

## Memorandum

**To:** Jim M. Perdue Jr.

**From:** Ad Hoc Debtor Group

**Re:** Proposed garnishment, turnover and execution rules, notices, and forms in compliance with H.B. 3774

**Date:** October 5, 2021

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### Introduction

H.B. 3774, which was passed in the regular session of the 87<sup>th</sup> Texas Legislature, adds Tex. Gov't Code § 22.0042. The new section requires the adoption of rules by May 2022 to provide a clear, expedited, and user-friendly procedure for asserting exemptions from seizure of personal property by a judgment creditor or turnover receiver.

The following sections detail a proposal for changes to garnishment rules and for adding new rules related to turnover receivers to comply with the newly enacted law.

### I. Proposed Changes to Garnishment Rules

#### A. Background

Rule changes are needed to address the inadequacies of the current garnishment procedures. The current process for judgment debtors to raise exemptions is cumbersome, not user-friendly for the unrepresented judgment debtor, and rarely used without the benefit of counsel. For example, current Rule 663a only provides that judgment debtors are entitled to a post-execution notice that they may file a bond or a motion to dissolve, concepts that make no sense to anyone other than lawyers.

Rule 663a also makes no explicit mention of exemptions, an important substantive right that might be raised to protect judgment debtors from seizure. In fact, exemptions cannot practically be raised at this time without the assistance of an attorney who drafts and files a motion to dissolve the writ of garnishment under Rule 664a, hardly a procedure that could be navigated by a pro se judgment debtor. The failure to give explicit notice of the right to assert exemptions in post-judgment garnishment proceedings and provide a simple pro se friendly procedure for asserting such exemptions has been found to violate fundamental tenets of due process. See *Strickland v. Alexander*, 772 F.3d 876 (11th Cir. 2014); 2015 WL 5256836 (N.D. Ga. 2015) (entry of judgment on remand); 2015 WL 5916003 (N.D. Ga. 2015) (amending judgment);

2015 WL 103221498 (N.D. Ga. 2015)(amending judgment again). In short, current garnishment rules are subject to constitutional attack unless they are amended to address these deficiencies.

Partly in response to *Strickland*, a subcommittee of the Supreme Court Advisory Committee considered garnishment rule changes back in 2016, but no amended rules were issued at that time. HB 3774 requires rules to be issued no later than May 1, 2022, highlighting the urgent need to amend Texas rules.

B. Proposed Rule Changes to Rules 663a and 664a

The proposed changes to Rules 663a and 664a are attached to this memo. Recognizing that the garnishment rules are well established, these amendments only revise the rules to the extent necessary to address the mandate of H.B. 3774. Otherwise, the proposal retains the current language of the rules.

**1. Revised notice of rights to be given to judgment debtors (Rule 663a)**

Rule 663a is substantially changed to comply with Tex. Gov't. Code §22.0042(b). First, the amended language requires that notice of garnishment be given to a defendant or a judgment debtor. The reference to a notice given to a “defendant” relates to pre-judgment garnishment, while the reference to a notice given to a “judgment debtor” relates to post-judgment garnishment.

Second, the form of the notice given to defendants in pre-judgment garnishments and to judgment debtors in post-judgment garnishment is totally redone and placed in new subsections (a) and (b). The current notice (placed on the face of the writ of garnishment to be delivered to defendants) only advises defendants or judgment debtors that they can regain possession of their garnished property by filing a replevy bond or by filing a motion to dissolve the writ of garnishment. This notice is difficult for lawyers to understand, let alone a pro se litigant. It also does not tell defendants and judgment debtors about their exemption rights, which is now required under the new law.

In accordance with the standards set forth in Tex. Gov't Code §22.0042(b), the proposed rules provide that a notice of garnishment includes the giving of the writ of garnishment, the application for the writ, and three Supreme Court-approved forms (one explaining exemption rights, an exemption claim form, and instructions on how to fill out that form). This change ensures that defendants, and particularly judgment debtors, will have notice about exemption rights and a form for asserting such rights. This approach addresses what H.B. 3774 and *Strickland* require.

