LEXIS 2769 (Tex. Civ. App. Houston 1st Dist. 1977) **LexisNexis Headnotes HN2**
550 S.W.2d 716 *p.718*

56. **Cited by:**
McCartney v. Mead, 541 S.W.2d 202, 1976 Tex. App. LEXIS 3065 (Tex. Civ. App. Houston 1st Dist. 1976) **LexisNexis Headnotes HN4, HN6**
541 S.W.2d 202 *p.205*

57. **Cited by:**
Williams v. Maynard, 515 S.W.2d 9, 1974 Tex. App. LEXIS 2672 (Tex. Civ. App. Austin 1974) **LexisNexis Headnotes HN6**
515 S.W.2d 9 *p.11*

58. **Cited by:**
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59. **Cited by:**
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60. **Cited by:**
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61. **Cited by:**
Coleman v. Long, 407 S.W.2d 279, 1966 Tex. App. LEXIS 2263 (Tex. Civ. App. Dallas 1966)
407 S.W.2d 279 *p.282*

62. **Explained by:**
Tubbs v. Coker, 401 S.W.2d 272, 1966 Tex. App. LEXIS 3025 (Tex. Civ. App. Houston 1st Dist. 1966)
401 S.W.2d 272 *p.272*
401 S.W.2d 272 *p.273*

63. **Cited by:**
Wright v. Peurifoy, 260 S.W.2d 234, 1953 Tex. App. LEXIS 1932, 1953 Tex. App. LEXIS 1933, 1953 Tex. App. LEXIS 1934 (Tex. Civ. App. 1953)
260 S.W.2d 234 *p.236*

64. **Cited by:**
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226 S.W.2d 924 *p.925*

65. **Cited in Dissenting Opinion at:**
Burleson v. Rawlins, 174 S.W.2d 979, 1943 Tex. App. LEXIS 582 (Tex. Civ. App. 1943)
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66. **Cited by:**
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74. *In re MATA*, 2012 TX S. Ct. Briefs 99428, 2012 TX S. Ct. Briefs LEXIS 453 (Tex. May 29, 2012)

75. *Davis v. Tarrant County*, 2011 TX S. Ct. Briefs 73, 2011 TX S. Ct. Briefs LEXIS 521 (Tex. July 1, 2011)

76. *In re HARVEY*, 2010 TX S. Ct. Briefs 44, 2010 TX S. Ct. Briefs LEXIS 388 (Tex. Feb. 19, 2010)

77. *RICHMONT AVIATION, INC. v. COMBS*, 2011 TX App. Ct. Briefs 666214, 2012 TX App. Ct. Briefs LEXIS 378 (Tex. App. Austin Apr. 17, 2012)

78. *Rocco v. Oei*, 2011 TX App. Ct. Briefs 183, 2012 TX App. Ct. Briefs LEXIS 1089 (Tex. App. Eastland Jan. 17, 2012)

79. *HAZELIP v. AMERICAN CAS. CO.*, 2009 TX App. Ct. Briefs 77648, 2010 TX App. Ct. Briefs LEXIS 2083 (Tex. App. June 29, 2010)

80. *CULLUM v. White*, 2009 TX App. Ct. Briefs 959524, 2010 TX App. Ct. Briefs LEXIS 1940 (Tex. App. San Antonio June 10, 2010)

81. *Shanklin v. Texas Dep't of Crim. Justice*, 2009 TX App. Ct. Briefs 502, 2009 TX App. Ct. Briefs LEXIS 2696 (Tex. App. Nov. 5, 2009)

82. *SCHLAPPER v. FOREST*, 2006 TX App. Ct. Briefs 986851, 2008 TX App. Ct. Briefs LEXIS 1115 (Tex. App. Mar. 21, 2008)

83. *SCHLAPPER v. FOREST*, 2006 TX App. Ct. Briefs 986851, 2008 TX App. Ct. Briefs LEXIS 1131 (Tex. App. Feb. 5, 2008)

84. *RHODES v. HONDA GREENVILLE HONDA*, 2007 TX App. Ct. Briefs 81, 2007 TX App. Ct. Briefs LEXIS 3070 (Tex. App. Nov. 13, 2007)

85. *MILLER v. COLONIAL LLOYDS & INS. CLAIMS OF THE SOUTH, INC.*, 2007 TX App. Ct. Briefs 620, 2007 TX App. Ct. Briefs LEXIS 2707 (Tex. App. Sept. 5, 2007)

MOTIONS (1 Citing Motion)

86. *In re MATA v GARCIA*, 2012 TX S. Ct. Motions 99428, 2012 TX S. Ct. Motions LEXIS 83 (Tex. May 29, 2012)

Exhibit D

Lessie Mae COOK, Appellant, v. Clarence JONES et al., Appellees

No. 18490

Court of Civil Appeals of Texas, Fifth District, Dallas

521 S.W.2d 335; 1975 Tex. App. LEXIS 3423

February 20, 1975

SUBSEQUENT HISTORY: **[**1]** On Rehearing, March 21, 1975, Reported at: *521 S.W.2d 335 at 338.*

COUNSEL: F. Burns Vick, Jr., Dallas Legal Services, Inc., Dallas, for appellant.

Thomas V. Murto, III, Earl Luna, Dallas, for appellees.

JUDGES: Claude Williams, Chief Justice.

OPINION BY: WILLIAMS

OPINION

[*336] Lessie Mae Cook appeals from an order of the Domestic Relations Court of Dallas County denying her petition for mandamus against the Sheriff and District Clerk of Dallas County and also the County Judge and members of the Dallas County Commissioners' Court. The petition sought to compel the parties to provide necessary funds to defray the costs of publication of citation in a divorce action, and to compel the return of such citation following publication.

On July 17, 1973, Lessie Mae Cook filed a petition for divorce against her husband, Horace Cook. Her petition was accompanied by an affidavit of inability to pay court costs as provided by *Texas Rules of Civil Procedure, rule 145.* On August 1, 1973, the Domestic Relations Court, following a hearing, certified Lessie Mae Cook as an indigent and allowed her to proceed *in forma pauperis.*

To enable the court to acquire jurisdiction of the parties to the litigation, **[**2]** Lessie Mae Cook attempted to secure personal service of process upon the defendant Horace Cook pursuant to the provisions of *Tex.R.Civ.P. 106.* [1] Attempts to secure personal service under this rule proved unsuccessful. Plaintiff wife then attempted to proceed to secure service on the defendant husband by complying with that part of *Tex.R.Civ.P. 106* authorizing substituted service. [2] Such efforts to comply with this rule also proved to be ineffective since the whereabouts of the defendant husband were unknown and he had no usual place of business or abode.

1 *Rule 106* provides "the citation shall be served by the officer delivering to each defendant, in person, a true copy of the citation with the date of delivery endorsed thereon and with a copy of the petition attached thereto."

2 *Tex.R.Civ.P. 106* provides "[where] it is impractical to secure personal service . . . the court, upon motion, may authorize service by leaving a copy of the citation, with petition attached, at the usual place of business of the party to be served, or by delivering same to any one over sixteen years of age at the party's usual place of abode, or in any other manner which will be reasonably effective to give the defendant notice of the suit."

[3]** Having made these efforts to secure service

by the first two methods prescribed by law, the plaintiff wife applied for substituted service by publication, the third method prescribed by law, as set forth in

[*337] *Tex.R.Civ.P. 109.* [3] Plaintiff filed an affidavit that defendant's residence was unknown, as required by that rule, but her efforts to secure citation by publication was frustrated because she did not have funds available to defray the cost of publication in a newspaper published in Dallas County as required by *Tex.R.Civ.P. 116.* [4] The Daily Commercial Record, the paper used frequently for such purposes, refused to print the citation without advance payment of costs therefor.

3 Pursuant to *Tex.R.Civ.P. 109* "[where] a party to a suit . . . shall make oath that the residence of any party defendant is unknown to affiant . . . and that after due diligence such party . . . [has] been unable to locate the whereabouts of such defendant . . . the clerk shall issue citation for such defendant for service by publication."

4 *Rule 116* provides: "The citation, when issued, shall be served by the sheriff or any constable of any county of the State of Texas by having the same published once each week for four (4) consecutive weeks, the first publication to be at least twenty-eight (28) days before the return day of the citation. In all suits which do not involve the title to land or the partition of real estate, such publication shall be made in the county where the suit is pending, if there be a newspaper published in said county, but if not, then in an adjoining county where a newspaper is published."

[4]** On February 25, 1974, plaintiff wife filed a petition for writ of mandamus against Clarence Jones, Sheriff of Dallas County; Bill Shaw, District Clerk of Dallas County; W. L. Sterrett, Dallas County Judge; and the members of the Commissioners' Court of Dallas County. The petition requested that Sheriff Jones be ordered to effect service of citation by publication pursuant to *Tex.R.Civ.P. 116* and to make the appropriate return of citation for publication as provided for by *Tex.R.Civ.P. 117.* The petition sought to require the District Clerk to forward the cost of publication to the newspaper and that the County Commissioners' Court furnish the necessary funds for such publication. On July 18, 1974, following a hearing, the Domestic Relations Court denied the motion for mandamus and plaintiff wife brings this appeal. We hold that the Domestic Relations Court erred in not granting the motion for mandamus against the Sheriff of Dallas County, Texas.

Respondents contend that mandamus is inappropriate because plaintiff has not exhausted her remedies under *Rule 106.* They argue that this rule permits service "in any manner which will be reasonably effective to give defendant notice of **[**5]** the suit," and that notice sent by registered mail would be more effective than citation by publication. This contention is without merit because this plaintiff, like any other plaintiff, is entitled to citation by publication on making the affidavit prescribed by *Rule 109.*

Service of citation by publication has been subjected to severe criticism by many courts and writers. [5] While we agree

[*338] with the criticism levelled at this obviously inadequate method of securing service upon defendants in civil actions in Texas, the fact remains that this method is one type of service authorized by the Legislature or the Supreme Court available to plaintiff wife so that she may have meaningful access to the Domestic Relations Court. She has been effectively denied this access because she does not have the necessary funds to pay the newspaper for publishing the citation the requisite number of times as prescribed by the rule. Because she has been duly certified by the Domestic Relations Court as an indigent, plaintiff wife should be allowed to initiate her divorce action without payment of court costs. Such costs include the fee for service of citation by publication.

5 The Supreme Court of the United States in *Boddie v. Connecticut, 401 U.S. 371, 382, 91 S. Ct. 780, 788, 28 L. Ed. 2d 113 (1971)* said:

> "[That] reliable alternatives exist to service of process by a state-paid sheriff if the State is unwilling to assume the cost of official service. This is perforce true of service by publication which is the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings . . . We think in this case service at defendant's last known address by mail and posted notice is equally effective as publication in a newspaper."

See also Ashley v. Superior Court In and For Pierce County, 83 Wash.2d 630, 521 P.2d 711 (1974); *L. v. L., 305 A.2d 620 (Del.1973)*; *Brown v. Brown, 112 N.H. 410, 296 A.2d 898 (1972)*; *Cohen v. Board of Supervisors, 20 Cal.App.3d 236, 97 Cal.Rptr. 550 (1971)*; Johnson, Citation by Publication -- A Sham Upon Due Process, 36 Tex.B.J. 205 (1973); and 2 McDonald, Texas Civil Practice § 9.01.4 (1970).

We are, however, not convinced that service by registered letter as suggested in *Boddie* would provide equivalent protection for the absent defendant. This is because such service under *Rule 106* would not be accompanied by the safeguards required by the rules relating to citation by publication. When citation has been served by publication, Rule 244 requires the court to appoint an attorney to defend the suit on behalf of the absent defendant, and further requires a statement of the evidence to be signed by the judge and filed with the papers. Rule 329(a) authorizes the court to grant a new trial upon petition of the defendant filed within two years after rendition of the judgment. Perhaps the rule should be amended to provide these safeguards in connection with other methods of substituted service.

[6]** *Rule 116* is plain and specific in its terms providing that when citation by publication is issued by the District Clerk it shall "be served by the sheriff or any constable of any county of the State of Texas by having the same published once each week for four (4) consecutive weeks . . ." Thus the Sheriff of Dallas County is unequivocally directed to perform this duty. This responsibility includes the payment of the essential cost. Ordinarily the Sheriff is entitled to payment for the cost of publication, as he may charge a fee for serving other citations. Here, however, plaintiff has been relieved of that obligation by *Rule 145*. Consequently, she is entitled to require performance of the duty without payment.

As to Clarence Jones, Sheriff of Dallas County, Texas, the judgment of the trial court is reversed and here rendered that such Sheriff be hereby ordered to comply with the provisions of *Tex.R.Civ.P. 116 et seq.* by having citation in this case duly served by publishing the same in a newspaper published in Dallas County, Texas, providing the costs therefor, and to return such citation, following service, in the manner provided by law.

Reversed and rendered in part and affirmed **[**7]** in part.

Cook v. Jones, 521 S.W.2d 335, 1975 Tex. App. LEXIS 2545, 1975 Tex. App. LEXIS 3423 (Tex. Civ. App. Dallas 1975)

Restrictions: *Unrestricted*
FOCUS(TM) Terms: *No FOCUS terms*
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SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary

No negative subsequent appellate history.

Citing References:

Positive Analyses: **Followed (1)**

Other Sources: Law Reviews (2)

PRIOR HISTORY (0 citing references)

(CITATION YOU ENTERED):
Cook v. Jones, 521 S.W.2d 335, 1975 Tex. App. LEXIS 2545, 1975 Tex. App. LEXIS 3423 (Tex. Civ. App. Dallas 1975)

SUBSEQUENT APPELLATE HISTORY (2 citing references)

1. **Writ of error refused no reversible error, (Jul. 7, 1975)**

2. **Rehearing of writ of error overruled, (Jul. 30, 1975)**

CITING DECISIONS (3 citing decisions)

TEXAS COURT OF APPEALS

3. **Followed by:**
In re Villanueva, 292 S.W.3d 236, 2009 Tex. App. LEXIS 5480 (Tex. App. Texarkana 2009)
292 S.W.3d 236 *p.244*

4. **Cited by:**
McGraw v. Texas Dep't of Protective & Regulatory Servs., 1998 Tex. App. LEXIS 4242 (Tex. App. Corpus Christi July 16, 1998)
1998 Tex. App. LEXIS 4242

TEXAS

5. **Cited by:**
1986 Tex. Op. Att'y Gen. JM-435
1986 Tex. Op. Att'y Gen. JM-435

LAW REVIEWS AND PERIODICALS (2 Citing References)

6. 30 Sw. L.J. 68
30 Sw. L.J. 68 *p.74*

7. 8 Tex. Tech L. Rev. 19
8 Tex. Tech L. Rev. 19 *p.39*

Exhibit E

EQUITABLE GENERAL INSURANCE COMPANY OF TEXAS, Petitioner v. THOMAS YATES, Respondent

No. C-3210

SUPREME COURT OF TEXAS

684 S.W.2d 669; 1984 Tex. LEXIS 301; 28 Tex. Sup. J. 172

December 19, 1984

SUBSEQUENT HISTORY: [**1] Rehearing Denied February 20, 1985.

PRIOR HISTORY: From Harris County, First District.

COUNSEL: Jeffrey H. Marsh w/Hudgins, Hudgins, Warrick & Mattingly of Houston, Texas, for Petitioner.

