SCAC MEETING AGENDA
May 13-14, 2011
9:00 a.m.

Location: **Texas Association of Broadcasters**
502 E. 11th Street, Suite 200
Austin, Texas 78701
512-322-9944

1. **WELCOME (Babcock)**

2. **STATUS REPORT FROM JUSTICE HECHT**

Justice Hecht will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the March 2011 meeting. Justice Hecht may refer new issues for the committee's study.

3. **APPELLATE PROCEDURE REGARDING FINAL COURT ORDERS, PARTICULARLY LETTER ORDERS FROM TRIAL COURT (Peeples)**

a) Referral letter from Justice Hecht (Attachment B) dated 9/14/10
b) Memo from Judge Peeples dated 5/12/11

4. **AMENDMENT TO TRCP 116 (Orsinger)**

a) Referral letter from Justice Hecht dated 3/14/11
b) Proposed Change to Rule 116 to Include Electronic Publication of Citation by Publication

5. **PROPOSED AMENDMENTS TO ANCILLARY PROCEEDING RULES: TRCP 592–734 (Carlson/Lawrence)**

*Ancillary Proceedings Task Force members Dulcie Wink, Pat Dyer and David Fritsche will attend the meeting and participate in the discussion regarding injunctions.

a) Final Report of Ancillary Proceedings Task Force dated 1/24/11 (discussion will cover pages 1–31, 53-69 and the "Section 2. Attachment")

The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

Chambers of
Justice Nathan L. Hecht

September 14, 2010

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Referral of Rules Issues

Via email

Dear Chip:

The Court requests the Supreme Court Advisory Committee's recommendations regarding whether and to what extent the procedural rules in Texas should be amended to: (1) reflect the proposed amendments to Federal Rule of Civil Procedure 26 that are scheduled to take effect December 1, 2010; and (2) provide a clearer procedure for determining when a trial-court order is final and otherwise appealable, particularly in cases involving a "letter order" from the trial court.

Attachment A contains the proposed amendments to Federal Rule of Civil Procedure 26 and an excerpt from an explanatory report of the Judicial Conference of the United States to the Supreme Court of the United States. Attachment B contains correspondence in which Chief Justice Thomas W. Gray summarized issues regarding the uncertain impact of letter orders from trial courts in Texas.

Please do not hesitate to contact me if you have any questions regarding these rule referrals. As always, the Court greatly appreciates your leadership and the Supreme Court Advisory Committee's thoughtful consideration of these referrals and its dedication to the rules process overall.

Sincerely,

Nathan L. Hecht
Justice

Attachment B

TENTH COURT OF APPEALS

McLennan County Courthouse
501 Washington Avenue, Rm. 415
Waco, Texas 76701-1373
Phone: (254) 757-5200 Fax: (254) 757-2822

December 10, 2009

Justice Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Re: Supreme Court Advisory Committee Issues

Dear Justice Hecht:

Over the years the Texas Supreme Court has sought to clarify and bring certainty to the determination regarding when a trial court order is final or otherwise appealable. One of the recurring issues with regard to appealable orders that impacts this problem is what this Court has generically referred to as "letter orders" signed by the trial court. Typically, these are letters from the court announcing the trial court's rulings with regard to various matters and frequently directing a party to draft an order.

This issue, however, can come up in an appeal in a variety of ways, including: 1) whether or not issues are preserved by obtaining a trial court ruling thereon; 2) the timeframe within which to bring an interlocutory appeal; and 3) the determination of whether or not certain issues, certain parties, or the entire case, have been finally disposed of.

As an example of the second type of problem for interlocutory appeals, I have enclosed a copy of a trial court clerk's notice, the defendant's notice of accelerated appeal, and to that notice of appeal is attached the trial court's "letter order," which is exemplary of that specific problem. Obviously, the appellant in this situation took the most cautious route and did not wait for his opposing counsel to "prepare and submit" a formal order. If it is the desire of the Court for the Supreme Court Advisory Committee to address this, and/or the broader issues concerning a determination of finality, or what constitutes an appealable order, I wanted this graphic example to be available to you. I have also provided a number of other cases with the references to letter rulings highlighted for your consideration of whether this issue is worthy of a rule of procedure.