Third, a new subsection (d) requires that notice be given by the plaintiff or judgment creditor to the defendant or judgment debtor within three days after service of the writ of garnishment (usually on a financial institution). The current rule requires such notice to be given “as soon as practicable” which has been construed to mean within 14 days. *Arriaga v. Jess Enterprises*, 2014 WL 1875917, \*2 (N.D. Tex. 2014)(applying Texas law); *Lease Finance Group, LLC*

*v. Childers*, 310 S.W.3d 120, 127 (Tex. App. – Fort Worth 2010, no pet.); *Requena v. Salomon Smith Barney, Inc.*, 2002 WL 356696, \*3-4 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2002, no pet.). Fourteen days, however, is an unconscionably long time, given that judgment debtors often learn about the garnishment when they are refused access to their accounts (as service of the writ of garnishment freezes accounts at financial institutions) – for example, when they’re attempting to pay for groceries. Because the information being provided is all form-based, it is not difficult for plaintiffs and judgment creditors to give more prompt notice. By giving faster notice, defendants and judgment debtors will then be given notice of how to exercise their exemption rights more quickly.

When a judgment debtor lives on exempt income, such as social security, and the entire amount on deposit is frozen by a writ of garnishment, those parties are entitled to prompt notice of how they can quickly seek access to their exempt funds. The exemptions have no real meaning if parties cannot exercise them promptly, which turns on giving prompt notice. This faster notice standard complies with Tex. Gov’t Code §22.0042(a)(1), which requires the Court to adopt rules that, “establish a simple and expedited procedure,” for a judgment debtor to assert exemptions in the garnishment process.

Fourth, a new subsection (d) prescribes the order of documents to be sent to a defendant or judgment debtor to make sure the garnishment notice is on top, promptly followed by an exemption claim form. That way, notice of exemption rights is prioritized. This approach aligns with the current rule that requires essential information for the judgment debtor to be included, “on the face of the copy of the writ served on the defendant.” (TCRP Rule 663a). It also comports with the requirement in statute for a simple procedure and one that provides information in plain language. (Tex. Gov’t Code §§22.0042(a)(1) and (b))

The manner of service, i.e. either by service or notice under Rule 21a, is set out in a new subsection (c), and the language is unchanged from the current rule.

## **2. Simpler procedure for raising exemption claims**

Current Rule 664a provides for the procedures associated with motions to dissolve writs of garnishment. Like Rule 663a, this rule is substantially changed to comply with the provisions in H.B. 3774. First, the language of the rule applicable only to pre-judgment garnishment has been placed in subsection (a) and been labeled as “General Rule for Pre-Judgment Garnishment.” The first two sentences of the current rule are the source of the language for this subsection.

Second, a new subsection (b) sets forth a “General Rule for Post-Judgment Garnishment” and it provides that a judgment debtor and interested third parties can file a motion to dissolve writ of garnishment or an exemption claim form (or its substantial equivalent). This new subsection retains the current language on who can file a challenge to a garnishment writ, but it provides basically two ways in which to challenge a garnishment writ – through either an exemption claim form or a motion to dissolve or modify the writ. The exemption claim form

is intended as a pro se friendly way to challenge the garnishment, unlike the motion which would likely need a lawyer to be effectively drafted and filed.

Third, the current language on when to conduct the hearing was placed in a new subsection (b). The only change was a reference to the hearing being on a motion under subsection (a) or a motion or claim under subsection (b).

Fourth, a new subsection (d) entitled “Motion for Dissolution of the Writ” is created to contain mostly the existing language about how the hearing should be conducted. On the need for an affidavit, this subsection offers a declaration as an alternative as permitted by CPRC § 132.001.

Fifth, a new subsection (e) entitled “Claim to Exemption” is added to set forth what should occur at a hearing on an exemption claim raised by an exemption claim form or its substantial equivalent. In essence, the trial court is supposed to decide whether any of the personal property, including funds, are exempt and if so, order its return within 3 days. In short, this subsection provides for a simple and expedited procedure that a pro se judgment debtor could navigate.

### **3. Proposed Notice, Instructions, and Form**

HB 3774 requires three plain language items to be sent out with the writ to defendants in pre-judgment garnishment and to judgment debtors in post-judgment garnishment. One is a notice of garnishment generally describing the recipient’s rights. According to Tex. Gov’t Code § 22.0042(b)1-5, the notice must be in plain language, in English with an integrated Spanish translation that can be easily read and understood by the public, list all exemptions under state and federal law, and provide information for accessing free and low-cost legal assistance. The proposed notice form includes all of the requirements, with the exception that it must still be translated into Spanish. The list of exempt personal property that is included in the notice is the same as the list included in the proposed exemption claim form. The statutory basis for each included exemption is presented in the form discussion.

In addition to the notice, the packet served on the defendant or judgment debtor must also include an exemption claim form, which list exemptions, and instructions to fill out the form. The proposed form and instructions are designed to be easy to use and understand. The proposed form allows the recipient to mark a box for each applicable exemption and to file the form (and serve the plaintiff or judgment creditor) to start the process of challenging the writ of garnishment.