James W. Patterson of Houston, Texas, for Respondent.

JUDGES: Sears McGee, Justice. Chief Justice Pope and Justices Spears and Gonzalez join in this dissent. William Kilgarlin, Justice.

OPINION BY: McGEE

OPINION

[*670] This is an appeal from a summary judgment rendered in favor of petitioner, Equitable General Insurance Company of Texas, against respondent, Thomas Yates. The issue presented is whether the trial court abused its discretion in granting Yates' motion for new trial conditioned upon the payment of $500 by Yates to opposing counsel for their attorney's fees. The court of appeals held that the trial court had no authority to grant a motion for new trial based on such a condition and that the subsequent final order overruling Yates' motion for new trial, based on his failure to pay the attorney's fees, was error. *672 S.W.2d 822.* We disagree; however, for the reasons stated herein, we affirm the judgment of the court of appeals.

Thomas Yates was awarded compensation by the Industrial [**2] Accident Board for injuries sustained while employed by Schepps Dairy. Both the insurance carrier, Equitable General Insurance Company of Texas and Yates filed suit to set aside the award. Equitable General filed a motion for summary judgment on the grounds that Yates had failed to file his claim for workers' compensation within six months from the day of injury. Yates did not file a response to the summary judgment motion until the day of the hearing; no motion for leave of court to file was tendered. The trial court refused to consider the late filed response, granted Equitable General's motion for summary judgment and on March 29, 1983 rendered judgment setting aside the award.

Yates filed a motion for new trial alleging substantially the same grounds as were in his response to the summary judgment. On May 9, 1983 an interlocutory order was rendered which provided that the motion for new trial would be granted upon the payment of $500 by Yates to the opposing counsel as attorney's fees for preparing and presenting a response to Yates' motion for new trial. The order also stated that a final judgment overruling the motion for new trial would be rendered upon Yates' failure to pay [**3] opposing counsel. Yates did not pay the $500; however, on June 8, 1983 he filed a

response to the interlocutory order. In an affidavit, attached to the response, Yates claimed that he was "financially unable to raise or to pay Five Hundred Dollars. . . ." No contest to this oath was filed. A final judgment was rendered denying the motion for new trial on June 9, 1983. A bill of exception perfected the next day states that the trial court, after the affidavit of inability was filed, overruled the motion for new trial.

A trial court has long been vested with great discretion in ruling upon a motion for a new trial and, absent manifest abuse of discretion, its action will not be disturbed on appeal. *Neunhoffer v. State, 440 S.W.2d 395, 397* (Tex. Civ. App. -- San Antonio 1969, writ ref'd n.r.e.). The latitude of the trial court's discretion is addressed in *Rule 320*, which provides: "New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct." *Tex. R. Civ. P. 320.*

[*671] A conditional grant of a motion for new trial based on a party's payment of costs is well within the trial court's discretion. **[**4]** This is especially well established when a default judgment has been rendered and a subsequent motion for new trial is granted, conditioned upon payment of the costs in obtaining the default judgment. *Town v. Guerguin, 93 Tex. 608, 610, 57 S.W. 565, 566 (1900)*. In particular, trial courts are permitted to grant new trials conditioned upon the payment of attorney's fees, expenses for witnesses, travel and other costs incurred in obtaining the default judgment. *United Beef Producers, Inc. v. Lookingbill, 532 S.W.2d 958, 959 (Tex. 1976)*. Conditional grants of new trial in default judgment cases are governed by the equitable consideration of not causing any injury to the party obtaining the original judgment. *Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939)*.

Our determination of the present case should be guided by the same principles. The trial court granted Yates' motion for new trial conditioned upon his paying the opposing counsel $500 "as attorney's fees for preparing and presenting the Response to Plaintiff's Motion for New Trial. . . ." We find the assessment was a proper equitable determination and the trial court was within its **[**5]** discretion to grant a new trial based on such a condition.

The court of appeals relied on *Continental Oil Co. v. Henderson, 180 S.W.2d 998* (Tex. Civ. App. -- Fort Worth 1944, writ ref'd w.o.m.) in holding that the trial court had no authority to make payment of all expenses for bringing the suit and attorney's fees a condition in granting a motion for new trial. We agree. *Continental Oil*, however, determined that a new trial should have been granted as a matter of law based on newly discovered evidence. In addition, the attorney's fees sought were for the entire trial, not just the expenses of preparing the motion for new trial. Moreover and most importantly, the parties in *Continental Oil* took the proper procedural steps, and the expenses incurred were not the result of a failure to file timely responses.

While we find that such conditional grants of new trial are permissible based on equitable considerations, in the present case the trial court abused its discretion in rendering final judgment and denying the new trial. Thomas Yates filed an affidavit of inability to pay and no contest was subsequently filed. An uncontested affidavit of inability to pay is conclusive **[**6]** as a matter of law. *Pattison v. Spratlan, 539 S.W.2d 60, 61* (Tex.), *cert. denied, 429 U.S. 1001, 97 S. Ct. 531, 50 L. Ed. 2d 612 (1976)*. Although we recognize the general rule that attorney's fees are not costs, the assessed fees in the present case will be considered in light of *Rule 145* and the rule's intended purpose to guarantee a forum to those unable to pay court costs. *Pinchback v. Hockless, 139 Tex. 536, 538, 164 S.W.2d 19, 20 (1942)*. Accordingly, the trial court abused its discretion by imposing such a monetary condition in the face of an uncontested affidavit of inability to pay.

The judgment of the court of appeals is affirmed.

Dissenting Opinion by Justice Kilgarlin in which Chief Justice Pope and Justices Spears and Gonzalez join.

DISSENT BY: KILGARLIN

DISSENT

WILLIAM KILGARLIN, Justice

DISSENTING OPINION

I respectfully dissent. What an anomaly! Had the trial judge followed his initial decision and overruled the motion for new trial without expressing any desire for leniency, he would be affirmed. His refusal to consider an untimely response to the motion for summary judgment would be upheld, where, as here, no excuse was given at the time for the late **[**7]** filing. *Rhodes v. City of Austin, 584 S.W.2d 917, 921-22* (Tex. Civ. App. -- Tyler 1979, writ ref'd n.r.e.). In the absence of a response, summary judgment was proper. *City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671 (Tex. 1979)*. That would have been that. No appellate court in this state would have had a second thought about affirming the judgment. Here, however, **[*672]** because of a desire to do fairness, and give the plaintiff a second chance, the trial judge offered a condition for granting a new trial, which he was not obligated to do. So, we reward his generosity by a reversal. The only possible result of the court's decision is that trial judges will replace compassionate justice with cold-hearted judicial edicts.

Moreover, it is a tortured reading of the Rules of Civil Procedure by which we allow this result. Regrettably, the court opinion emasculates the obvious intent of *Rule 320, Tex. R. Civ. P.*, to confer discretion on

the trial judge. That rule states in pertinent part, "New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion *on such terms as the court shall direct." (Emphasis added)* **[**8]** . In spite of this language, this court holds that the trial court in this case may not condition a new trial on payment of attorney's fees. Does not the court opinion now require us to amend *Rule 320* to delete trial court discretion in this area? Are we not professing to understand the circumstances surrounding the trial better than the judge who sat through it?

The torture extends beyond *Rule 320*. We now equate attorney's fees with court costs in order to invoke the indigency provisions of *Tex. R. Civ. P. 145*. I readily accept the concept of indigency affidavits when an inability to pay costs exists. Otherwise, we would be guilty of violating our constitutional guarantee of open access to courts. *Tex. Const. art. I, § 13*. However, attorney's fees were conditionally assessed in this case just as sanctions would be assessed for discovery violations. Costs are what clerks receive. No rule exists authorizing indigency affidavits in lieu of paying court-ordered attorney's fees.

By this opinion, I fear that we open the door for potential violence to the trial judge's power to assess monetary sanctions for discovery abuse. A major intent behind the adoption of *Tex. R. Civ. P. 215* on April **[**9]** 1, 1984, was to clothe the trial judge with greater discretion to apply proper sanctions based on the degree of the abuse involved. *See Tex. R. Civ. P. 215*, interp. commentary (Vernon 1984).

This court recognized, in amending the rules, that administration of justice would be enhanced by empowering courts to cope with unreasonable delay tactics, meaningless responses, gamesmanship, and the other abuses which thwart the discovery process' intended orderly search for truth. Kilgarlin & Jackson, *Sanctions for Discovery Abuse Under New Rule 215*, 15 St. Mary's L.J. 767, 770 (1984). What will happen now when a trial judge imposes a monetary sanction for discovery abuse? If an indigency affidavit is filed, and not opposed, does the abuse go unpunished? If the affidavit is contested, must the trial judge expend vital court time conducting a hearing to decide if he can enforce the monetary sanction which he has determined? Are we not encouraging the trial judge, who earnestly attempts to obtain compliance with the discovery process, to levy a harsher sanction such as striking of pleadings, dismissal or default, rather than suffer through a contest of a milder ruling ordering attorney **[**10]** fees payment?

Finally, I note that the court approvingly cites *United Beef Producers, Inc. v. Lookingbill, 532 S.W.2d 958 (Tex. 1976)*. They do not recite, however, language from the opinion which says "we agree that, as a condition to the granting of his motion for new trial, a defendant should be required to reimburse plaintiff for costs of suit incurred in obtaining the judgment." *Id. at 959*. With our decision today, all I can say is *sic transit United Beef Producers, Inc. v. Lookingbill* and *Rule 320, Tex. R. Civ. P.*

I would reverse the judgment of the court of appeals.

Chief Justice Pope and Justices Spears and Gonzalez join in this dissent.

Equitable General Ins. Co. v. Yates, 684 S.W.2d 669, 1984 Tex. LEXIS 301, 28 Tex. Sup. Ct. J. 172 (Tex. 1984)

Restrictions: *Unrestricted*
FOCUS(TM) Terms: *No FOCUS terms*
Print Format: *FULL*
Citing Ref. Signal: *Hidden*

SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary

No negative subsequent appellate history.

Citing References:

⚠	Cautionary Analyses:	**Distinguished (1)**
	Positive Analyses:	Followed (4)
	Neutral Analyses:	Dissenting Op. (1)
	Other Sources:	Law Reviews (4), Treatises (6), Court Documents (9)

LexisNexis Headnotes: HN1 (20), HN2 (5)

PRIOR HISTORY (2 citing references)

1. *Yates v. Equitable General Ins. Co.*, 672 S.W.2d 822, 1984 Tex. App. LEXIS 5081 (Tex. App. Houston 1st Dist. 1984)

2. **Writ granted by:**

   Equitable General Ins. Co. v. Yates, 27 Tex. Sup. Ct. J. 554 (Tex. 1984)

   Affirmed by (CITATION YOU ENTERED):

   Equitable General Ins. Co. v. Yates, 684 S.W.2d 669, 1984 Tex. LEXIS 301, 28 Tex. Sup. Ct. J. 172 (Tex. 1984)

SUBSEQUENT APPELLATE HISTORY (1 citing reference)

3. **Rehearing of cause overruled by, (Feb. 20, 1985)**

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TEXAS COURT OF APPEALS

4. **Cited by:**
Giraldo v. Pavia, 2013 Tex. App. LEXIS 1026 (Tex. App. Houston 14th Dist. Feb. 5, 2013)
2013 Tex. App. LEXIS 1026

5. **Followed by:**
In re Villanueva, 292 S.W.3d 236, 2009 Tex. App. LEXIS 5480 (Tex. App. Texarkana 2009) **LexisNexis Headnotes HN1, HN2**
292 S.W.3d 236 *p.243*

6. **Followed by:**
In the Guardianship of Luke Forrest Humphrey, 2009 Tex. App. LEXIS 1099 (Tex. App. Tyler Feb. 18, 2009) **LexisNexis Headnotes HN2**
2009 Tex. App. LEXIS 1099

7. **Followed by:**
Boyd v. Family Dollar Stores of Tex., Inc., 2006 Tex. App. LEXIS 5495 (Tex. App. Dallas June 28, 2006) **LexisNexis Headnotes HN1**
2006 Tex. App. LEXIS 5495

8. **Cited by:**
Quality Dialysis, Inc. v. Adams, 2006 Tex. App. LEXIS 4921 (Tex. App. Corpus Christi June 8, 2006) **LexisNexis Headnotes HN1**
2006 Tex. App. LEXIS 4921

9. **Cited by:**
Hyperoam, Inc. v. Valley Wireless Internet, 2005 Tex. App. LEXIS 6616 (Tex. App. Corpus Christi Aug. 18, 2005) **LexisNexis Headnotes HN1**
2005 Tex. App. LEXIS 6616

10. **Cited by:**
Fountain v. Fountain, 2005 Tex. App. LEXIS 464 (Tex. App. Austin Jan. 21, 2005)
2005 Tex. App. LEXIS 464

11. **Cited by:**
In re Gossett, 2004 Tex. App. LEXIS 11056 (Tex. App. Tyler Dec. 8, 2004) **LexisNexis Headnotes HN2**
2004 Tex. App. LEXIS 11056

12. **Cited by:**
Harris v. Caldwell, 2003 Tex. App. LEXIS 1028 (Tex. App. Dallas Feb. 4, 2003) **LexisNexis Headnotes**

HN1
2003 Tex. App. LEXIS 1028

13. **Cited by:**
Sanchez v. Rodriguez, 2001 Tex. App. LEXIS 6783 (Tex. App. Corpus Christi Oct. 4, 2001) **LexisNexis Headnotes HN1**
2001 Tex. App. LEXIS 6783

14. **Cited by:**
Sanchez v. Rodriguez, 2001 Tex. App. LEXIS 5801 (Tex. App. Corpus Christi Aug. 23, 2001)
2001 Tex. App. LEXIS 5801

15. **Cited by:**
In re Steiger, 55 S.W.3d 168, 2001 Tex. App. LEXIS 5469 (Tex. App. Corpus Christi 2001) **LexisNexis Headnotes HN1**
55 S.W.3d 168 *p.172*

16. **Cited by:**
Retzlaff v. Courteau, 2001 Tex. App. LEXIS 1258 (Tex. App. Austin Feb. 28, 2001) **LexisNexis Headnotes HN2**
2001 Tex. App. LEXIS 1258

17. **Cited by:**
In re Hawk, 5 S.W.3d 874, 1999 Tex. App. LEXIS 8055, 1999:44 Tex. Civil Op. Serv. 281 (Tex. App. Houston 14th Dist. 1999) **LexisNexis Headnotes HN1**
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18. **Cited by:**
Gonzalez v. Kinlaw Oil Corp., 1998 Tex. App. LEXIS 3663 (Tex. App. San Antonio June 17, 1998) **LexisNexis Headnotes HN1**
1998 Tex. App. LEXIS 3663

19. **Followed by:**
Noone v. Noone, 1996 Tex. App. LEXIS 5895 (Tex. App. San Antonio Dec. 31, 1996) **LexisNexis Headnotes HN1**
1996 Tex. App. LEXIS 5895

20. **Cited by:**
Deann Douthit Warnock v. Warnock, 1996 Tex. App. LEXIS 4703 (Tex. App. Houston 14th Dist. Oct. 24, 1996) **LexisNexis Headnotes HN1**
1996 Tex. App. LEXIS 4703