Very truly yours,

Thomas W. Gray
Chief Justice

TWG:nw
Enclosure

LEXSEE 49 S.W.3D 40, 66

BARBARA KAY BLAKE BEARD, Appellant v. BRAMLET FRANK BEARD, Appellee

No. 10-98-357-CV

COURT OF APPEALS OF TEXAS, TENTH DISTRICT, WACO

49 S.W.3d 40; 2001 Tex. App. LEXIS 2545

April 18, 2001, Delivered
April 18, 2001, Filed

SUBSEQUENT HISTORY: Petition for Review Denied April 18, 2002.

PRIOR HISTORY: [**1] From the 74th District Court McLennan County, Texas. Trial Court # 97-1973-3.

DISPOSITION: Affirmed as modified.

COUNSEL: LaNelle L. McNamara, MCNAMARA & MCNAMARA, Waco, TX.

W.V. Dunnam, Jr., DUNNAM & DUNNAM, L.L.P., Waco, TX.

JUDGES: REX D. DAVIS, Chief Justice. Before Chief Justice Davis, Justice Vance, and Justice Gray.

OPINION BY: REX D. DAVIS

OPINION

[*45] Barbara Kay Blake Beard appeals a divorce decree dissolving the marriage between Bramlet Frank Beard and herself. Barbara presents sixteen issues in which she challenges: the authority of the judge assigned under chapter 74 of the Government Code to render judgment after an extended, post-trial hospitalization; the sufficiency of the evidence to support the court's findings of fact and conclusions of law; the court's failure to make amended or additional findings of fact and conclusions of law; the court's deferral until after trial of a ruling on her motions to strike an amended pleading filed by Bramlet less than seven days before trial and to exclude evidence relevant only to claims [*46] asserted for the first time in this amended pleading; the classification of certain of the parties' assets; the reimbursements among the community and separate estates; the division of the community estate; and the appointment of a receiver to sell the parties' residence "to the highest [**2] bidder."

AUTHORITY OF ASSIGNED JUDGE

Barbara's first issue asserts that the original decree signed by Judge Kenneth Douglas in this case is void because his assignment was superceded and terminated by intervening assignments of other judges to the case after he was hospitalized. Her second issue claims that any actions Judge Douglas took after she filed a recusal motion are void because she timely objected to his "reassignment" to the case.

According to the record, the presiding judge of the Third Administrative Judicial Region, B. B. Schraub, appointed Judge Douglas to hear the Beard divorce case after the elected judge recused himself. The assignment order provides in pertinent part:

THE STATE OF TEXAS

THIRD ADMINISTRATIVE JUDICIAL REGION

ORDER OF ASSIGNMENT BY PRESIDING JUDGE

Pursuant to *Section 74.056, Texas Government Code*

On the: 14th day of: October, 19: 97

The Honorable: KENNETH A. DOUGLAS

SENIOR Judge of the: 13TH District Court.

was assigned to the: 74TH District Court of: McLENNAN County, Texas. RE: Cause Number 97-1973-3 - IN THE MATTER OF THE MARRIAGE OF

BARBARA BEARD and BRAMLET BEARD and any other matter coming before the [**3] court while sitting on assignment in this cause.

This assignment will begin on the: 14TH day of: October, 19:97 and will continue for the period of time that may be deemed necessary for the assigned Judge to complete trial of any case or cases begun during this period, and to pass on motions for new trial and all other matters growing out of cases tried by the Judge herein assigned during this period.

After this assignment, the parties proceeded to trial before the court in November 1997. At the conclusion of the trial, Judge Douglas orally granted a divorce but postponed the classification of the parties' assets and division of the community estate.