H.B. 3774 requires the form to include all existing exemptions. The proposed form provides a full list of exemptions and the statutory citation that covers most personal property exemptions under state law. The legal source for most of these exemptions is set forth below:

1. Social Security Retirement income --- 42 U.S.C. § 407(a) and *Philpot v. Essex County Welfare Board*, 409 U.S. 413, 417 (1973);

2. Social Security Disability income --- 42 U.S.C. § 407(a); *Philpot v. Essex County Welfare Board*, 409 U.S. 413, 417 (1973);
3. SSI or Supplemental Security Income --- 42 U.S.C. § 407(a); *Philpot v. Essex County Welfare Board*, 409 U.S. 413, 417 (1973);
4. Alimony, child or spousal support --- Tex. Prop. Code 42.001(b)(3);
5. Veterans' benefits --- 38 U.S.C. § 5301(a) and *Ruby v. Ryan*, 2016 WL 11448151, \*8 (S.D. Calif. 2016);
6. Unemployment compensation --- Tex. Labor Code § 207.079(c);
7. Workers' compensation --- Tex. Labor Code § 408.201;
8. FEMA benefits --- 44 C.F.R. § 206.110(g);
9. Railroad retirement benefits --- 45 U.S.C. § 231m(a);
10. Pension and retirement benefits --- 29 U.S.C. § 1056(d) and Tex. Prop. Code § 42.0021(a) and (g);
11. Money belonging to a joint account holder --- Tex. Estates Code § 113.004(2), *Bechem v. Reliant Energy Retail Services, LLC*, 441 S.W.3d 839, 845 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2014, no pet.) and *In re Marriage of McNelly*, 2014 WL 2039855, \*7 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2014, pet. denied);
12. Money from the sale of a homestead for a period of six --- months after the sale --- Tex. Prop. Code § 41.001(5)(c);
13. Tax-deferred accounts like a 401(k) or an IRA account --- 29 U.S.C. § 1056(d) and Tex. Prop. Code § 42.0021(a) and (g);
14. Education and health savings accounts such as 529 accounts or other qualified accounts - -- 29 U.S.C. § 1056(d) and Tex. Prop. Code § 42.0021(a) and (g); and
15. Proceeds of a life, health or accident insurance policy, including related annuities --- Tex. Ins. Code § 1108.051 and *Rotella v. Cutting*, 2011 WL 3836456, \*2-3 (Tex. App. – Fort Worth 2011, no pet.).
16. Temporary Assistance for Needy Families (TANF)--- Tex. Human Res. Code § 31.040.

## II. Proposed Turnover Rules and Forms

### A. Background

Unlike garnishment proceedings that are heavily regulated by statutes and rules, turnover proceedings are far less regulated, largely because there are no procedural rules governing how they are conducted. Currently, there is no recognized procedure in turnover proceedings for asserting exemption rights. Some attorneys have filed motions to return exempt funds in those proceedings, but there is no procedure for giving judgment debtors notice of their exemption rights in turnover proceedings and there are no directions by which they could easily assert such rights.

Like garnishment procedures, the failure to give explicit notice of the right to assert exemptions in post-judgment turnover proceedings and provide a simple pro se friendly procedure for asserting such exemptions could well be found to violate fundamental tenets of due process. See *Strickland v. Alexander*, 772 F.3d 876 (11th Cir. 2014); 2015 WL 5256836 (N.D.

Ga. 2015) (entry of judgment on remand); 2015 WL 5916003 (N.D. Ga. 2015)(amending judgment); 2015 WL 103221498 (N.D. Ga. 2015)(amending judgment again). In short, the absence of any rules makes turnover proceedings ripe for constitutional attack. H.B. 3774 now requires that rules be adopted to address these concerns.

## B. Proposed New Rules

Given that the issues relating to the procedure for raising exemption rights is similar in garnishment and turnover proceedings, the proposed new turnover procedural rules mimic the revised rules that are proposed for garnishment proceedings. (Note: Rule 660 is used as the rule number in this proposal, because the prior rule using that number was repealed, leaving that number available. Using 660 as the rule number is also helpful, as it would put these rules in the vicinity of the garnishment rules.)

### 1. **New Rule 660**

Rule 660 provides that all funds seized by a turnover receiver are kept for 30 days before distribution to the judgment creditor and the turnover receiver for her fees. It also provides that such funds should be remain in escrow if a claim to exemption or motion for return exempt funds is filed until such time as the claim or motion is decided. By holding the funds in escrow, they can be more easily refunded promptly to a judgment debtor if a court finds any of the seized funds are exempt.