21. **Cited by:**

Stout v. Estrada, 1996 Tex. App. LEXIS 1164 (Tex. App. San Antonio Mar. 27, 1996) **LexisNexis Headnotes HN2**
1996 Tex. App. LEXIS 1164

22. **Cited by:**
Wu v. Walnut Equip. Leasing Co., Tex. Civ. App. Dkt. No. 14-94-00283-CV (Tex. App. Houston 14th Dist. Oct. 19, 1995)
Tex. Civ. App. Dkt. No. 14-94-00283-CV

23. **Cited by:**
Wu v. Walnut Equip. Leasing Co., 909 S.W.2d 273, 1995 Tex. App. LEXIS 2535 (Tex. App. Houston 14th Dist. 1995)
909 S.W.2d 273 *p.279*

24. **Cited by:**
Lehrer v. Garner, 1995 Tex. App. LEXIS 877 (Tex. App. Houston 1st Dist. Apr. 27, 1995) **LexisNexis Headnotes HN1**
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25. **Cited by:**
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856 S.W.2d 512 *p.514*

26. **Cited by:**
Daniels v. Pecan Valley Ranch, Inc., 831 S.W.2d 372, 1992 Tex. App. LEXIS 1605 (Tex. App. San Antonio 1992) **LexisNexis Headnotes HN1**
831 S.W.2d 372 *p.382*

27. **Cited by:**
White v. Independence Bank, N.A., 794 S.W.2d 895, 1990 Tex. App. LEXIS 1884 (Tex. App. Houston 1st Dist. 1990) **LexisNexis Headnotes HN1**
794 S.W.2d 895 *p.900*

28. **Cited in Dissenting Opinion at:**
Masuccio v. Standard Fire Ins. Co., 770 S.W.2d 854, 1989 Tex. App. LEXIS 1634 (Tex. App. San Antonio 1989) **LexisNexis Headnotes HN1**
770 S.W.2d 854 *p.858*

29. **Cited by:**
Allied Rent-All, Inc. v. International Rental Ins., 764 S.W.2d 11, 1988 Tex. App. LEXIS 3250 (Tex. App. Houston 14th Dist. 1988) **LexisNexis Headnotes HN1**
764 S.W.2d 11 *p.13*

30. **Cited by:**
M & M Constr. Co. v. Great American Ins. Co., 749 S.W.2d 526, 1988 Tex. App. LEXIS 629 (Tex. App. Corpus Christi 1988) **LexisNexis Headnotes HN1**
749 S.W.2d 526 *p.527*

31. **Cited by:**
Howell v. City Towing Associates, Inc., 717 S.W.2d 729, 1986 Tex. App. LEXIS 8818 (Tex. App. San Antonio 1986) **LexisNexis Headnotes HN1**
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Price v. Firestone Tire & Rubber Co., 700 S.W.2d 730, 1985 Tex. App. LEXIS 12832 (Tex. App. Dallas 1985) **LexisNexis Headnotes HN1**
700 S.W.2d 730 *p.733*

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Nava v. Steubing, 700 S.W.2d 668, 1985 Tex. App. LEXIS 12808 (Tex. App. San Antonio 1985) **LexisNexis Headnotes HN1**
700 S.W.2d 668 *p.670*

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17 St. Mary's L. J. 273 *p.325*

36. *ARTICLES: SETTLEMENT STRATEGIES AND REMEDIES CODE CHAPTER 42: WHO PAYS ATTORNEY'S FEES AND COSTS?*, 67 Tex. B. J. 106 (2004)
67 Tex. B. J. 106 *p.106*

37. *ARTICLE: FOREWORD TO AVOIDING SANCTIONS: TRYING TO DODGE THE BULLET*, 25 Tex. Tech L. Rev. 1 (1993)

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38. *7-100 Dorsaneo, Texas Litigation Guide @ 100.12*

39. *10-140 Dorsaneo, Texas Litigation Guide @ 140.01*

40. *2-10 Texas Civil Trial and Appellate Procedure @ 10-3*

41. *2-10 Texas Civil Trial and Appellate Procedure @ 10-9*

42. *2-10 Texas Civil Trial and Appellate Procedure @ 10-11*

43. *3-19 Texas Civil Trial and Appellate Procedure @ 19-1*

BRIEFS (9 Citing Briefs)

44. *RETZLAFF v. PURPLE RELAY SERVS. CO.*, 2009 TX App. Ct. Briefs 792476, 2010 TX App. Ct. Briefs LEXIS 1346 (Tex. App. May 14, 2010)

45. *Qi Weng v. Denton Hwy. Haltom Assocs.*, 2009 TX App. Ct. Briefs 446537, 2010 TX App. Ct. Briefs LEXIS 58 (Tex. App. Fort Worth Jan. 22, 2010)

46. *PRINCE v. FOREMAN*, 2008 TX App. Ct. Briefs 382498, 2009 TX App. Ct. Briefs LEXIS 3431 (Tex. App. Fort Worth Nov. 3, 2009)

47. *DRAKE v. ANDREWS*, 2007 TX App. Ct. Briefs 1576, 2008 TX App. Ct. Briefs LEXIS 3656 (Tex. App. Aug. 8, 2008)

48. *CERVANTES v. CERVANTES*, 2007 TX App. Ct. Briefs 35991, 2008 TX App. Ct. Briefs LEXIS 1039 (Tex. App. Jan. 8, 2008)

49. *Cornish v. Washington Mut. Bank*, 2006 TX App. Ct. Briefs 733343, 2007 TX App. Ct. Briefs LEXIS 1697 (Tex. App. Mar. 30, 2007)

50. *MURAT HOLDINGS v. RED ROOF INNS, INC.*, 2006 TX App. Ct. Briefs 203D, 2006 TX App. Ct. Briefs LEXIS 1459 (Tex. App. Dallas Aug. 23, 2006)

51. *KERN v. SPENCER*, 2006 TX App. Ct. Briefs 836737, 2006 TX App. Ct. Briefs LEXIS 167 (Tex. App. Fort Worth Aug. 8, 2006)

52. *MURAT HOLDINGS v. RED ROOF INNS, INC.*, 2006 TX App. Ct. Briefs 203D, 2006 TX App. Ct. Briefs LEXIS 1458 (Tex. App. Dallas July 14, 2006)

Exhibit F

LAWRENCE HIGGINS, PETITIONER, v. RANDALL COUNTY SHERIFF'S OFFICE, RESPONDENT

NO. 06-0917

SUPREME COURT OF TEXAS

257 S.W.3d 684; 2008 Tex. LEXIS 455; 51 Tex. Sup. J. 911

May 16, 2008, Opinion Delivered

SUBSEQUENT HISTORY: Released for Publication June 27, 2008.
On remand at *Higgins v. Randall County Sheriffs Office, 2009 Tex. App. LEXIS 1821 (Tex. App. Amarillo, Mar. 16, 2009)*

PRIOR HISTORY: [**1]
ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS.
Higgins v. Randall County Sheriffs Office, 2006 Tex. App. LEXIS 7423 (Tex. App. Amarillo, Aug. 22, 2006)

COUNSEL: For Mr. Lawrence Higgins, PETITIONER: Huntsville, TX.

For Randall county Sheriffs Ollice, RESPONDENT: Frandall County Crminal District Attorney, Canyon, TX.

JUDGES: JUSTICE O'NEILL delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE BRISTER, and JUSTICE MEDINA joined. JUSTICE GREEN filed a dissenting opinion, in which JUSTICE WAINWRIGHT and JUSTICE WILLETT joined. JUSTICE JOHNSON did not participate in the decision.

OPINION BY: Harriet O'Neill

OPINION

[*685] *Texas Rule of Appellate Procedure 20.1* governs the procedures to establish an appellant's indigence. The rule enumerates eleven items of financial information that the affidavit of indigence must contain, *TEX. R. APP. P. 20.1(b)*, and also provides that if no contest to the affidavit is filed, "no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs," *TEX. R. APP. P. 20.1(f)*. We must decide whether the appeal of a party asserting indigence may proceed when the affidavit lacks complete information on all of the items enumerated in subsection (b) but no contest to the affidavit is filed. We hold that it may. Accordingly, we reverse the court of appeals' judgment of dismissal and remand the case to that court **[**2]** for consideration of the petitioner's appeal.

Lawrence Higgins, a *pro se* inmate, timely appealed the trial court's dismissal of his civil suit for want of prosecution but failed to either pay the filing fee or file an affidavit of indigence. When the court of appeals requested payment of the filing fee within ten days, Higgins filed an affidavit of indigence. Because Higgins failed to file the affidavit *with* his appeal as *Texas Rule of Appellate Procedure 20.1(c)(1)* provides, and because the affidavit failed to fully comply with *Rule 20.1(b)*, the court dismissed Higgins's appeal. *Higgins v. Randall County Sheriffs Office, No. 07-05-0004-CV, 257 S.W.3d 732, 2005 Tex. App. LEXIS 495, at * 1-*2 (Tex. App.--Amarillo Jan. 19, 2005)*. We reversed on both

grounds, holding that an appeal may not be dismissed for a formal procedural defect unless the party is provided a reasonable opportunity to correct the defect. *See Higgins v. Randall County Sheriff's Office, 193 S.W.3d 898, 899-900 (Tex. 2006)* (*"Higgins I"*).

After our decision, by letter dated July 18, 2006, the court of appeals directed Higgins to file, by July 27, 2006, a written response justifying the late filing of his

[*686] affidavit and an amended affidavit **[**3]** that complied with *Rule 20.1*. According to Higgins, he received the court's letter on July 24th and that same day mailed a new affidavit of indigence, a copy of his inmate trust fund account statement, and a statement justifying his belatedness. That affidavit, in its entirety, reads:

> I, Lawrence Daniel Higgins, hereby swear that I am unable to pay any court costs in court of appeals No. 07-05-00004-CV. I am incarcerated and do not receive any monies from anywhere. I have no money at this time nor do I expect any money in the immediate future. I have attached a copy of the last trust fund account statement that I received which shows my balance to be $ 00.03. Please allow my appeal to proceed in forma pauperis since I am unable to pay the costs.

Higgins contends that under prison rules governing access to the law library, it was impossible for him to access the appellate rules and ascertain *Rule 20.1*'s requirements in time to comply with the court's July 27th deadline. No contest was filed to Higgins's affidavit. The court of appeals dismissed Higgins's appeal for failure to comply with *Rule 20.1(b). No. 07-05-0004-CV, 2006 Tex. App. LEXIS 7423, at *7*. We grant Higgins's petition for **[**4]** review to consider the effect of incomplete compliance with *Rule 20.1(b)* when an affidavit of indigence is uncontested.

The concept that courts should be open to all, including those who cannot afford the costs of admission, is firmly embedded in Texas jurisprudence. *See, e.g., TEX. CONST. art. I, § 13*; *Griffin Indus., Inc. v. Thirteenth Court of Appeals, 934 S.W.2d 349, 353 (Tex. 1996)*; *Pinchback v. Hockless, 139 Tex. 536, 164 S.W.2d 19, 19-20 (Tex. 1942)*; *see also Goffney v. Lowry, 554 S.W.2d 157, 159 (Tex. 1977)*; *Pendley v. Berry, 95 Tex. 72, 65 S.W. 32, 33 (Tex. 1901)*. The option of submitting an affidavit of indigence in lieu of a filing fee has been available in civil appeals for more than a century, first by statute and now by rule. *See* Act of May 3, 1871, 12th Leg., R.S., ch. 71, §§ 1-2, 1871 Tex. Gen. Laws 74, *amended by* Act of Apr. 14, 1879, 16th Leg., R.S., ch. 81, § 1, art. 1401, 1879 Tex. Gen. Laws 90, *amended by* Act of May 18, 1931, 42d Leg., R.S., ch. 134, § 1, 1931 Tex. Gen. Laws 226, *repealed by* Act of May 15, 1939, 46th Leg., ch. 25, § 1, 1939 Tex. Gen. Laws 201 (current version at *TEX. R. APP. P. 20.1*); *see also Pendley, 65 S.W. at 32-33*. Throughout this time, the fundamental requirement for **[**5]** asserting indigence has remained the same: the applicant must declare to the court, by affidavit, an inability to pay any, or the ability to pay only some, of the costs of appeal. *TEX. R. APP. P. 20.1(a)(1), (b), (k)*; *Pendley, 65 S.W. at 32-33*.

The method of ensuring fairness, permitting interested parties to contest the claim of indigence, has also been in place for more than a century. Act of Apr. 14, 1879, 16th Leg., R.S., ch. 81, § 1, art. 1401, 1879 Tex. Gen. Laws 90 (amending Act of May 3, 1871, 12th Leg., R. S., ch. 71, §§ 1-2, 1871 Tex. Gen. Laws 74); *TEX. R. APP. P. 20.1(e)*. If the affidavit is contested, the burden is on the applicant to prove indigence by a preponderance of the evidence. *TEX. R. APP. P. 20.1(g)*; *Pinchback, 164 S.W.2d at 20*. The test for determining indigence is straightforward: "Does the record as a whole show by a preponderance of the evidence that the applicant would be unable to pay the costs, or a part thereof, or give security therefor, if he really wanted to and made a good-faith effort to do so?" *Pinchback, 164 S.W.2d at 20*; *see also TEX. R. APP. P. 20.1(h)-(i)*. Depending upon the circumstances, certain types of financial information may be relevant **[**6]**

[*687] and helpful to a court when evaluating a contested claim of indigence, including the following items described in *Rule 20.1(b)*:

> (1) the nature and amount of the party's current employment income, government-entitlement income, and other income;
>
> (2) the income of the party's spouse and whether that income is available to the party;
>
> (3) real and personal property the party owns;
>
> (4) cash the party holds and amounts on deposit that the party may withdraw;
>
> (5) the party's other assets;
>
> (6) the number and relationship of any dependents;
>
> (7) the nature and amount of the party's debts;
>
> (8) the nature and amount of the party's monthly expenses;
>
> (9) the party's ability to obtain a loan for court costs;
>
> (10) whether an attorney is providing free legal services to the party without a contingent fee; and
>
> (11) whether an attorney has agreed to pay or advance court costs.

TEX. R. APP. P. 20.1(b). Although the rule was revised in 1997 to include these enumerated items, such information was already considered by the courts in determining whether, "from the record as a whole, it really appears that a party is unable to pay the costs." *Pinchback, 164 S. W.2d at 20*; *see TEX. R. APP. P. 20.1(b)(1)-(11)*; *Griffin Indus., 934 S.W.2d at 354* **[**7]** (considering the nature of the fee agreement between the appellant and her attorney, as well as the record as a whole, as demonstrating appellant's indigence).

The financial information described in *Rule 20.1(b)* is virtually the same information that *Texas Rule of Civil Procedure 145* requires to demonstrate indigence in the underlying proceedings before the trial court. *TEX. R. CIV. P. 145(b)*. Unlike in federal court, [1] our procedural rules require the filing of an affidavit of indigence both upon the initial filing of suit in the trial court and again if an appeal is taken. *TEX. R. APP. P. 20.1(a)*; *TEX. R. CIV. P.145(a)*. *Rule 145* permits the defendant or the clerk to contest the affidavit, provided it is not accompanied by an IOLTA certificate. [2] *TEX. R. CIV. P. 145(d)*. The trial court in this case dismissed Higgins's claim for want of prosecution rather than for failure to pay costs, and it appears from the record that the trial court was satisfied that Higgins was indeed indigent. No party contested Higgins's indigence at the trial court level.