Judge Douglas entered a hospital on February 18, 1998. He remained hospitalized until August 1998. Judge Schraub assigned Judge James F. Clawson to the Beard case on July 7, 1998. Bramlet filed an objection to Judge Clawson's assignment. *See TEX. GOV'T CODE ANN. § 74.053(b)* (Vernon 1998). Thus, Judge Clawson was automatically disqualified and could not hear the Beard case. *See In re Perritt, 992 S.W.2d 444, 446 (Tex. 1999)* (orig. proceeding); *TEX. GOV'T CODE ANN. § 74.053(b)*. [**4] Accordingly, Judge Schraub assigned Judge Joe B. Dibrell, Jr. to the case on August 11, 1998.

In September 1998, the parties received a decree signed by Judge Douglas. The decree recites on its face that it was "signed on April , 1998." Under *Rule of Civil Procedure 306a(2)*, "If the date of signing is not recited in the judgment or order, it may be shown in the record by a certificate of the judge or otherwise; provided, [*47] however, that the absence of a showing of the date in the record shall not invalidate any judgment or order." *TEX. R. CIV. P. 306a(2)*. Although Judge Douglas has not filed a certificate reciting the date of signing, the parties agree that he signed the decree on September 15, 1998, which is the date of the letter by which the judge advised the parties of the filing of the judgment. We accept this as correct for purposes of this appeal. *See TEX. R. APP. P. 38.1(f)*.

SCOPE OF AUTHORITY

An assigned judge's authority depends upon a valid assignment by the presiding judge. *See In re Nash, 13 S.W.3d 894, 899* (Tex. App.--Beaumont 2000, orig. proceeding). The scope and extent of that authority depends on the terms and conditions of the [**5] assignment. An assigned judge sits in all other respects as the judge of the court to which he is assigned. *See TEX. GOV'T CODE ANN. § 74.059* (Vernon 1998); *In re PG & E Reata Energy, L.P., 4 S.W.3d 897, 900* (Tex. App.--Corpus Christi 1999, orig. proceeding). A judge assigned to a district or statutory county court may hear and determine a matter pending in any district or statutory court in the county. *See TEX. GOV'T CODE ANN. § 74.094(a)* (Vernon Supp. 2001).

OTHER CASES

Barbara contends on appeal that the judgment was signed "at a point in time when Judge Douglas was no longer the judge assigned to this case." Citing *Starnes v. Chapman* and *Roberts v. Ernst*, she says that "once the assignment of an assigned judge has ended and another judge has been assigned to preside over and hear the case, the Judge who was previously assigned has no authority to act on any matter relating to the case." *Starnes, 793 S.W.2d 104* (Tex. App.--Dallas 1990, orig. proceeding); *Roberts, 668 S.W.2d 843* (Tex. App.--Houston [1st Dist.] 1984, orig. proceeding). Because each case [**6] is distinguishable, we disagree with her conclusion. [1]

> 1 Although we decide this issue on other grounds, we note that the Supreme Court recently held that an objection to a judge assigned under chapter 74 is timely if it is filed before the very first hearing or trial in the case, without regard to the particular order under which the judge is assigned. *See In re Canales, 2001 Tex. LEXIS 4, 44 Tex. Sup. J. 407, 410, 2000 WL 33146426*, at *4 (Feb. 1, 2001). Thus, even if we were to construe Judge Schraub's letter as a "reassignment" of Judge Douglas, Barbara's objection to that "reassignment" came too late. *Id.*

Starnes v. Chapman

In *Starnes*, Judge Ryan was assigned to hear cause number 86-7704-I in the 162nd District Court in Dallas. According to the Fifth Court of Appeals, the assignment "to cause No. 86- 7704-I was to continue for a period of time as may be necessary for Judge Ryan to complete trial of the case and to pass on motions for new trial and all other matters [**7] growing out of the case." *Starnes, 793 S.W.2d at 106*. Judge Ryan granted a summary judgment on some claims and severed other claims into causes 89-6582-I and 89-10016-I. Another judge, Judge Wright, was assigned to hear the severed cases, but he was objected to, preventing his hearing those cases. Judge Ryan was then assigned to hear the severed causes, and he was objected to. After the summary judgment was reversed, he was assigned to hear cause number 86-7704-I on remand but was objected to in that case as well. The presiding judge of the administrative region who had made all these assignments overruled the objections to Judge Ryan and reassigned him to all three cases.

