A BRIEF RESPONSE TO THE TEXAS APPLESEED PROPOSAL[1]

The proposed rules and notices submitted by Lone Star Legal Aid, Texas Appleseed and Professor Spector have significant gaps, errors, and omissions that should be considered by the Supreme Court Advisory Committee. I have attempted to issue spot and briefly cite the relevant case law or actual practice, for further discussion or follow-up as needed:

- The list of exemptions is misleading and inaccurate
    - The right to unemployment compensation is exempt from garnishment or turnover, but after deposit it is only exempt if not mingled with other funds. Tex. Labor Code § 207.075
    - The right to pensions and retirement benefits are exempt, but unless they are federal or state pension benefits, once received they are only exempt for sixty days. Tex. Prop. Code § 42.0021(e)
    - There is no exemption for money belonging to a joint account holder
        - Issues surrounding ownership of a joint account conflate a third party's rights with the judgment debtor's exemptions. A judgment debtor cannot assert a third party's rights in an exemption form; they have no standing.
        - Issues surrounding ownership of funds or property by a third party cannot be resolved on an expedited basis with potentially less than three days' notice. It will require documentation and an analysis of deposits. It cannot be subject to the same process.
        - Tex. Estates Code §113.101 clearly and unambiguously states that the code provision does not affect the withdrawal power of those persons under the terms of an account contract. Because a turnover receiver steps into the shoes of the judgment debtor, they have the same withdrawal power as the judgment debtor as account holder.
    - There is no exemption for "wages deposited into an account by an employer" as stated in the turnover notice
        - This is an attempt to create a new exemption where none exists.
        - Mike Bernstein has done an exhaustive analysis of why this argument – essentially, the "proceeds of wages" argument – is incorrect. I've attached his presentation from 2016 that runs through the whole set of case law on the topic.
- The proposed garnishment rules create an unworkable process
    - Proposed Rule 661(b) directs the clerk to attach the garnishment notice to the writ, but the writ is served on the bank, so it is not needed (especially the two copies)
    - Proposed Rule 663a(b) directs the plaintiff or judgment creditor to serve the defendant with the garnishment notice and mandates font size, but previously directed the clerk to issue the notice, so the creditor will not have any control over the notice.
    - Proposed Rule 663a(d) requires service not later than one day after the date of service of the writ of garnishment. However, service of the writ of garnishment occurs by deputy sheriff or constable, who often does not inform the creditor's attorney for days (if at all). Frequently, the creditor first gets notice of service on the bank when the defendant calls

[1] This response is submitted by Craig Noack in his individual capacity and after a brief review, and has not been endorsed by the Texas Creditors Bar Association or the Texas Association of Turnover Receivers.

the creditor about the frozen account. A creditor could not comply with this provision given their inability to compel deputies to timely report service. An additional issue is that many banks take a number of days after service to freeze a bank account. Notice should not be compelled to occur before the account is frozen.

- Proposed Rule 664a(d)(2) only imposes upon the movant the burden to prove that "all or part of the value of the personal property is exempt" where the law and the promptness of the hearing require the movant to bear the burden to prove the actual character of the property as exempt. *Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 226 (Tex.1991)*; *Roosth v. Roosth*, 889 S.W.2d 445, 459 (Tex.App.-Houston [14th Dist.] 1994, writ denied).
- Proposed Rule 664a(e) uses the word "shall" to create a situation where a judge at an expedited hearing cannot continue the hearing to gather more evidence, including documentary evidence from a bank that has not had time to comply with a document request or subpoena.

- The proposed turnover rules demonstrate a lack of knowledge of the process, and also create an unworkable process
  - Proposed Rule 660 creates a holding period of 60 days.
    - First and foremost, sixty days is not a reasonable period as mandated by HB 3774. All other periods for replevies, bonds, and assertions of rights of third parties under the rules center around ten days.
    - Judgment defendants do not want their funds held for sixty days. One of the major benefits of turnover receiverships is that the judgment defendant's money can be released within 48 hours once an agreement is reached, versus the 20-27 days money is on hold while a bank files an answer in a garnishment. This would materially harm judgment defendants.
    - Not all receivers request a remit of all funds immediately. Many freeze the account, determine the defendant's situation, then release a portion of even non-exempt funds back to the judgment debtor in return for a payment plan. This means the funds never actually get remitted to the receiver until after a payment plan is established.
    - This ignores the possibility of seizing actual, physical personal property.
  - Proposed Rule 660a requires delivery to the financial institution of the exemption form
    - This accomplishes nothing. The financial institution does not typically provide the turnover demand to the judgment debtor, and is in fact not authorized to do so when the turnover demand includes a record request. Tex. Fin. Code § 59.006(a)(5).
    - It is not explained why the bank needs two copies of the exemption form and additional copies of the letter, when the receiver is required to send the notices directly to the judgment debtor
  - Proposed Rule 660b requires that the receiver send a copy of the letter sent by the turnover receiver to the financial institution.
    - This is not required by the statute, and acts to harm the judgment creditor's interest. If a turnover receiver accompanies a levy request with a demand for documentation, a judgment debtor may take action to further hide assets, because the turnover receiver's document requests have been disclosed to the defendant before the receiver obtains responses. For example, if a defendant discovers that

a receiver will be obtaining copies of all deposited checks, the defendant may move to close down other accounts with non-exempt assets.

- Proposed Rule 660b(d) requires service of the notice one day after receipt of funds seized.
  - This is impractical for receivers with large volume practices.
  - More importantly, the notice should be going out based on when the funds are frozen. Funds are received by receivers days or weeks after the funds are frozen. Receivers are talking to consumers the day of the account freeze, and working through exemption issues that day, not weeks later.
  - Again, this ignores the concept that actual, physical property can be seized, or funds not at a financial institution.
- Proposed Rule 660c is inflexible and unworkable
  - On potentially less than three days' notice, the receiver must prove that all required procedures have been followed or else all funds returned. What if the proof must be by business records affidavit but not enough time existed to get the records on file? What if the attorney was unavailable on the date of the hearing set for the next day?
  - The movant only has to prove the value of the exempt property, not that the property is actually exempt
  - How can a receiver controvert an affidavit or declaration on less than three days' notice when the bank has not had sufficient time to respond to the records request included in the turnover demand?
  - There is no ability to extend the hearing for additional time to gather documents. There is no ability to allow funds just received by a receiver to clear the bank. There is no contemplation of physical property versus funds.
- Proposed Rule 660d is a punitive provision with no statutory purpose
  - There is no rationale given for this provision, despite the fact that receivers work for the court and are entitled to deference as extensions of the court. Instead, they are made targets. This attempts to create an FDCPA-like "let's see what imagined wrongs we can allege" atmosphere for a straightforward post-judgment process. There is no deadline for how long a defendant has to raise a concern, nor is there any limitation on what potential rules or statutes might have applied in any particular situation.

- The notices attempt to inject other "judgment appeals" into the property exemption claim
  - There is no basis for claiming that someone's property is protected by exemption because of failure to serve. This is legal advice.
  - Moreover, it would trick defendants into thinking they've raised an issue when they have not. Many would check a box stating that they have not been served and file it with the court, which the court could do nothing about because it has lost plenary power. It would not have the effect of a restricted appeal or bill of review, so the judge would set a hearing only to tell the defendant that he could not help them.