> 1 In federal court, an indigent party may rely upon the affidavit filed in the trial court and need not file a second affidavit on appeal. *28 U.S.C. § 1915(a)*. **[**8]** The Federal Rules of Civil Procedure contain a form that indigent parties may complete to satisfy the indigence requirements. *See* FED. R. CIV. P. form 4.
>
> 2 *Rule 145* was amended in 2005 to prohibit contests to affidavits of indigence that are accompanied by an IOLTA certificate indicating that the party has passed the rigorous screening process for beneficiaries of IOLTA-funded programs. *See* TEX. R. CIV. P. 145(c)-(d). The amendment's purpose was to eliminate frivolous challenges to a party's indigence, thereby promoting "two important principles of our judicial system -- conservation of judicial resources and increased access to justice for the poor." Chief Justice Wallace B. Jefferson, *Access to Justice, 70 TEX. B. J. 687, 687 (2007)*. Our proposed 2008 rule changes extend the IOLTA certificate rule to appellate filings. *See Court Orders, 71 TEX. B. J. 286, 289-90 (2008)*.

On appeal, Higgins's affidavit did not specifically discuss all of the items enumerated in *Rule 20.1(b)*. However, Higgins did clearly attest that he had no current

[*688] or expected income of any kind, and that he had no prospects for receiving any money in the future. Further, as we indicated in *Higgins I,* "common sense" **[**9]** supports the notion that an incarcerated individual is highly unlikely to qualify for loans, and Higgins is not represented by counsel. *193 S.W.3d at 900* (quoting *Allred v. Lowry, 597 S.W.2d 353, 355 (Tex. 1980)*); *see TEX. R. APP. P. 20.1(b)(9), (11)*. Importantly, neither the clerk, the court reporter, nor any party challenged Higgins's claim of indigence by filing a contest to his affidavit, as *subsection (e)* specifically allows. [3] *TEX. R. APP. P. 20.1(e)*. Had any one done so, *subsection (h)* would apply, which provides as follows:

> If the affidavit of indigence is filed in an appellate court *and a contest is filed,* the court may:
>
> (1) conduct a hearing and decide the contest;
>
> (2) decide the contest based on the affidavit and any other timely filed documents;
>
> (3) request the written submission of additional evidence and, without conducting a hearing, decide the contest based on the evidence; or
>
> (4) refer the matter to the trial court with instructions to hear evidence and grant the appropriate relief.

TEX. R. APP. P. 20.1(h) (emphasis added). If no contest is filed, subsection (f) provides that "no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will **[**10]** be allowed to proceed without advance payment of costs." *TEX. R. APP. P. 20.1(f)*.

> 3 Respondent Randall County Sheriff's Office elected not to file either a response to Higgins's petition for review or a brief on the merits in this Court.

The purpose of *Rule 20.1* is to *permit* parties to proceed without paying filing fees if they are unable to do so, and we have long interpreted the Rules of Appellate Procedure liberally in favor of preserving appellate rights. *See Verburgt v. Dorner, 959 S.W.2d 615, 616-17 (Tex. 1997)*; *Jones v. Stayman, 747 S.W.2d 369, 370 (Tex. 1987)* ("Indigency provisions, like other appellate rules, have long been liberally construed in favor of a right to appeal."); *see also TEX. R. CIV. P.1* ("[T]o obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law . . . with as great expedition and dispatch and at the least expense . . . as may be practicable, these rules shall be given a liberal construction."). It is a simple matter under the rule to contest an affidavit of indigence; the contest must only be timely and it need not be sworn. *TEX. R. APP. P. 20.1(e)*. The dissenting justices posit that, **[**11]** when no contest is filed, subsection (f) only operates to "deem[] true" whatever allegations the affidavit contains; if those allegations are incomplete, the appeal should be dismissed. S.W.3d , . Subsection (f), however, does more than "deem" the affidavit's allegations true; it specifically provides that the allegations "will be deemed true, *and the party will be allowed to proceed* without advance payment of costs." *TEX. R. APP. P. 20.1(f)* (emphasis added). The dissent's view would render the foregoing language meaningless.

Once again, "[w]e decline to elevate form over substance, as the dissenters would," *Verburgt, 959 S.W.2d at 617*, and conclude that Higgins's uncontested affidavit was adequate to fulfill the fundamental purpose of *Rule 20.1*. Our decision "reflect[s] the policy embodied in our appellate rules that disfavors disposing of appeals based upon harmless procedural defects." *Id. at 616*; *see Jones, 747 S.W.2d at 370*. We have steadfastly adhered

[*689] to this policy in refusing to require strict conformance with other formal aspects of *Rule 20.1*, including the requirement that an affidavit of indigence be filed "with or before the notice of appeal." *See, e.g., Sprowl v. Payne, 236 S.W. 3d 786, 787 (Tex. 2007)*; **[**12]** *Springer v. Springer, 240 S.W.3d 871, 872 (Tex. 2007)*; *Hood v. Wal-Mart Stores, Inc., 216 S.W.3d 829, 830 (Tex. 2007)*; *Higgins I, 193 S.W.3d at 899-900.*

Higgins's affidavit adequately explained that he is unable to pay the required filing fee and, as no challenge was made to his assertion of indigence, Higgins is entitled to proceed without advance payment of costs. Accordingly, without hearing oral argument, we grant the petition for review, reverse the court of appeals' judgment, and remand Higgins's appeal to that court for further proceedings consistent with this opinion. *See TEX. R. APP. P. 59.1.*

Harriet O'Neill

Justice

OPINION DELIVERED: May 16, 2008

DISSENT BY: PAUL W. GREEN

DISSENT

JUSTICE GREEN, joined by JUSTICE WAINWRIGHT and JUSTICE WILLETT, dissenting.

The Texas Rules of Appellate Procedure require a party filing an appeal to pay a filing fee with the appellate court. *TEX. R. APP. P. 5.* Failure to pay the filing fee may result in dismissal of the appeal. *Id.* ("The appellate court may enforce this rule by any order that is just."); *see also id. 25.1(b), 42.3.* But the rules also provide that an indigent appellant may be excused from paying the filing fee if he demonstrates by affidavit his inability **[**13]** to pay costs. *See id. 20.1. Rule 20.1(b)* states that the affidavit "must" contain "complete information" concerning eleven specific categories of information regarding the affiant's financial condition. *Id. 20.1(b).* The question presented here is whether, in the case of an affidavit violating *Texas Rule of Appellate Procedure 20.1(b), Rule 20.1(f)* [1] strips courts of appeals of their general sua sponte dismissal power.

> 1 "Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs." *TEX. R. APP. P. 20.1(f).*

The Court today concludes that it does, holding that when no contest is filed, any affidavit purporting to invoke indigent status is sufficient to avoid dismissal, no matter how deficient. I respectfully dissent because *Rule 20.1* properly places the burden of proving indigence entirely on the party seeking that status and makes clear what that party must do to establish his inability to pay costs. [2] An affidavit that fails to comply with *Rule 20.1(b)* fails to establish indigence, whether or not a contest is filed.

> 2 Contrary to the Court's suggestion, whether **[**14]** or not "it appears from the record that the trial court was satisfied that Higgins was indeed indigent," S.W.3d , at , plays no part in our consideration of Higgins's conduct at the court of appeals. The two processes are wholly independent, and must be evaluated as such. *See TEX. R. APP. P. 20.1(a), (c).*

Rule 20.1(f) does not create an exception to the court's power to dismiss an appeal when the affidavit violates *Rule 20.1(b). Rule 20.1* contains three equally mandatory requirements, none less compulsory than another:

> (a) Establishing Indigence. A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if:
>
> **[*690]** (1) the party files an affidavit of indigence in compliance with this rule;
>
> (2) the claim of indigence is not contested or, if contested, the contest is not sustained by written order; and
>
> (3) the party timely files a notice of appeal.

Id. 20.1(a). The absence of an authorized contest

alleviates *only* the (a)(2) burden of proving the affidavit's allegation that the affiant lacks the actual ability to pay. *Id. 20.1(a)(2), (f)*. Because the (a)(1) and (a)(3) requirements stand independently, affiants must *always* "file in compliance" with **[**15]** each component of *Rule 20.1* and must *always* meet the deadline for filing a notice of appeal. Unlike *(a)(2)*, neither *(a)(1)* nor *(a)(3)* contain any recognition of *(f)*, and that difference must be given meaning. The absence of any language recognizing *(f)* in *(a)(1)* and *(a)(3)* means that (f) cannot dispense with those two requirements. It is unimaginable that the lack of a contest would absolve a petitioner's failure to comply with appellate deadlines, as required by *(a)(3)*, yet--without any basis in the language of the Rule--the Court somehow concludes that *(a)(1)* is subject to different treatment.

Rule 20.1(f) has nothing to do with an appellate court's power to dismiss; it is about proof. *Rule 20.1(g)* provides that "[i]f a contest is filed, the party who filed the affidavit of indigence *must prove the affidavit's allegations." Id. 20.1(g)* (emphasis added); *see also id. 20.1(h)-(i)* (hearing procedures). *Rule 20.1(f)* "deem[s]" allegations "true" if no contest is filed. *Id. 20.1(f)*. But an incomplete affidavit constitutes a defect regardless of whether its allegations are proven in a hearing under *(g)* or "deemed true" by operation of *(f)*. *Id.* Because missing allegations cannot be deemed **[**16]** true, an incomplete affidavit violates the "complete information" requirement, *id. 20.1(b)*, and the requirement of filing "in compliance with this rule," *id. 20.1(a)(1)*, justifying dismissal of the appeal. [3]

> 3 The Court suggests that before the adoption of *Rule 20.1(b)* and its requirement that affiants provide eleven specific pieces of information, "such information was already considered by the courts" in determining indigence. S.W.3d at . But how could courts be considering information that affiants were not providing? This case is not the first to prove that affiants do not always provide the information required for accurate indigence determinations. *See, e.g., Johnson v. Harris County, No. 14-03-00992-CV, 257 S.W.3d 730, 2004 Tex. App. LEXIS 1567, 2004 WL 306088, at *2 (Tex. App.--Houston [14th Dist.] Feb. 19, 2004, no pet.)* (mem. op.) (affiant failed to provide all 20.1(b) information); *Teague v. Southside Bank, No. 12-03-00003-CV, 257 S.W.3d 726, 2003 Tex. App. LEXIS 4964, 2003 WL 21356052, at *2 (Tex. App.--Tyler June 11, 2003, no pet.)* (mem. op.) (affiant failed to provide all 20.1(b) information); *Thomas v. Olympus/Nelson Prop. Mgmt., 97 S.W.3d 350, 353 (Tex. App.--Houston [14th Dist.] 2003, no pet.)* (affiant failed to provide all 20.1(b) information). **[**17]** The failure of affiants to provide complete information is the reason that *Rule 20.1(b)* must exist and must be enforced.

We recognized this in *Higgins v. Randall County Sheriff's Office, 193 S.W.3d 898 (Tex. 2006)* (per curiam), concluding that the court of appeals could dismiss Higgins's appeal if his affidavit's defects remained after a reasonable opportunity to correct. *Id. at 899-900* (citing *TEX. R. APP. P. 44.3* and *In re J.W., 52 S.W.3d 730, 733 (Tex. 2001)* (per curiam)). We later affirmed *Higgins*'s construction in *Hood v. Wal-Mart Stores, Inc., 216 S.W.3d 829 (Tex. 2007)* (per curiam): "[U]nder *Texas Rule of Appellate Procedure 44.3*, a court of appeals *may not dismiss* an action due to a formal defect or irregularity *without first* allowing the petitioner reasonable time to cure the error." *Id. at 830* (emphasis added). We have never held, as the Court today does, that *Rule 20.1(f)* prevents courts from dismissing a case no matter how deficient the **[*691]** affidavit. *Higgins* concluded that if a reasonable opportunity to correct were provided, this court of appeals could dismiss Higgins's appeal because of this affidavit's defects. *193 S.W.3d at 899-900*. The Court's citation to the *Higgins* opinion **[**18]** in support of today's decision is inexplicable.

The Court says that "[t]he method of ensuring fairness, permitting interested parties to contest the claim of indigence, has also been in place for more than a century," implying that the Court's holding is in accord with our historical practice. S.W.3d at . Even if true, this historical premise is not a license to ignore the text of the rule that governs today. Before 1997, Rule 40(a)(3) governed affidavits of indigence and required only that an affiant "state he is unable to pay the costs of appeal or any part thereof, or to give security therefor." TEX. R. APP. P. 40(a)(3) (Tex. & Tex. Crim. App. 1986, amended 1990). If that were the rule we were still applying, the Court's analysis would be more persuasive. But the 1997 promulgation of *Rule 20.1* created two new requirements that we cannot ignore: *Rule 20.1(a)(1)*, a *new requirement* that affiants "file an affidavit of indigence in compliance with this rule," and *Rule 20.1(b)*, a *new requirement* that affiants provide complete

information about the eleven enumerated indicia of indigence. *TEX. R. APP. P. 20.1(a)-(b)*. The Court refuses to recognize those changes because it prefers **[**19]** a different balance. That is not our role. [4]

> 4 I agree with the Court that we ought not "elevate form over substance," S.W.3d at , and that is why I would adhere to the rule that courts of appeals must provide a reasonable opportunity to correct before dismissing appeals like Higgins's. The reasonable opportunity to correct ensures that mere oversights and good faith errors are not subject to dismissal.

In its interpretation of *Rule 20.1(b)*, the Court converts mandatory terms into permissive suggestions without justification. According to the Court, "[d]epending upon the circumstances, certain types of financial information may be relevant and helpful to a court when evaluating a contested claim of indigence, including the following items described in *Rule 20.1(b)* . . . ." S.W.3d at . Under that reading, when *Rule 20.1(b)* says that "[t]he affidavit must also contain complete information" about the eleven types of information, "must" really only means "may," and even then only "depending upon the circumstances." *Id.* at . That is not a "liberal construction" of the text, *id.* at ; that is rewriting the text. If *Rule 20.1(b)*'s purpose was to require different showings **[**20]** in different circumstances, the text would have included more flexible terms. After all, the rules of appellate procedure should be interpreted as more than mere "relevant and helpful" suggestions. S.W.3d at . *Rule 20.1(b)* must be read to give litigants notice of what is actually required: An affidavit containing the eleven enumerated indicia of indigence, without exception.

As the Court endorses Higgins's conclusory assertions of his inability to pay costs, *id.* at , it fails to recognize the critical omissions in his affidavit. Higgins's affidavit says nothing about his spouse's income, nothing about real or personal property, nothing about other assets, nothing about dependants, nothing about debts, nothing about monthly expenses, nothing about the ability to obtain a loan, and nothing about an attorney. *See TEX. R. APP. P. 20.1(b)(2), (b)(3), (b)(5)-(11)*. Yet under the Court's rule, Higgins could have three yachts, a millionaire spouse, and two parents who would gladly loan him the money, while still proceeding as an indigent. *Rule 20.1(b)* stands for the proposition that an accurate indigence inquiry *always* requires **[*692]** *all* of the *Rule 20.1(b)* information. Without it, neither **[**21]** we nor the potential contestants can conduct a meaningful evaluation of the litigant's indigence. Even if "'common sense' supports the notion that an incarcerated individual is highly unlikely to qualify for loans," S.W.3d at (quoting *Higgins, 193 S.W.3d at 900*), no part of our jurisprudence recognizes an inmate exception to *Rule 20.1*. Instead, we require individualized determinations precisely because assumptions and likelihoods are inaccurate predictors of actual need. *See Gibson v. Tolbert, 102 S.W.3d 710, 713 (Tex. 2003)*. "[I]f the courts allow the privilege granted [by the indigent cost rules] to be abused by those who, in fact, ought to pay, this may lead to the abolition of the exemption." *Pinchback v. Hockless, 139 Tex. 536, 164 S.W.2d 19, 20 (Tex. 1942)*. Under *Rule 20.1*, courts ought not make the choice of whether to challenge the claim of indigence, but they ought to be able to ensure that the choice belonging to the contestants is a meaningful one.