[*48] In conditionally granting a writ of mandamus, the Dallas Court held that under the terms of his assignment order Judge Ryan's assignment to the original cause expired when the time periods for filing and ruling on motions for new trial expired and appeal was perfected. *See Starnes, 793 S.W.2d at 106.* The court further held that Judge Ryan was without authority to hear the remanded case unless reassigned. *Id.* (citing *Roberts, 668 S.W.2d at 846*).

As to the severed [**8] cases, the court held, "Our reversal of the [summary judgment] did not reinvest Judge Ryan with authority over the severed causes of action by virtue of his original assignment . . . ." *Starnes, 793 S.W.2d at 107.* Although the court stated that the "intervening assignment of [Judge Wright] to those cases superseded [the] assignment [of] Judge Ryan and terminated Judge Ryan's authority," it *held* that Judge Ryan's authority over the severed cases terminated when they were severed. *Id.* Because he was thereafter reassigned, the court found the objection to that assignment to be valid. [2] *Id.*

> 2 The Dallas Court has interpreted *Starnes* in a similar manner: "This Court concluded that Judge Ryan's initial assignment expired along with his plenary power over the summary judgment. Consequently, when the case was remanded, Judge Ryan was without authority to proceed further unless he was reassigned and Starnes's objection was timely." *Ex parte Holland, 807 S.W.2d 827, 828-29* (Tex. App.--Dallas 1991, orig. proceeding) (citations omitted).

[**9] *Roberts v. Ernst*

In *Roberts*, the First Court of Appeals was confronted with a situation in which Judge Dickerson, a sitting judge, was assigned to another district court for one week and for such time thereafter as necessary to complete trial of any case begun during that week "and to pass on all motions for new trial and all of the matters growing out of cases tried by the judge herein assigned during this period." *Roberts, 668 S.W.2d at 844.* Judge Dickerson conducted the trial, then granted a motion for new trial. Two months later, he vacated an order granting a continuance that another assigned judge had granted and ordered a change of venue. Two months after that, one of the regular judges of that county vacated the transfer order and denied the motion to change venue.

The First Court noted that the assignment was for a one-week period and to continue after that as was necessary to complete trial in any case begun during that week and "to pass on all motions for new trial and all matters growing out of cases tried." *Roberts, 668 S.W.2d at 846.* Thus, it construed his assignment as requiring him to proceed to trial on all cases set on his docket [**10] and to rule on all issues that arose during the course of a trial. *See id.* The court held that, because of the terms of his assignment order, when Judge Dickerson granted the new trial his assignment and his authority ceased. *Id.* It is true that the court also held that a later assignment of another judge superceded Judge Dickerson's assignment, but that holding was unnecessary to the decision as the court had already determined that his assignment was completed and his authority had ceased. *Id.*

O'Connor v. Lykos

In *O'Connor v. Lykos*, the presiding judge assigned Judge Lykos to the 309th District Court for one week and thereafter "as may be necessary for the assigned Judge to complete trial of any case begun during the period, and to pass on motions for new trial and all other matters growing out of cases tried by the Judge herein assigned during this period." *O'Connor v. Lykos, 960 S.W.2d 96, 97 n.1* (Tex. App.--Houston [*49] [1st Dist.] 1997, orig. proceeding). Judge Lykos granted a default judgment in March, then on June 2 signed an order granting a new trial and setting the case for trial on June 24. Also on June 2, the presiding judge again [**11] assigned Judge Lykos to the 309th District Court. *See O'Connor, 960 S.W.2d at 97.* This time, a party objected to the assignment, which the judge overruled. *O'Connor, 960 S.W.2d at 97-98.* The party then sought mandamus relief to set aside the "void orders" that resulted. *Id. at 98.*