This proposal for Rule 660 is consistent with Tex. Gov't Code § 22.0042(a)(1), which requires "a simple and expedited procedure to assert an exemption to the seizure of personal property by a judgment creditor." Once the seized funds have been distributed, it likely would be difficult to retrieve exempt funds as they could be in the hands of multiple parties. In addition, it is unclear if funds taken as fees for the turnover receiver could be easily retrieved. Therefore, holding the funds in escrow for a period of time is necessary for an expedited process. Thirty days was selected to ensure enough time for the judgment debtor to receive service of the notice and forms, to engage with the legal process, and to complete a hearing.

### 2. **New Rule 660a**

Rule 660a provides for the same type of notice that is required by the revised Rule 663a that is being proposed, except that turnover receivers are required to give the notice (whereas judgment creditors are required to do so in post-judgment garnishment proceedings). Like the proposal for revised Rule 663a, this new rule provides for 3 forms to be approved by the Texas Supreme Court: (a) a turnover notice, (b) a turnover exemption claim form, and (c) directions on how to fill out and file the claim form. See subsections (a) and (b) of both Rule 660b and revised Rule 663a. Rule 660b also adopts the same language as revised Rule 663a on the manner and timing of service as well as the order of documents.

This reference to court-approved forms is similar to Rule 145(b) which calls for the use of

Supreme Court-approved statements of inability to afford court costs or their equivalent.

### 3. New Rule 660b

This new rule is substantially similar to revised Rule 664a. Like revised Rule 664a, it establishes a process for the judgment debtor to raise exemption claims, provides for an expedited hearing process, specifies the nature of the hearing for motions to return exempt funds, and details the basis of the court determination.

#### C. Proposed Notice, Instructions, and Form

The notice, instructions, and form for turnover are almost identical to those proposed for garnishment with only a few major substantive differences. There are differences because there are more exemptions to turnover than to garnishment.

Specifically, CPRC § 31.002(f) provides an exemption from turnover of “the proceeds of, or the disbursement of, property exempt under any statute, including Section 42.0021, Property Code.” Through this provision, the Legislature “. . . intended to specifically exempt [from the turnover statute] paychecks, retirement checks, individual retirement accounts and other such property exempt under the bankruptcy code.” *Caulley v. Caulley*, 806 S.W.2d 795, 798 (Tex. 1991). Accord: *Goebel v. Brandley*, 174 S.W.3d 359, 364-365 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2005, pet. denied); *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317, 323 (Tex. App. – Dallas 1997, writ denied)(holding disbursements from spendthrift trusts to be exempt from turnover). In other words, once wages are paid to a judgment debtor, they become the proceeds of exempt property and thereby not subject to turnover. *Marrs v. Marrs*, 401 S.W.3d 122, 124-127 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2011, no pet.). In addition, at least two courts of appeal have assumed that taking the proceeds of a paycheck from a judgment debtor’s bank account by way of a *turnover order* might violate section 31.002(f), but the more limited exemption for current wages did not preclude *garnishment* of those proceeds. *Guiberson v. Bohnefeld*, 1993 WL 175242, \*1-2 (Tex. App. – Dallas 1993, no writ); *American Express Travel Related Services v. Harris*, 831 S.W.2d 531, 532-533 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1992, no writ).

Normally, “current wages” in the hands of employers are exempt from seizure under Tex. Prop. Code § 42.001(b)(1) but are subject to garnishment once they are received by the judgment debtor. *American Express Travel Related Services v. Harris*, 831 S.W.2d 531, 532-533 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1992, no writ). Likewise, spendthrift trust funds remaining in the trust are exempt from seizure under Tex. Trusts Code § 112.035. The use of the terms “proceeds” and “disbursements” in section 31.002(f) means the funds are distributed to a judgment debtor and they remain exempt from turnover even though they are subject to seizure by garnishment.

In short, wages and spendthrift trust proceeds are subject to garnishment after receipt by a judgment debtor, but not by turnover. This standard is established in statute, because turnover is a far more imposing remedy and one that is largely unregulated. As a result, wages and proceeds from spendthrift trusts are included as exemptions on the turnover forms.

### **III. Proposed Execution Rules and Forms**

The current execution rules do not discuss exemptions whatsoever. As a result, the Debtor Group is proposing 3 new rules ---- Rules 621b, 621c and 621d. In substance, they are very similar to the turnover rules. The exemption notice and claim form are different in that they only list exemptions for tangible personal property which should be the only form of property that might be exempt in the exemption process.