The Court's decision today changes the balance struck by *Rule 20.1* and departs from the Rule's clear mandates. We ought not overrule *Higgins* and *Hood* less than two years after their issuance. I would hold that the court of appeals did **[**22]** not abuse its discretion by dismissing this appeal because Higgins's affidavit of indigence was defective on its face, and because Higgins was given a reasonable opportunity to correct his affidavit of indigence and failed to do so. [5] Because the Court does not, I respectfully dissent.

> 5 Without explanation, the Court today approves an affidavit of indigence filed in the wrong court. *See TEX. R. APP. P. 20.1(c)(1)-(2)* (affidavits of indigence for appeals must be filed in the trial court). Since I would hold that the violation of *Rule 20.1(b)* justifies the court of appeals' dismissal, I need not address whether the previous proceedings in this matter justify this strange result. *See Higgins, 193 S.W.3d 898*; *cf. Hood, 216 S.W.3d 829* (approving an appellant's affidavit of indigence filed in the court of appeals).

PAUL W. GREEN

JUSTICE

OPINION DELIVERED: May 16, 2008

Higgins v. Randall County Sheriff's Office, 257 S.W.3d 684, 2008 Tex. LEXIS 455, 51 Tex. Sup. Ct. J. 911 (Tex. 2008)

Restrictions: *Unrestricted*
FOCUS(TM) Terms: *No FOCUS terms*
Print Format: *FULL*
Citing Ref. Signal: *Hidden*

SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary

No negative subsequent appellate history.

Citing References:

Positive Analyses:	**Followed (8)**
Neutral Analyses:	Dissenting Op. (1)
Other Sources:	Law Reviews (2), Treatises (5), Court Documents (14)

LexisNexis Headnotes: HN1 (8), HN2 (4), HN3 (18), HN5 (11), HN6 (2), HN8 (3), HN9 (11)

PRIOR HISTORY (3 citing references)

1. *Higgins v. Randall County Sheriffs Office*, 257 S.W.3d 732, 2005 Tex. App. LEXIS 495 (Tex. App. Amarillo 2005)

2. **Reversed by, Remanded by:**

   Higgins v. Randall County Sheriff's Office, 193 S.W.3d 898, 2006 Tex. LEXIS 487, 49 Tex. Sup. Ct. J. 645 (Tex. 2006)

3. **On remand at:**

   Higgins v. Randall County Sheriffs Office, 2006 Tex. App. LEXIS 7423 (Tex. App. Amarillo Aug. 22, 2006)

   Petition for review granted by, Reversed by, Remanded by (CITATION YOU ENTERED):

   Higgins v. Randall County Sheriff's Office, 257 S.W.3d 684, 2008 Tex. LEXIS 455, 51 Tex. Sup. Ct. J. 911 (Tex. 2008)

SUBSEQUENT APPELLATE HISTORY (4 citing references)

4. **On remand at:**

Higgins v. Randall County Sheriffs Office, 2009 Tex. App. LEXIS 1821 (Tex. App. Amarillo Mar. 16, 2009)

5. **Petition for review denied by:**

Higgins v. Randall County Sheriff's Office, 2009 Tex. LEXIS 389 (Tex. May 29, 2009)

6. **Petition for review denied by:**

Higgins v. Randall County Sheriff's Office, 2009 Tex. LEXIS 531 (Tex. July 17, 2009)

7. **Writ of certiorari denied:**

Higgins v. Randall County Sheriff's Office, 558 U.S. 973, 130 S. Ct. 468, 175 L. Ed. 2d 314, 2009 U.S. LEXIS 7522, 78 U.S.L.W. 3237 (2009)

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8. **Cited by:**
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9. **Cited by:**
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10. **Cited by:**
CMH Homes v. Perez, 340 S.W.3d 444, 2011 Tex. LEXIS 390, 54 Tex. Sup. Ct. J. 1098 (Tex. 2011) **LexisNexis Headnotes HN9**
340 S.W.3d 444 *p.453*

11. **Followed by:**
In re C.H.C., 331 S.W.3d 426, 2011 Tex. LEXIS 77, 54 Tex. Sup. Ct. J. 520 (Tex. 2011) **LexisNexis Headnotes HN3, HN5**
331 S.W.3d 426 *p.429*

12. **Cited by:**
Sweed v. Nye, 323 S.W.3d 873, 2010 Tex. LEXIS 793, 54 Tex. Sup. Ct. J. 151 (Tex. 2010) **LexisNexis Headnotes HN6**

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TEXAS COURT OF APPEALS

13. **Followed by:**
Adams v. Ross, 2012 Tex. App. LEXIS 9237 (Tex. App. Houston 1st Dist. Nov. 1, 2012) **LexisNexis Headnotes HN1, HN3, HN5, HN8, HN9**
2012 Tex. App. LEXIS 9237

14. **Cited by:**
Rodriguez v. Malaise Law Firm, 2012 Tex. App. LEXIS 8992 (Tex. App. San Antonio Oct. 31, 2012) **LexisNexis Headnotes HN1, HN5, HN9**
2012 Tex. App. LEXIS 8992

15. **Cited by:**
In re R.G., 388 S.W.3d 820, 2012 Tex. App. LEXIS 7666 (Tex. App. Houston 1st Dist. 2012) **LexisNexis Headnotes HN9**
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16. **Cited by:**
Caldwell v. Caldwell, 2012 Tex. App. LEXIS 7092 (Tex. App. Austin Aug. 16, 2012) **LexisNexis Headnotes HN3**
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17. **Cited by:**
Bonner v. Austin, 2012 Tex. App. LEXIS 6028 (Tex. App. Houston 1st Dist. July 24, 2012) **LexisNexis Headnotes HN1, HN3, HN5, HN8**
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18. **Cited by:**
Shockome v. Shockome, 2012 Tex. App. LEXIS 3440 (Tex. App. San Antonio May 2, 2012) **LexisNexis Headnotes HN3, HN5**
2012 Tex. App. LEXIS 3440

19. **Cited by:**
Jackson v. North Forest Indep. Sch. Dist., 2012 Tex. App. LEXIS 591 (Tex. App. Houston 1st Dist. Jan. 26, 2012) **LexisNexis Headnotes HN9**
2012 Tex. App. LEXIS 591

20. **Cited by:**
Moreno v. Perez, 363 S.W.3d 725, 2011 Tex. App. LEXIS 8831 (Tex. App. Houston 1st Dist. 2011) **LexisNexis Headnotes HN1, HN2, HN3, HN5, HN9**
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21. **Cited by:**
Kastner v. Tex. Bd. of Law Examiners, 2011 Tex. App. LEXIS 6669 (Tex. App. Austin Aug. 18, 2011) **LexisNexis Headnotes HN3**
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22. **Followed by:**
Eggers v. Van Zandt, 2011 Tex. App. LEXIS 6479 (Tex. App. Amarillo Aug. 15, 2011) **LexisNexis Headnotes HN1, HN3**
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24. **Cited by:**
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25. **Cited by:**
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331 S.W.3d 796 *p.800*

26. **Cited by:**
Roblin v. Briggs, 2010 Tex. App. LEXIS 8655 (Tex. App. Corpus Christi Oct. 28, 2010) **LexisNexis Headnotes HN3**
2010 Tex. App. LEXIS 8655

27. **Followed by:**
Morris v. Aguilar, 366 S.W.3d 208, 2010 Tex. App. LEXIS 5365 (Tex. App. Austin 2010) **LexisNexis Headnotes HN3**
366 S.W.3d 208 *p.211*

28. **Followed by:**
Conner v. Johnson, 2010 Tex. App. LEXIS 3586 (Tex. App. Amarillo May 11, 2010) **LexisNexis Headnotes HN3**
2010 Tex. App. LEXIS 3586

29. **Followed by, Cited in Dissenting Opinion at:**
In re B.N., 303 S.W.3d 16, 2009 Tex. App. LEXIS 9410 (Tex. App. Waco 2009) **LexisNexis Headnotes HN1, HN2, HN5, HN9**

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303 S.W.3d 16 *p.18*
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32. **Followed by:**
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33. **Cited by:**
Kastner v. Martin & Drought, P.C., 2009 Tex. App. LEXIS 2321 (Tex. App. San Antonio Apr. 8, 2009) **LexisNexis Headnotes HN2**
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34. **Followed by:**
Kastner v. Martin & Drought, P.C., 2009 Tex. App. LEXIS 1534 (Tex. App. San Antonio Mar. 11, 2009) **LexisNexis Headnotes HN3**
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35. **Cited by:**
In re Norton, 2008 Tex. App. LEXIS 8793 (Tex. App. Amarillo Nov. 24, 2008)
2008 Tex. App. LEXIS 8793

36. **Cited by:**
Tex. Dep't of Pub. Safety v. J.H.J., 274 S.W.3d 803, 2008 Tex. App. LEXIS 8625 (Tex. App. Houston 14th Dist. 2008) **LexisNexis Headnotes HN5**
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37. **Cited by:**
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43. *2-30 Dorsaneo, Texas Litigation Guide @ 30.105*

44. *10-149 Dorsaneo, Texas Litigation Guide @ 149.06*

45. *10-149 Dorsaneo, Texas Litigation Guide @ 149.201*

46. *10-149 Dorsaneo, Texas Litigation Guide @ 149.56*

47. *2-14 Texas Civil Trial and Appellate Procedure @ 14-5*

BRIEFS (13 Citing Briefs)

48. *Stanley Works v. Wichita Falls Independent School District*, 2012 TX S. Ct. Briefs 552, 2012 TX S. Ct. Briefs LEXIS 528 (Tex. July 12, 2012)

49. *PARSONS v. TURLEY*, 2011 TX S. Ct. Briefs 338, 2011 TX S. Ct. Briefs LEXIS 1188 (Tex. Nov. 8, 2011)

50. *DOUGLASS v. NEAL*, 2011 TX S. Ct. Briefs 593, 2011 TX S. Ct. Briefs LEXIS 669 (Tex. July 29, 2011)

51. *Davis v. Tarrant County*, 2011 TX S. Ct. Briefs 73, 2011 TX S. Ct. Briefs LEXIS 521 (Tex. July 1, 2011)

52. *CMH HOMES, INC. v. PEREZ*, 2010 TX S. Ct. Briefs 688, 2010 TX S. Ct. Briefs LEXIS 2124 (Tex. Nov.

12, 2010)

53. *AMO ENTERPRISES v. MONTANEZ*, 2012 TX App. Ct. Briefs 92, 2012 TX App. Ct. Briefs LEXIS 2051 (Tex. App. Oct. 29, 2012)

54. *JENNINGS v. WALLBUILDER PRESENTATIONS, INC.*, 2012 TX App. Ct. Briefs 47, 2012 TX App. Ct. Briefs LEXIS 673 (Tex. App. Fort Worth May 16, 2012)

55. *RICHMONT AVIATION, INC. v. COMBS*, 2011 TX App. Ct. Briefs 666214, 2012 TX App. Ct. Briefs LEXIS 378 (Tex. App. Austin Apr. 17, 2012)

56. *KASTNER v. TEXAS BD. OF LAW EXAMINERS*, 2010 TX App. Ct. Briefs 56240, 2011 TX App. Ct. Briefs LEXIS 386 (Tex. App. Austin Apr. 7, 2011)

57. *WILSON v. CLOUSER*, 2010 TX App. Ct. Briefs 246, 2010 TX App. Ct. Briefs LEXIS 3678 (Tex. App. Houston 14th Dist. Aug. 31, 2010)

58. *Shanklin v. Texas Dep't of Crim. Justice*, 2009 TX App. Ct. Briefs 502, 2009 TX App. Ct. Briefs LEXIS 2751 (Tex. App. Dec. 7, 2009)

59. *Shanklin v. Texas Dep't of Crim. Justice*, 2009 TX App. Ct. Briefs 502, 2009 TX App. Ct. Briefs LEXIS 2696 (Tex. App. Nov. 5, 2009)

60. *American Int'l Specialty Lines Ins. Co. v. LM Ericsson Telefon, AB*, 2007 TX App. Ct. Briefs 1747, 2008 TX App. Ct. Briefs LEXIS 1841 (Tex. App. May 28, 2008)

MOTIONS (1 Citing Motion)

61. *In re MATA v GARCIA*, 2012 TX S. Ct. Motions 99428, 2012 TX S. Ct. Motions LEXIS 83 (Tex. May 29, 2012)

Exhibit G

IN RE: CARLA KAYE VILLANUEVA

No. 06-09-00045-CV

COURT OF APPEALS OF TEXAS, SIXTH DISTRICT, TEXARKANA

292 S.W.3d 236; 2009 Tex. App. LEXIS 5480

July 16, 2009, Submitted
July 17, 2009, Decided

COUNSEL: Hon. Angela L. Lee, Hon. Annette M. Lamoreaux, Hon. Martha M. Beard-Duncan, Texas Advocacy Project, Austin, TX.

Hon. James H. Verschoyle, Attorney At Law, Atlanta, TX.

JUDGES: **[**1]** Before Morriss, C.J., Carter and Moseley, JJ. Opinion by Chief Justice Morriss.

OPINION BY: Josh R. Morriss, III

OPINION

[*238] Original Mandamus Proceeding

Opinion by Chief Justice Morriss

OPINION

Carla Kaye Villanueva, proceeding pro se below, brought a divorce action and suit affecting the parent-child relationship (SAPCR). She also filed an affidavit of inability to pay costs. [1] Her husband filed a waiver of service, in which he waived his right to make an appearance in the case and his right to further notice in the proceedings. So, the matter below is an uncontested divorce and custody case.

1 We find nothing in the record to question or contest Villanueva's indigency.

Before the husband's waiver, on February 23, 2009, the trial court sua sponte entered its order appointing ad litem and compelling home study. [2] The order does not recite that there was any hearing or any evidence taken to support the order, and we find in the record no evidence that any hearing was held or any evidence was taken. In that order, the trial court found that "it is in the best interest of the child[ren] that an attorney ad litem be appointed"; that order names James H. Verschoyle as attorney ad litem and provides that the parties pay **[**2]** Verschoyle in advance a fee of $ 750.00. The order also directed Charlene Raney perform a social study of the home within forty-five days of the order and directed the parties to pay Raney an unspecified reasonable fee in advance in equal shares.

2 We will use the term "social study" as described by *Section 107.0501(1) of the Texas Family Code. See TEX. FAM. CODE ANN. § 107.0501(1)* (Vernon 2008).