In conditionally granting mandamus, the First Court held that Judge Lykos's authority under the first assignment terminated "when she signed an order granting a new trial" and that the objection under *section 74.053(c)* was timely as to the second assignment. *Id. at 99.* Thus, all orders entered thereafter were void. *Id.*

NECESSITY OF A TERMINATING EVENT

These decisions teach us that once a judge is assigned under a valid assignment order, such as the one in this case, termination of his authority (generally and as to specific cases) occurs only upon some event. Termination of authority depends on the terms of the assignment. It may be a date specified by the assignment order (most assignments described in the cases are for one day, two days, one week, etc.), *i.e.*, the judge's general authority over cases in the court to which he was assigned terminates [**12] on that date. It can be an event such as the signing of a judgment which becomes final or is appealed or a ruling on a motion for new trial, *i.e.*, the judge's authority over a specific case ends upon that event. In each instance however, the terms of the written assignment control when the assigned judge's authority terminates as to a specific case. Here, no such event oc-

curred, and Judge Douglas's authority under the assignment was still in effect at the time he signed the final decree in September 1998.

TERMINATION OF AUTHORITY BY LATER ASSIGNMENT

Neither of the assignment orders by which Judges Clawson and Dibrell were assigned explicitly revoked or terminated Judge Douglas's authority over this case. Indeed, contrary to Barbara's assumption, Judge Schraub had no authority to revoke Judge Douglas's assignment.

Judge Schraub sent the following letter to the parties and Judges Dibrell and Douglas on October 8:

Dear Judges and Attorneys:

I have been advised there is some confusion as to the judge presently assigned in the above matter. This office has previously assigned Judges Kenneth Douglas, James Clawson and Joe Dibrell. We have been advised there was an objection [**13] to Judge Clawson.

The assignment of Judge Dibrell was made because Judge Douglas became ill before the entry of a final judgment. At the time, there was a question as to when or if Judge Douglas would be able to resume work. Since that time, Judge Douglas has recovered, and is able and willing to work as a judge. It is the opinion of the undersigned that Judge Douglas is the judge currently assigned to the above case, and until such time as he steps aside, is authorized to preside over this case.

We agree with Judge Schraub that as of September 1998, Judge Douglas's authority to act in the Beard case continued because he had begun trial during his assignment and no event had caused his assignment to terminate under the terms of the assignment order. *See O'Connor, 960 S.W.2d at 99*; *Starnes, 793 S.W.2d at 107*; *Roberts, 668 S.W.2d at 846.*

[*50] Barbara's argument that the later assignment of another judge terminated Judge Douglas's authority must be based on the notion that two judges cannot have authority over the same case at the same time. We disagree with that proposition. In fact, under our judicial system, more often than [**14] not multiple judges have authority over any given case at any given time. *See, e.g. TEX. CONST. art. V, § 11* (district judges may exchange districts or hold court for each other when they deem it expedient); TEX. GOV'T CODE ANN. § 24.330 (Vernon 1988) (in counties with two or more district courts, judges of those courts may, in their discretion, exchange benches or districts); *TEX. R. CIV. P. 330(e)* (in counties with two or more district courts, judges may, in their discretion, exchange benches or districts); *Camacho v. Samaniego, 831 S.W.2d 804, 810-11 (Tex. 1992)* (under *section 74.094 of the Government Code*, district and statutory county court judges may, within a county, exchange benches or sign a judgment or order in another court without transferring the case). Because of the way our judicial system is structured, we perceive no reason to conclude that the assignment of a judge necessarily terminates the authority of a judge who was assigned earlier and whose assignment, by its terms, remains in effect. Simply because two judges might have authority over the same case at the same time does not require that [**15] result.