The attorney ad litem filed an answer on behalf of the children March 4, 2009. Villanueva objected to the trial court's order March 18, 2009. In response, again with no recitation or indication that any hearing was held or evidence received relative to Villanueva's objections, the trial court overruled her objection to the social study and abated [3] her objection to the appointment of the attorney ad litem. In abating her objection to the appointment of the attorney ad litem, the trial court stated, "If [Villanueva] is able to present the necessary information, the objection will be sustained. If not, the

Court will continue the hearing and overrule the objection." The effect of the trial court's ruling is that the social study order is still in effect and that the attorney ad litem is still appointed, **[**3]** the latter to be made the subject of a deferred ruling, which would come after a later hearing or a later presentation of information by Villanueva. [4]

3 We emphasize that the order does not abate the appointment of the attorney ad litem, but instead abates Villanueva's objection to that appointment, thus deferring a ruling on the merits of that objection.

4 To the extent that *Section 107.023 of the Texas Family Code* mandates that the attorney ad litem be paid for his work done in preparation of the answer on behalf of the children, we will address the trial court's order appointing the attorney ad litem. *TEX. FAM. CODE ANN. § 107.023* (Vernon 2008). We will develop this issue later in the opinion.

Villanueva argues that the trial court cannot make this order without evidence that such appointments are necessary.

[*239] Her argument is that, since the divorce and custody issues are uncontested and Villanueva's parental rights are not being challenged, the trial court was without authority to make these appointments, especially considering that she is unable to pay for them. She asks this Court to issue a writ of mandamus directing the trial court to vacate its order appointing the attorney ad litem **[**4]** and providing for a home study. We address the issues presented by describing the trial court's duties under the Texas Family Code, outlining the trial court's authority to appoint an attorney ad litem, and outlining its authority to order a social study, exploring the considerations the trial court must undertake as to each determination. We then examine the trial court's reasoning here for appointing the attorney ad litem and ordering a home study in terms of those considerations and in terms of the effect of Villanueva's indigent status. Finally, we put the analysis in the framework to determine whether mandamus will lie. After doing so, we will conditionally grant mandamus relief.

(1) Duty of the Trial Court in Divorce and SAPCR

A petition in a suit to dissolve a marriage involving children under the age of eighteen must include a SAPCR. [5] *See TEX. FAM. CODE ANN. § 6.406(b)* (Vernon 2006); *Brown, 917 S.W.2d at 361-62* (in divorce proceeding in which minor children are involved, trial court must dispose of all issues before it, including questions of conservatorship, possession, and access to minor children and child support). The Texas Family Code allows for parties to waive the issuance **[**5]** or service of process as did Villanueva's husband here. *TEX. FAM. CODE ANN. § 6.4035* (Vernon 2006).

> 5 A SAPCR is "a suit filed as provided by this title in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is requested." *TEX. FAM. CODE ANN. § 101.032(a)* (Vernon 2008); *Brown v. Brown, 917 S.W.2d 358, 361 (Tex. App.--El Paso 1996, no writ).*

Generally, a final order in a SAPCR must include a parenting plan. *See TEX. FAM. CODE ANN. § 153.603* (Vernon 2008). The Texas Family Code permits the parties to submit an agreed parenting plan, but that agreed plan must still be approved by the trial court. *See TEX. FAM. CODE ANN. § 153.007* (Vernon 2008). In determining whether to approve the proposed parenting plan, the trial court is called on to determine whether the plan is in the best interest of the child or children. *TEX. FAM. CODE ANN. § 153.007(b).* This mandate is consistent with the Texas Family Code's general pronouncement that the child's best interest is to be "the primary consideration" in determining issues of conservatorship and possession of and access to the child. **[**6]** *TEX. FAM. CODE ANN. § 153.002* (Vernon 2008).

(2) Authority to Appoint Attorney Ad Litem

Again, our inquiry here is a limited one that addresses only the payment of the appointed attorney ad litem for the work performed before the trial court's decision to hold the appointment order in abeyance. The trial court is given discretionary authority to appoint an attorney ad litem in certain cases and must take certain factors into consideration in deciding whether to make such appointments:

> (a) In a suit in which the best interests of a child are at issue, other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as

[*240] conservator of the child, the court may appoint one of the following:

> (1) an amicus attorney;
>
> (2) an attorney ad litem; or
>
> (3) a guardian ad litem.
>
> . . . .

(b) In determining whether to make an appointment under this section, the court:

> (1) shall:
>
> (A) give due consideration to the ability of the parties to pay reasonable fees to the appointee; and
>
> (B) balance the child's interests against the cost to the parties that would result from an appointment by taking into consideration the cost of available alternatives **[**7]** for resolving issues without making an appointment;
>
> (2) may make an appointment only if the court finds that the appointment is necessary to ensure the determination of the best interests of the child, unless the appointment is otherwise required by this code; and
>
> (3) may not require a person appointed under this section to serve without reasonable compensation for the services rendered by the person.

TEX. FAM. CODE ANN. § 107.021 (Vernon 2008). [6] It is important to note that *Section 107.021(b)(1)(A) of the Texas Family Code* specifically directs the trial court to consider the ability of the parties to pay reasonable fees to the appointee when deciding whether to make a discretionary appointment. *See TEX. FAM. CODE ANN. § 107.021(b)(1)(A)*. This becomes rather important here because *Section 107.021* also prohibits the trial court from requiring that a person appointed under that section serve without reasonable compensation. [7] *TEX. FAM. CODE ANN. § 107.021(b)(3)*. The Texas Family Code further addresses the payment of those appointed pursuant to *Section 107.021*:

> (a) In a suit other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment **[**8]** of the entity as conservator of the child, in addition to the attorney's fees that may be awarded under Chapter 106, the following persons are entitled to reasonable fees and expenses in an amount set by the court and ordered to be paid by one or more parties to the suit:
>
> (1) an attorney appointed as an amicus attorney or as an attorney ad litem for the child; and
>
> (2) a professional who holds a relevant professional license and who is appointed as guardian ad litem for the child, other than a volunteer advocate.
>
> (b) The court shall:
>
> (1) determine the fees and expenses of an amicus attorney, an attorney ad litem, or a guardian ad litem by reference to the reasonable and customary

[*241] fees for similar services in the county of jurisdiction;

(2) order a reasonable cost deposit to be made at the time the court makes the appointment; and

(3) before the final hearing, order an additional amount to be paid to the credit of a trust account for the use and benefit of the amicus attorney, attorney ad litem, or guardian ad litem.

(c) A court may not award costs, fees, or expenses to an amicus attorney, attorney ad litem, or guardian ad litem against the state, a state agency, or a political subdivision **[**9]** of the state under this part.

(d) The court may determine that fees awarded under this subchapter to an amicus attorney, an attorney ad litem for the child, or a guardian ad litem for the child are necessaries for the benefit of the child.

TEX. FAM. CODE ANN. § 107.023.

6 We have omitted reference to the language in Section (a-1) because it is irrelevant to our situation. Section (a-1) requires the trial court to appoint an amicus attorney or an attorney ad litem in a suit seeking termination of parental rights brought by an individual "unless the court finds that the interests of the child will be represented adequately by a party to the suit whose interests are not in conflict with the child's interests." *TEX. FAM. CODE ANN. § 107.021(a-1)* (Vernon 2008).

7 Again, it is because the Texas Family Code prohibits the trial court from requiring an appointed attorney ad litem to work without reasonable compensation and because the attorney ad litem has already participated to some extent in the cause below, that we feel the attorney ad litem issue is before us.

Section 107.021 of the Texas Family Code provides us the necessary considerations the trial court must undertake in its decision whether **[**10]** to make discretionary appointments. In determining whether to appoint a representative, the trial court must give due consideration to the parties' ability to pay reasonable fees to the appointee. *TEX. FAM. CODE ANN. § 107.021(b)(1)(A)*. The trial court must also balance the child's interests against the cost to the parties by taking into consideration the cost of available alternatives for resolving issues without making an appointment. *TEX. FAM. CODE ANN. § 107.021(b)(1)(B)*. The court may make such an appointment only if doing so is necessary to ensure the determination of the child's best interest. *TEX. FAM. CODE ANN. § 107.021(b)(2)*. The trial court may not require the appointed person to serve without reasonable compensation for services rendered. *TEX. FAM. CODE ANN. § 107.021(b)(3)*.

(3) Authority to Order a Social Study

What the trial court and the parties have called a home study is characterized by the Texas Family Code as a "social study." A social study is "an **[**11]** evaluative process through which information and recommendations regarding adoption of a child, conservatorship of a child, or possession of or access to a child may be made to a court, the parties, and the parties' attorneys." *TEX. FAM. CODE ANN. § 107.0501(1)*; *see Chacon v. Chacon, 978 S.W.2d 633, 637 (Tex. App.--El Paso 1998, no pet.)*. The trial court may order the preparation of a social study into the circumstances and condition of (1) a child who is the subject of a suit or a party to a suit; and (2) the home of any person requesting conservatorship of, possession of, or access to a child. *TEX. FAM. CODE ANN. § 107.051(a)*; *Taylor v. Tex. Dep't of Protective & Regulatory Servs., 160 S.W.3d 641, 649 (Tex. App.--Austin 2005, pet. denied)*. The remainder of *Section 107.051 of the Texas Family Code* goes on to delineate who may be appointed in suits by various entities and briefly refers to the qualifications of those who may conduct a social study. *See TEX. FAM. CODE Ann. §§ 107.051(b)-(d)* (Vernon 2008). Those provisions are not central to the issues presented in this petition.

The decision to order a social study is discretionary. *TEX. FAM. CODE ANN. § 107.051*; *In re Garza, 981 S.W.2d 438, 442 (Tex. App.--San Antonio 1998, orig.*

proceeding); **[**12]** *Swearingen v. Swearingen, 578 S.W.2d 829, 831 (Tex. Civ. App.--Houston [1st Dist.] 1979, writ dism'd)*. The Texas Family Code specifically addresses the preparation fee for a social study:

> If the court orders a social study to be conducted, the court shall award the agency or other person a reasonable fee

> **[*242]** for the preparation of the study that shall be imposed in the form of a money judgment and paid directly to the agency or other person. The person or agency may enforce the judgment for the fee by any means available under law for civil judgments.

TEX. FAM. CODE ANN. § 107.056 (Vernon 2008). The Texas Family Code does not specifically address the situation at hand here, where the trial court has ordered an indigent parent to pay for the social study. Nor does the Texas Family Code provide us with as tidy a framework of the necessary factors a trial court must consider in deciding whether to order a social study. Since the ordering of a social study is a *discretionary* act, we will address the trial court's order compelling the home study in a framework analogous to the framework provided when the trial court makes its *discretionary* appointments under *Section 107.021 of the Texas Family Code.*

(4) **[**13]** *Basis for Trial Court's Decision to Appoint Ad Litem and Direct Home Study*

Noting that, often, pro se litigants successfully litigate simple divorces, the trial court distinguished those cases involving children:

> When children are involved, the matter becomes much more complicated. As demonstrated above, there are many statutory and legal considerations a trial court must make in deciding conservatorship, possession and access of minor children. In order to make these decisions, the parties must present competent evidence to the court upon which the decision may be based. Where the parties (or at least one party) have attorneys, the court can be assured that the necessary evidence will be presented. However, in the absence of attorneys, the court has no such assurance.

The trial court also expressed its concern that "some parties deliberately conceal facts which bear directly on these issues," that is, of the best interest of the children. The trial court found "that it is in the minor children's best interests for the court to have access to all of the pertinent facts." The court thus directed the completion of the social study as a means of achieving such. [8]

8 In recognition of *Section 107.021 of the Texas Family Code*'s **[**14]** direction that it "tak[e] into consideration the cost of available alternatives for resolving issues without making an appointment," the trial court wrote:

> Therefore, in considering "available alternatives" under *section 107.021*, the Court will abate its order appointing an ad litem and give Petitioner the opportunity to present the necessary evidence at a final hearing. If, at the final hearing, Petitioner is able to present sufficient evidence to demonstrate that her agreed order is in the children's best interest, no ad litem will be necessary. If, on the other hand, Petitioner is not able to present sufficient evidence to demonstrate this fact, the Court will continue the hearing, deny Petitioner's objection and wait for the ad litem to finish his work.
>
> Nevertheless, a home study is routine in any case involving child conservatorship, possession and access, whether the parties are represented by counsel or not. *Family Code section 107.051* provides for the appointment of a social study into the circumstances and condition of: "(1) a child who is the subject of a suit or a party to a suit; and (2) the home of any person requesting conservatorship of, possession of, or access to child." **[**15]** By its terms, *section 107.021* does not apply to social study appointments, and *section 107.051* contains no requirement that the court give consideration to the parties' ability to pay fees or to other alternatives. Therefore, the Court overrules

Petitioner's objection to the order compelling home study.

(5) The Trial Court's Mandatory Considerations in Appointing an Attorney Ad Litem and the Exercise of Its Discretion in Ordering Home Study

(a) On the Issue of Necessity

[*243] Villanueva contends that the trial court lacked the authority to make these orders in the absence of any evidence of necessity. The trial court maintains that Villanueva's pro se status makes it necessary; only by making such appointments can the trial court guarantee that it will be presented with sufficient information on which to make the required findings relating to the best interest of the children.

As described, the determinations to be made by the trial court presiding over a divorce and SAPCR center on the best interest of the child even when, as here, the parents appear to have arrived at an agreed parenting plan. *See TEX. FAM. CODE ANN. §§ 153.002, 153.007.* The trial court's reasoning for appointing the ad litem **[**16]** and ordering the social study reflects its recognition of this "primary consideration." *See TEX. FAM. CODE ANN. § 153.002.* And that reasoning appears to be an attempt to ensure that the trial court will be provided sufficient evidence on which it may make its mandatory findings regarding the best interest of the Villanueva children.

The trial court acts under clear instructions to consider first the best interest of the child. So, to the extent a social study would assist the trial court in so doing, the social study *could* be necessary. But it is important to note that, while the trial court must make the determination of the best interest of the child, there is no evidence that, without the social study, the trial court will be unable to make such determination. So, the social study *could* be necessary and *would* likely be helpful but, ultimately, we cannot know whether the social study is necessary to allow the trial court to make its determination as to the best interest of the children. Nor, as the trial court so expresses, can it know what will be presented or missing to make that determination.

(b) On Due Consideration of Ability to Pay and Effect of Affidavit of Inability to Pay **[**17]** *Costs*

We note that Villanueva filed an affidavit of inability to pay costs pursuant to *Rule 145 of the Texas Rules of Civil Procedure. See TEX. R. CIV. P. 145.* No one contested that affidavit, meaning its effect as to Villanueva's ability to pay costs is conclusive; she is indigent as a matter of law. *See Equitable Gen. Ins. Co. of Tex. v. Yates, 684 S.W.2d 669, 671 (Tex. 1984).* In *Yates*, the Texas Supreme Court examined a trial court's conditional grant of a new trial based on a party's payment of $ 500.00 for the opposing party's attorney's fees. *Id. at 670.* The *Yates* court acknowledged that ordinarily such a conditional grant would lie within the trial court's discretion. *Id. at 671.* However, the new trial conditioned on a party's payment of attorney's fees was improper when that party had filed an uncontested affidavit of inability to pay costs pursuant to *Rule 145 of the Texas Rules of Civil Procedure. Id.* The Texas Supreme Court also addressed, and ultimately ignored, the distinction between "costs" and "fees" as it relates to *Rule 145 of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 145.* "Although we recognize the general rule that attorney's fees are not costs, [9] the assessed **[**18]** fees in the present case will be considered in light of *Rule 145* and the rule's intended purpose to guarantee a forum to those unable to pay court costs." *Id.* So, we learn from the Texas Supreme Court that the proper focus is not directed at the distinct characterization of the "fees" or "costs" to be paid. Rather, the focus is on

[*244] *Rule 145*'s intended effect of guaranteeing a forum for indigent litigants. *See id.*

> 9 The Texas Family Code allows the trial court to assess attorney's fees as costs. *See TEX. FAM. CODE ANN. § 106.002* (Vernon 2008).