We acknowledge that the *Starnes* opinion discusses the termination of an assigned judge's authority by a later assignment of another judge and the *Roberts* opinion "holds" that. *See Starnes, 793 S.W.2d at 107*; *Roberts, 668 S.W.2d at 846.* In neither case was that issue essential to the decision, because in each the court had found an earlier event that terminated the assigned judge's authority. Furthermore, because we believe that any such "holding" is incorrect, we decline to follow those cases in that respect.

There is an additional policy reason for our conclusion. To hold that a presiding judge could terminate the authority of an assigned judge at any time simply by assigning another judge would undermine the judicial independence of all assigned judges. We find nothing in chapter 74 of the Government Code that authorizes a presiding judge to remove an assigned judge or to terminate his authority, once given. The extent of and limits on an assigned judge's authority are those set forth in his assignment order. Furthermore, Judge Douglas did nothing that would authorize his removal as a public official. He presided over the case, [**16] including the trial on the merits, became ill, recovered, and signed the decree. We find no fault in the process by which he accomplished this.

Having found that Judge Douglas's authority never terminated, he had the authority to sign the final decree in September 1998. We overrule Barbara's first issue. [3]

3 The criminal rule seems to be that the expiration of a judge's assignment does not render a conviction void. *See Wilson v. State, 977 S.W.2d 379, 380-81 (Tex. Crim. App. 1998).*

RECUSAL

Barbara's second issue claims that a decree signed by Judge Douglas after she filed a recusal motion is void because she timely objected to his "reassignment" to the case. She concedes, however, that "no formal order of reassignment was made by the Presiding Judge."

The parties agree that Judge Douglas signed the decree on September 15, 1998. Barbara filed a motion to recuse Judge Douglas on October 19. Judge Douglas [*51] resigned the decree "in Waco, Texas" on December 15, 1998, and it is the December [**17] decree that she attacks in her second issue.

Barbara's motion to recuse Judge Douglas was filed under *Rule 18a of the Rules of Civil Procedure.* [4] *See TEX. R. CIV. P. 18a.* It was not an *objection* to his "reassignment." [5] *Rule 18a* requires that such a motion be filed at least ten days before the date of the first hearing or trial over which the judge is to preside. *Id. 18*a(a). As the El Paso Court of Appeals observed in a family law case involving a motion to recuse filed after judgment on a motion to modify visitation, after a request for findings of fact and conclusions of law and the findings were made, after a motion to suspend the judgment during appeal, and after a motion for additional or amended findings and conclusions:

When a motion to recuse a judge is filed, the judge must either recuse him- or herself or request the administrative judge to assign another judge to hear the motion. In either case, the judge is prohibited from taking any further action in the case until the motion to recuse has been resolved. The mandatory provisions in *Rule 18a*, however, never come into play unless and until a timely motion to recuse is filed.

The record in the instant case [**18] shows that Appellant did not file a timely Motion to Recuse the trial judge. Consequently, we find *Rule 18a* inapplicable in this case. [6]

4 Judges may be removed from a particular case because they are constitutionally disqualified, subject to a statutory strike, or subject to recusal under the civil procedural rules. *See In re Union Pac. Resources Co., 969 S.W.2d 427, 428 (Tex. 1998)* (orig. proceeding).

5 When a party timely *objects* to an assigned judge under *section 74.053 of the Government Code*, the judge's removal is mandatory. *See TEX. GOV'T CODE ANN. § 74.053(b)* (Vernon 1998); *In re Perritt, 992 S.W.2d 444, 446 (Tex. 1999)* (orig. proceeding); *Dunn v. Street, 938 S.W.2d 33, 34 (Tex. 1997)* (orig. proceeding); *Flores v. Banner, 932 S.W.2d 500, 501 (Tex. 1996)* (orig. proceeding). Any subsequent orders by the assigned judge are void. *See Dunn, 938 S.W.2d at 34-35*; *Flores, 932 S.W.2d at 501.*

[**19] *Wright v. Wright, 867 S.W.2d 807, 811* (Tex. App.--El Paso 1993, writ denied) (citations omitted). After Judge Douglas signed the decree on September 15, it was filed with the clerk on September 23. A "Notice of Appealable Order" was mailed by the clerk to Bramlet and to Barbara on September 24. On October 5, Barbara filed a motion to set aside the decree for lack of authority and a request for findings of fact and conclusions of law. Not until October 19 did she file the motion to recuse Judge Douglas.