We also see the effect of an uncontested *Rule 145* affidavit in a family law setting in *Cook v. Jones, 521 S.W.2d 335 (Tex. Civ. App.--Dallas 1975, writ ref'd n.r.e.)*. Cook filed a petition for divorce in 1973. *Id. at 336*. Along with her petition, she filed an affidavit of inability to pay court costs pursuant to *Rule 145 of the Texas Rules of Civil Procedure*. *Id.* The trial court certified her as indigent. *Id.* Cook attempted to secure personal service of process on her husband but was unsuccessful. *Id.* She then took steps to secure substituted service but was again unsuccessful. *Id.* She then applied for substituted service by publication, but her efforts **[**19]** to secure citation by publication were frustrated by her lack of funds to pay for the cost of publication in a newspaper. *Id. at 337*.

Cook first sought mandamus relief at the trial court level, asking the trial court to direct the county sheriff [10] to effect service of citation by publication and make the appropriate return of citation pursuant to the Texas Rules of Civil Procedure. Her petition was denied, and she appealed to the intermediate appellate court. *Id.* The court was critical of the "obviously inadequate" mechanism of service by publication. It nevertheless recognized the mechanism's availability under the rules and the denial of which effectively denied Cook meaningful access to the court as a result of her inability to pay for the cost of publication. *Id. at 337-38*.

> Because she has been duly certified by the [trial court] as an indigent, plaintiff wife should be allowed to initiate her divorce action without payment of court costs. Such costs include the fee for service of citation by publication.

Id. at 338. The court noted that the sheriff's office is "unequivocally directed to perform this duty" and ordinarily would be entitled to payment for the cost of publication just **[**20]** as it would be entitled to charge a fee for serving other citations. *Id. Rule 145*, however, relieved Cook of her obligation to pay the sheriff's office for its services and permitted her to require performance of the sheriff's duties without payment. *Id.* The Dallas court focused on *Rule 145*'s effect of allowing access to a forum for indigent litigants, the same concern which would be later shared, and arguably broadened, by the Texas Supreme Court in *Yates*. *See 684 S.W.2d at 671*.

> 10 To be thorough, Cook's petition went on to ask the trial court to direct the district clerk to pay the publication charges to the newspaper and to direct the county commissioners to make available the necessary funds for that payment.

(c) On Balancing Best Interest of Child and Cost of Appointment to Parent

As is evident from the trial court's order on Villanueva's objections, we feel quite certain that the trial court's orders were motivated by the pursuit of its duty to determine the best interest of the Villanueva children. However, the prohibitive effect of the appointments in this situation causes us to question the balance between finding the best interest of the children and effectively denying the parents **[**21]** a forum in which they may dissolve the marriage and arrange for the custody of the children.

The case of *Shirley v. Montgomery, 768 S.W.2d 430 (Tex. App.--Houston [14th Dist.] 1989, orig. proceeding)*, is instructive in examining this delicate balance. The mandamus proceeding in *Shirley* came from a "complex and hotly contested custody battle." *Id. at 430*. The trial court ordered the mother to pay $ 15,000.00 in attorney ad litem fees. *Id. at 431*. The mother, who had gotten $ 186,000.00 from her parents

[*245] to pay attorney's fees related to the divorce and criminal proceedings stemming from the divorce, had exhausted any funds available to her and failed to pay the $ 15,000.00 as ordered. *Id.* The attorney ad litem then filed a motion for contempt and sanctions at the hearing on which the mother and her parents both testified that they had no more funds available to them to pay the attorney ad litem fees. *Id.* When the mother again failed to pay as ordered, the trial court imposed discovery sanctions: her pleadings were struck and she was prohibited from introducing evidence at trial. *Id.*

The mother sought mandamus relief from the court of appeals, contending that the trial court's order to **[**22]** pay the ad litem fees was not enforceable by discovery sanctions and that the trial court abused its discretion by ordering her to pay the $ 15,000.00 when she was financially unable to comply with the order. The court concluded that the trial court's order was enforceable through discovery sanctions. *Id. at 432-33.* The court went on to conclude, though, that in this situation, when the mother testified that she was unable to pay the attorney ad litem fees, imposition of such sanctions was, in fact, an abuse of discretion. *Id. at 433.* The *Shirley* court pointed to the mother's testimony that she was no longer able to pay her own attorney, that she was working at a job that paid five dollars an hour, that she owned no assets of any value, and that she had about $ 200.00 in savings. *Id.* She did offer to make monthly payments to the attorney ad litem. *Id.* The mother's parents also testified that they could no longer finance their daughter's custody battle. *Id.*

Based on the testimony at the contempt hearing, the court concluded that the trial court could have come to only one conclusion: that the mother was not able to pay $ 15,000.00 to the attorney ad litem. *Id.* In concluding that appeal **[**23]** was an inadequate remedy under these circumstances, the court touched on "the primary consideration," the best interest of the child at the center of the custody dispute:

> In this child custody case, the overriding consideration is the best interest of the four-year-old child. . . . We believe it will be in her best interest for her mother to have a forum in which to present her claim of conservatorship in the upcoming trial, without having to await an appeal and possibly a second trial.

Id. at 434. The court granted the mother relief, directing the trial court to set aside its order striking her pleadings and disallowing her offering of evidence. *Id.* It is important to note that the court related the child's best interest to the availability of and the parent's access to a forum. *See id.*

(6) Availability of Mandamus

Mandamus will issue only when the mandamus record establishes (1) a clear abuse of discretion or the violation of a duty imposed by law and (2) the absence of a clear and adequate remedy at law. *Cantu v. Longoria, 878 S.W.2d 131, 132 (Tex. 1994)* (orig. proceeding); *In re Green Tree Servicing LLC, 275 S.W.3d 592, 600 (Tex. App.--Texarkana 2008, orig. proceeding).*

A trial court **[**24]** clearly abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992)*; *In re Green Tree, 275 S.W.3d at 600.* With respect to the resolution of factual issues or matters committed to the trial court's discretion, the reviewing court may not substitute its judgment for the trial court. *Brady v. Fourteenth Court of Appeals, 795 S.W.2d 712, 714 (Tex. 1990)*; *In re Green Tree, 275 S.W.3d at 600.* However, "[a] trial court has no 'discretion'

[*246] in determining what the law is or applying the law to the facts." *Huie v. DeShazo, 922 S.W.2d 920, 927-28 (Tex. 1996)*; *see In re Jorden, 249 S.W.3d 416, 424 (Tex. 2008)* (explaining that "[a] trial or appellate court has no discretion in determining what the law is or in applying the law to the facts, even if the law is somewhat unsettled"). Therefore, an erroneous legal conclusion by the trial court constitutes an abuse of discretion. *Huie, 922 S.W.2d at 927-28*. A clear failure by the trial court to apply the law correctly is an abuse of discretion. *Walker, 827 S.W.2d at 840*; *In re Green Tree, 275 S.W.3d at 600*. A reviewing court may **[**25]** set aside the trial court's determination if it is clear from the record that the trial court could only reach one decision. *See Walker, 827 S.W.2d at 840*.

(7) Conclusions

According to her affidavit of inability to pay, Villanueva has four dependents and a monthly income of $ 102.02. She owns a 1994 Geo Prism and has approximately $ 20.00 total in checking and savings accounts and $ 15.00 in cash. She has a minimum of $ 515.00 in monthly expenses.

The law is clear that, since no one contested her affidavit of inability to pay costs, Villanueva is indigent as a matter of law. As applied in *Yates* and *Cook*, then, without reference to the exact nature of the cost or fee at issue, *Rule 145 of the Texas Rules of Civil Procedure* removes any financial obstacles to the indigent litigant's access to the courts. *See Yates, 684 S.W.2d at 671*; *Cook, 521 S.W.2d at 337-38*. Access to a forum in which to resolve family law matters is in the best interest of the children. *See Shirley, 768 S.W.2d at 433-34*.

Based on the uncontested assertions in Villanueva's affidavit, the conclusive effect and application of *Rule 145 of the Texas Rules of Civil Procedure*, and the protective stances taken in *Yates, Cook*, **[**26]** and *Shirley* to guarantee an indigent litigant's access to the court system, the trial court could only come to one conclusion: that Villanueva could not pay for the attorney ad litem and the social study. We conclude that the trial court abused its discretion when it ordered Villanueva to pay the costs and fees associated with the attorney ad litem and the social study administrator when Villanueva is indigent as a matter of law and when such orders effectively deny her a forum in which to dissolve her marriage and resolve custody issues. Though undoubtedly driven by its duty to determine the best interest of the children, the trial court exercised its discretion in a manner inconsistent with the conclusive effect as to indigence provided by *Rule 145 of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 145*.

Since there appears to be no authority that would authorize an interlocutory appeal here and since it does not appear litigation will continue such that there will be a final order, there is no adequate remedy by appeal.

With that, we conditionally grant mandamus relief. The writ of mandamus will issue only if the trial court fails to vacate its order appointing the attorney ad **[**27]** litem and ordering a social study.

Josh R. Morriss, III

Chief Justice

Date Submitted: July 16, 2009

Date Decided: July 17, 2009

In re Villanueva, 292 S.W.3d 236, 2009 Tex. App. LEXIS 5480 (Tex. App. Texarkana 2009)

Restrictions: *Unrestricted*
FOCUS(TM) Terms: *No FOCUS terms*
Print Format: *FULL*
Citing Ref. Signal: *Hidden*

SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary

No subsequent appellate history.

Citing References:

Citing Decisions: **Citing decisions with no analysis assigned (1)**

Other Sources: **Statutes (2), Treatises (5)**

LexisNexis Headnotes: HN4 (1), HN7 (1), HN9 (1), HN13 (1)

PRIOR HISTORY (0 citing references)

(CITATION YOU ENTERED):
In re Villanueva, 292 S.W.3d 236, 2009 Tex. App. LEXIS 5480 (Tex. App. Texarkana 2009)

CITING DECISIONS (1 citing decision)

TEXAS COURT OF APPEALS

1. **Cited by:**
In re T.L.W. & O.L.W., 2012 Tex. App. LEXIS 2689 (Tex. App. Tyler Mar. 30, 2012) **LexisNexis Headnotes HN4, HN7, HN9, HN13**
2012 Tex. App. LEXIS 2689

ANNOTATED STATUTES (2 Citing Statutes)

2. *Tex. Fam. Code sec. 107.021*

3. *Tex. Fam. Code sec. 107.051*

TREATISE CITATIONS (5 Citing Sources)

4. *22-360A Dorsaneo, Texas Litigation Guide @ 360A.03*
5. *22-370 Dorsaneo, Texas Litigation Guide @ 370.07*
6. *22-370 Dorsaneo, Texas Litigation Guide @ 370.08*
7. *1-3 Texas Family Law: Practice and Procedure C3.10*
8. *3-6 Texas Family Law: Practice and Procedure H6.02*

Exhibit H

TEXAS ACCESS to JUSTICE FOUNDATION

2013 Income Guidelines

Client Income Eligibility Standards Updated for 2013
Income Level for Individuals Eligible for TAJF Funded Assistance

Each year, the Texas Access to Justice Foundation (TAJF) announces client income-eligibility standards based on the Department of Health and Human Services (DHHS) most recent federal poverty guidelines. On January 24, 2013, DHHS released the 2013 federal poverty data. Attached are the revised income eligibility guidelines for 2013 that are effective immediately. They will also be posted on our web site.

These guidelines establish maximum income levels for individuals and families eligible for assistance from TAJF-funded legal aid programs whether funded by IOLTA, BCLS, CVCLS, Veteran or other TAJF grant funds. The purpose of the income guidelines are to determine whether an individual seeking legal assistance funded in part or whole with TAJF funds and has insufficient income (and assets) to make private legal assistance actually and practically available and therefore eligible under one of our grant programs.

Please circulate and distribute these guidelines to all staff involved in providing TAJF funded legal services.

2013 IOLTA/BCLS Financial Eligibility Guidelines
(125 % of Poverty)

Size of household	Annual Household Income
1	$ 14,363
2	$ 19,388
3	$ 24,413
4	$ 29,438
5	$ 34,463
6	$ 39,488
7	$ 44,513
8	$ 49,538
For each additional member of the household in excess of 8, add:	$ 5,025

P. O. Box 12886 | Austin, Texas 78711-2886 | *tel* 512.320.0099 | *toll free in Texas* 800.252.3401 | *fax* 512.469.0112 | www.teajf.org

2013 CVCLS Financial Eligibility Guidelines
(187½ % of Poverty)

Size of household	Annual Household Income
1	$ 21,543
2	$ 29,081
3	$ 36,619
4	$ 44,156
5	$ 51,694
6	$ 59,231
7	$ 66,769
8	$ 74,306
For each additional member of the household in excess of 8, add:	$ 7,538

2013 Veterans Financial Eligibility Guidelines
(200 % of Poverty)

Size of household	Annual Household Income
1	$ 22,980
2	$ 31,020
3	$ 39,060
4	$ 47,100
5	$ 55,140
6	$ 63,180
7	$ 71,220
8	$ 79,260
For each additional member of the household in excess of 8, add:	$ 8,040

Organizations receiving a TAJF grant must use such funds to provide civil legal services to individual indigent persons or client groups, associations, and nonprofit organizations eligible

under these guidelines. Grantees must adopt and utilize criteria relating to income, assets and liabilities defining the indigent persons eligible to benefit from TAJF grants.

For individuals served with IOLTA and BCLS funds, TAJF defines low-income as those who live at or below 125 percent of the federal poverty level, whose assets cannot exceed certain limits established by the grantee. In CVCLS funded cases, the client's gross income can be as high as 187.5% of the federal poverty line and must be victims of crime and that legal assistance is related to addressing problems stemming from the crime. For assistance under our Veteran grants program, individual's household income cannot exceed 200% of the federal poverty guidelines.

Below are instructional definitions:

DEFINITIONS

1. Family: Includes only those persons related by blood or by law as relatives to the applicants for whom the applicant has a legal responsibility to support.

2. Income: Actual current annual total cash receipts before taxes of all persons who are resident member of, and contribute to support of, the family, to the extent that such funds are legally and actually available to the family.

3. Liquid Assets: Those assets which can readily and promptly be converted to cash by the individual seeking assistance, prior to the time that the assistance is required. Only net liquid assets, after subtracting all expenses of conversion and taxes, are considered.

4. Non-Liquid Assets: All assets other than liquid.

5. Available: Assets to which the individual seeking assistance has legal and actual access without having to obtain the consent or cooperation of another person over whom the individual does not have control and who does not, in fact, consent or cooperate.

Note that the Foundation defines 'income" consistent with the Legal Services Corporation (LSC) definition of income. There are **no** provisions to allow household incomes to exceed these TAJF maximum caps and then be reduced to 125%, 187.5% or 200% using certain deductions as permitted with LSC funds.