Barbara does not attack the validity of the September 15, 1998, decree on any grounds other than that Judge Douglas's authority had terminated. In discussing issue one, we concluded that his authority continued under the terms of the original assignment order and that the September 15 decree is valid. Thus, whether the decree that was "resigned" in December was valid or void does not affect the validity of the September decree as a decree. The December decree is identical in every respect to the September decree, except that it notes that it was signed in "Waco, Texas." Even if we were to consider that it changed or modified the September decree in some way that [**20] would make its validity critical to our review of this case, we would and do find that the motion to recuse Judge Douglas, made after he had presided over extensive pre-trial proceedings and had heard the case [*52] on its merits, was untimely. [6] *See TEX. R. CIV. P. 18a(a)*; *Wright, 867 S.W.2d at 811.* We overrule Barbara's second issue.

6 When a judge is constitutionally disqualified, any order involving judicial discretion by that judge is "absolutely void," "a nullity," and is an error that can be raised at any point in the proceeding. *See Buckholts Indep. School Dist. v. Glaser, 632 S.W.2d 146, 147 (Tex. 1982)*; *see also Union Pac. Resources, 969 S.W.2d at 428*; *TEX. CONST. art. V, § 11.*

SUMMARY

Based on our conclusions that Judge Douglas's authority under the assignment order never terminated and that the motion to recuse him was untimely, we hold that the decree of divorce is not void. Thus, we proceed to the remaining issues.

LATE-FILED PLEADINGS

[**21] Barbara's fifth issue challenges the court's deferral until after trial of rulings on her motion to strike Bramlet's Third Amended Answer and Cross-Petition for Divorce and her motion to exclude evidence relevant only to issues raised for the first time in this pleading. The parties do not dispute that Bramlet filed the complained-of pleading six days before trial. However, to preserve such a complaint for appellate review, the complainant must demonstrate surprise and request a continuance. *See Morse v. Delgado, 975 S.W.2d 378, 386*

(Tex. App.--Waco 1998, no pet.); *Greenstein, Logan & Co. v. Burgess Mktg., Inc., 744 S.W.2d 170, 184* (Tex. App.--Waco 1987, writ denied). Barbara did not request a continuance. Thus, she did not properly preserve this complaint. Accordingly, we overrule her fifth issue.

FINDINGS OF FACT/CONCLUSIONS OF LAW

Barbara contends in her sixth issue that the court erred by refusing to enter the amended "and/or" additional findings of fact and conclusions of law she requested. However, she does not contend that she has been harmed in any respect by the court's refusal to make the requested findings.

A trial court's refusal [**22] to make findings of fact does not require reversal if "the record before the appellate court affirmatively shows that the complaining party suffered no injury." [7] *Tenery v. Tenery, 932 S.W.2d 29, 30 (Tex. 1996)* (quoting *Cherne Indus., Inc. v. Magallanes, 763 S.W.2d 768, 772 (Tex. 1989)).* An appellant has suffered injury from such refusal when the circumstances of the case require her to guess the reason or reasons the court ruled against her. *See Chandler v. Chandler, 991 S.W.2d 367, 389* (Tex. App.--El Paso 1999, pet. denied); *Rafferty v. Finstad, 903 S.W.2d 374, 380* (Tex. App.--Houston [1st Dist.] 1995, writ denied); *Sheldon Pollack Corp. v. Pioneer Concrete of Tex., Inc., 765 S.W.2d 843, 845* (Tex. App.--Dallas 1989, writ denied).