To determine monthly income, divide annual by 12, for weekly income, divide annual by 52 or divide monthly by 4.2 but whichever approach, must be in writing and used consistently. Income received twice a month should be multiplied by 2. If the applicant is a seasonal employee, consideration can be based on previous year. Applicants shall be informed of their duty to report changes in their income should their case be accepted.

Grantee's screening and intake procedures must include instructions to solicit sufficient questions from the applicant to determine the total amount of household income and grantees must be able to provide reasonably demonstrate that staff practice and follows these procedures

uniformly and consistently. A total amount of the applicant's household income must be recorded even if it is zero.

If an applicant's total household income is derived solely from a government program for low-income individuals or families on a needs base test, then the grantee may determine that the applicant is financially eligible based on those benefits. The grantee must record household size, household income, and the specific identity of the government program.

In representing a client group, association, or nonprofit organization, the grantee must comply with all of the other provisions of these rules and is subject to all of the prohibitions contained herein. A client group, association, or nonprofit organization is eligible if it is (1) primarily composed of individual indigent persons and does not have available resources to retain private counsel; or (2) the organization's primary purpose is in furtherance of the interests of indigent persons and is seeking legal assistance on a matter relating to such purpose and does not have available resources to retain private counsel.

ASSET LIMITATIONS

[Grantees must have an asset policy that caps the amount of assets for eligibility determinations. Grantee may select one of the below options and use consistently or Grantees may develop an alternative written asset policy if approved by their Board of Directors]

OPTION 1 In general, an individual client may have up to $10,000 in liquid assets (plus $5,000 for each additional family member) and $15,000 in non-liquid assets ($5,000 for each additional family member). Exempted from the asset limit are the client's principal residence, first car, personal and household goods, tools or equipment essential to employment, trusts restricted to educational or medical purposes, interest in IRA or Keogh plans, assets not counted by public assistance programs, and burial plots or trusts.

Where a client owns property, each assets must be identified (e.g., "savings account" or "vacation villa") and its value entered into the client's financial eligibility field in their case management system or paper application. The client's home, household goods, one car, or checking and/or savings account whose combined value is less than $2000 need not be listed. If the client has no countable assets, the grantee will report "None" in the appropriate field of the financial eligibility field.

OPTION 2 1) An individual seeking assistance may not have total family assets, disregarding exclusions, if in excess of the following:

a) Liquid assets of $2,500; or non-liquid assets of $20,000; or
b) $5,000 in liquid assets or $40,000 in non-liquid assets if a member of the applicant's family is elderly, handicapped or institutionalized.

2) An individual seeking assistance may not have total family assets, disregarding exclusions, in excess of the following:

a) Liquid assets in excess of double, or non-liquid assets in excess of four times the estimated cost of obtaining private legal assistance for the matter on which assistance is sought; or

b) Liquid assets in excess of three times the estimated cost of obtaining private legal assistance for the matter on which assistance is sought, if a member of the applicant's family is elderly, handicapped or institutionalized, in which case non-liquid assets may be disregarded.

3) Exclusion: The following items are to be excluded from consideration in determining whether an individual seeking assistance has assets in excess of those permitted:

a) The principal residence of an individual seeking assistance, or of any member of the applicant's family.

b) The reasonable equity value in work-related equipment which is essential to the employment or self-employment of an applicant or members of an applicant's family.

c) Any assets which are exempted from execution by Texas or Federal Law.

Exhibit I

PROPERTY CODE

TITLE 5. EXEMPT PROPERTY AND LIENS

SUBTITLE A. PROPERTY EXEMPT FROM CREDITORS' CLAIMS

CHAPTER 42. PERSONAL PROPERTY

Sec. 42.001. PERSONAL PROPERTY EXEMPTION. (a) Personal property, as described in Section 42.002, is exempt from garnishment, attachment, execution, or other seizure if:

(1) the property is provided for a family and has an aggregate fair market value of not more than $60,000, exclusive of the amount of any liens, security interests, or other charges encumbering the property; or

(2) the property is owned by a single adult, who is not a member of a family, and has an aggregate fair market value of not more than $30,000, exclusive of the amount of any liens, security interests, or other charges encumbering the property.

(b) The following personal property is exempt from seizure and is not included in the aggregate limitations prescribed by Subsection (a):

(1) current wages for personal services, except for the enforcement of court-ordered child support payments;

(2) professionally prescribed health aids of a debtor or a dependent of a debtor;

(3) alimony, support, or separate maintenance received or to be received by the debtor for the support of the debtor or a dependent of the debtor; and

(4) a religious bible or other book containing sacred writings of a religion that is seized by a creditor other than a lessor of real property who is exercising the lessor's contractual or statutory right to seize personal property after a tenant breaches a lease agreement for or abandons the real property.

(c) Except as provided by Subsection (b)(4), this section does not prevent seizure by a secured creditor with a contractual landlord's lien or other security in the property to be seized.

(d) Unpaid commissions for personal services not to exceed 25 percent of the aggregate limitations prescribed by Subsection (a) are exempt from seizure and are included in the aggregate.

(e) A religious bible or other book described by Subsection (b)(4) that is seized by a lessor of real property in the exercise of the lessor's contractual or statutory right to seize personal property after a tenant

breaches a lease agreement for the real property or abandons the real property may not be included in the aggregate limitations prescribed by Subsection (a).

Acts 1983, 68th Leg., p. 3522, ch. 576, Sec. 1, eff. Jan. 1, 1984. Amended by Acts 1991, 72nd Leg., ch. 175, Sec. 1, eff. May 24, 1991; Acts 1997, 75th Leg., ch. 1046, Sec. 1, eff. Sept. 1, 1997.
Amended by:
Acts 2007, 80th Leg., R.S., Ch. 444, Sec. 1, eff. September 1, 2007.

Sec. 42.002. PERSONAL PROPERTY. (a) The following personal property is exempt under Section 42.001(a):

(1) home furnishings, including family heirlooms;

(2) provisions for consumption;

(3) farming or ranching vehicles and implements;

(4) tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession;

(5) wearing apparel;

(6) jewelry not to exceed 25 percent of the aggregate limitations prescribed by Section 42.001(a);

(7) two firearms;

(8) athletic and sporting equipment, including bicycles;

(9) a two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of a family or single adult who holds a driver's license or who does not hold a driver's license but who relies on another person to operate the vehicle for the benefit of the nonlicensed person;

(10) the following animals and forage on hand for their consumption:

(A) two horses, mules, or donkeys and a saddle, blanket, and bridle for each;

(B) 12 head of cattle;

(C) 60 head of other types of livestock; and

(D) 120 fowl; and

(11) household pets.

(b) Personal property, unless precluded from being encumbered by other law, may be encumbered by a security interest under Subchapter B, Chapter 9, Business & Commerce Code, or Subchapter F, Chapter 501, Transportation Code, or by a lien fixed by other law, and the security interest or lien may not be avoided on the ground that the property is exempt under this chapter.

Acts 1983, 68th Leg., p. 3522, ch. 576, Sec. 1, eff. Jan. 1, 1984. Amended by Acts 1991, 72nd Leg., ch. 175, Sec. 1, eff. May 24, 1991; Acts 1993, 73rd Leg., ch. 216, Sec. 1, eff. May, 17, 1993; Acts 1997, 75th Leg., ch. 165,

Sec. 30.245, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 414, Sec. 2.36, eff. July 1, 2001; Acts 1999, 76th Leg., ch. 846, Sec. 1, eff. Aug. 30, 1999.

Sec. 42.0021. ADDITIONAL EXEMPTION FOR CERTAIN SAVINGS PLANS. (a) In addition to the exemption prescribed by Section 42.001, a person's right to the assets held in or to receive payments, whether vested or not, under any stock bonus, pension, annuity, deferred compensation, profit-sharing, or similar plan, including a retirement plan for self-employed individuals, or a simplified employee pension plan, an individual retirement account or individual retirement annuity, including an inherited individual retirement account or individual retirement annuity, or a health savings account, and under any annuity or similar contract purchased with assets distributed from that type of plan or account, is exempt from attachment, execution, and seizure for the satisfaction of debts to the extent the plan, contract, annuity, or account is exempt from federal income tax, or to the extent federal income tax on the person's interest is deferred until actual payment of benefits to the person under Section 223, 401(a), 403(a), 403(b), 408(a), 408A, 457(b), or 501(a), Internal Revenue Code of 1986, including a government plan or church plan described by Section 414(d) or (e), Internal Revenue Code of 1986. For purposes of this subsection, the interest of a person in a plan, annuity, account, or contract acquired by reason of the death of another person, whether as an owner, participant, beneficiary, survivor, coannuitant, heir, or legatee, is exempt to the same extent that the interest of the person from whom the plan, annuity, account, or contract was acquired was exempt on the date of the person's death. If this subsection is held invalid or preempted by federal law in whole or in part or in certain circumstances, the subsection remains in effect in all other respects to the maximum extent permitted by law.

(b) Contributions to an individual retirement account, other than contributions to a Roth IRA described in Section 408A, Internal Revenue Code of 1986, or an annuity that exceed the amounts deductible under the applicable provisions of the Internal Revenue Code of 1986 and any accrued earnings on such contributions are not exempt under this section unless otherwise exempt by law. Amounts qualifying as nontaxable rollover contributions under Section 402(a)(5), 403(a)(4), 403(b)(8), or 408(d)(3) of the Internal Revenue Code of 1986 before January 1, 1993, are treated as exempt amounts under Subsection (a). Amounts treated as qualified rollover contributions under Section 408A, Internal Revenue Code of 1986, are treated as exempt amounts under Subsection (a). In addition, amounts qualifying as nontaxable rollover contributions under Section 402(c), 402(e)(6), 402(f), 403(a)(4), 403(a)(5), 403(b)(8), 403(b)(10), 408(d)(3), or 408A of the Internal Revenue Code of 1986 on or after

January 1, 1993, are treated as exempt amounts under Subsection (a). Amounts qualifying as nontaxable rollover contributions under Section 223(f)(5) of the Internal Revenue Code of 1986 on or after January 1, 2004, are treated as exempt amounts under Subsection (a).

(c) Amounts distributed from a plan, annuity, account, or contract entitled to an exemption under Subsection (a) are not subject to seizure for a creditor's claim for 60 days after the date of distribution if the amounts qualify as a nontaxable rollover contribution under Subsection (b).

(d) A participant or beneficiary of a plan, annuity, account, or contract entitled to an exemption under Subsection (a), other than an individual retirement account or individual retirement annuity, is not prohibited from granting a valid and enforceable security interest in the participant's or beneficiary's right to the assets held in or to receive payments under the exempt plan, annuity, account, or contract to secure a loan to the participant or beneficiary from the exempt plan, annuity, account, or contract, and the right to the assets held in or to receive payments from the plan, annuity, account, or contract is subject to attachment, execution, and seizure for the satisfaction of the security interest or lien granted by the participant or beneficiary to secure the loan.

(e) If Subsection (a) is declared invalid or preempted by federal law, in whole or in part or in certain circumstances, as applied to a person who has not brought a proceeding under Title 11, United States Code, the subsection remains in effect, to the maximum extent permitted by law, as to any person who has filed that type of proceeding.

(f) A reference in this section to a specific provision of the Internal Revenue Code of 1986 includes a subsequent amendment of the substance of that provision.

Added by Acts 1987, 70th Leg., ch. 376, Sec. 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 1122, Sec. 1, eff. Sept. 1, 1989; Acts 1995, 74th Leg., ch. 963, Sec. 1, eff. Aug. 28, 1995; Acts 1999, 76th Leg., ch. 106, Sec. 1, eff. Sept. 1, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 130, Sec. 1, eff. May 24, 2005.
Acts 2005, 79th Leg., Ch. 130, Sec. 2, eff. May 24, 2005.
Acts 2011, 82nd Leg., R.S., Ch. 933, Sec. 1, eff. June 17, 2011.

Sec. 42.0022. EXEMPTION FOR COLLEGE SAVINGS PLANS. (a) In addition to the exemption prescribed by Section 42.001, a person's right to the assets held in or to receive payments or benefits under any of the following is exempt from attachment, execution, and seizure for the satisfaction of debts:

(1) any fund or plan established under Subchapter F, Chapter 54, Education Code, including the person's interest in a prepaid tuition contract;

(2) any fund or plan established under Subchapter G, Chapter 54, Education Code, including the person's interest in a savings trust account; or

(3) any qualified tuition program of any state that meets the requirements of Section 529, Internal Revenue Code of 1986, as amended.

(b) If any portion of this section is held to be invalid or preempted by federal law in whole or in part or in certain circumstances, this section remains in effect in all other respects to the maximum extent permitted by law.

Added by Acts 2003, 78th Leg., ch. 113, Sec. 1, eff. Sept. 1, 2003.

Sec. 42.003. DESIGNATION OF EXEMPT PROPERTY. (a) If the number or amount of a type of personal property owned by a debtor exceeds the exemption allowed by Section 42.002 and the debtor can be found in the county where the property is located, the officer making a levy on the property shall ask the debtor to designate the personal property to be levied on. If the debtor cannot be found in the county or the debtor fails to make a designation within a reasonable time after the officer's request, the officer shall make the designation.

(b) If the aggregate value of a debtor's personal property exceeds the amount exempt from seizure under Section 42.001(a), the debtor may designate the portion of the property to be levied on. If, after a court's request, the debtor fails to make a designation within a reasonable time or if for any reason a creditor contests that the property is exempt, the court shall make the designation.

Acts 1983, 68th Leg., p. 3524, ch. 576, Sec. 1, eff. Jan. 1, 1984. Amended by Acts 1991, 72nd Leg., ch. 175, Sec. 1, eff. May 24, 1991.

Sec. 42.004. TRANSFER OF NONEXEMPT PROPERTY. (a) If a person uses the property not exempt under this chapter to acquire, obtain an interest in, make improvement to, or pay an indebtedness on personal property which would be exempt under this chapter with the intent to defraud, delay, or hinder an interested person from obtaining that to which the interested person is or may be entitled, the property, interest, or improvement acquired is not exempt from seizure for the satisfaction of liabilities. If the property, interest, or improvement is acquired by discharging an encumbrance held by a third person, a person defrauded, delayed, or hindered is subrogated to the rights of the third person.

(b) A creditor may not assert a claim under this section more than two

years after the transaction from which the claim arises. A person with a claim that is unliquidated or contingent at the time of the transaction may not assert a claim under this section more than one year after the claim is reduced to judgment.

(c) It is a defense to a claim under this section that the transfer was made in the ordinary course of business by the person making the transfer.

Acts 1983, 68th Leg., p. 3524, ch. 576, Sec. 1, eff. Jan. 1, 1984. Amended by Acts 1991, 72nd Leg., ch. 175, Sec. 1, eff. May 24, 1991.

Sec. 42.005. CHILD SUPPORT LIENS. Sections 42.001, 42.002, and 42.0021 of this code do not apply to a child support lien established under Subchapter G, Chapter 157, Family Code.

Added by Acts 1991, 72nd Leg., 1st C.S., ch. 15, Sec. 4.07, eff. Sept. 1, 1991. Amended by Acts 1997, 75th Leg., ch. 165, Sec. 7.56, eff. Sept. 1, 1997.