7 The original quotation is from *Wagner v. Riske. See Cherne Indus., Inc. v. Magallanes, 763 S.W.2d 768, 772 (Tex. 1989)* (quoting *Wagner, 142 Tex. 337, 343, 178 S.W.2d 117, 120 (1944)).*

[**23] Barbara does not allege that she has been harmed by the court's refusal to make the additional findings requested. The circumstances of this case do not indicate that she must guess the rationale for the court's adverse rulings. Accordingly, we conclude that she has not been harmed by the court's refusal to make the requested additional findings. *See Roberts v. Padre Island Brewing Co., 28 S.W.3d 618, 622* (Tex. App.--Corpus Christi 2000, pet. denied). Thus, we overrule her sixth issue.

[*53] SUFFICIENCY OF EVIDENCE

In Barbara's third and fourth issues respectively, she contends that there is no evidence to support the court's findings of fact and such findings are contrary to the great weight and preponderance of the evidence.

In addition to the general no-evidence and great weight challenges raised in Barbara's third and fourth issues, she contends in her seventh issue that the court erred in failing to confirm as her separate property: (1) a three percent interest in the parties' residence attributable to funds she allegedly contributed from her separate property for closing costs; (2) all funds which she owned before marriage and placed in a CD at the Ennis [**24] State Bank; and (3) all amounts which she received by virtue of an inheritance. [8]

8 Although Barbara contends that the court "erred" in the rulings complained of in the 7th, 8th, 9th, and 12th issues, the form and content of her brief suggest that she is asserting no-evidence and great-weight challenges against the court's rulings on these issues. Accordingly, we address them in this manner.

Barbara avers in her eighth issue that the court erred in failing to reimburse the community estate from Bramlet's separate estate for: (1) community funds and assets used to pay a debt on Bramlet's separate property rental condominium; (2) losses sustained by the community from the condominium; and (3) community funds wasted by Bramlet in strip clubs.

Barbara's ninth issue contests the court's failure to compensate her separate estate from the community estate for approximately $ 60,000 in attorney's fees which she has paid from her separate property funds to prosecute the divorce. Her twelfth issue challenges the court's [**25] failure to award her separate estate moneys from the community estate for Bramlet's alleged breach of fiduciary duty as her husband and as her bank officer with regard to her separate property funds on deposit at the Ennis State Bank.

FINDINGS AT ISSUE

Under these issues, Barbara expressly challenges Findings of Fact Nos. 8, 9, 10, and 11, in which the court found:

8. During the marriage of the parties herein $ 7,000.00 of Respondent's separate party, received by him as a gift from his mother, was paid on the purchase price of a $ 17,350.00 diamond ring possessed by and awarded to Petitioner herein and $ 6,000.00 of its purchase price was from the community estate of the parties.

9. Petitioner failed to allege in any pleading herein that said ring, any part thereof or any of the above sums paid thereon, was a gift to her and failed to prove such by even a preponderance of the evidence, much less by clear and convincing evidence.

10. During the existence of the marriage of the parties herein a home improvement loan was procured by the parties for the making of permanent and valuable improvements on their homestead and $ 5,548.00 of Respondent's separate property was paid [**26] in satisfac-

tion of said improvement loan, for which Respondent's separate estate has a charge against said homestead.

11. During the period that payments from the community estate of the parties herein were made on the condominium that was Respondent's separate property, the community estate of the parties derived monetary benefits from the rental value of said condominium that were $ 200.00 per month in excess of the payments thereon and major tax benefits.

[*54] She also appears [9] to challenge the next three findings:

12. At the time of the marriage [of] the parties herein Petitioner owned a CD in the amount of about $ 19,000.00 from which she thereafter expended about $ 4,000.00 toward a purchase of said $ 17,350.00 diamond ring, and said CD is presently in an amount in excess of $ 15,000.00.

13. During the period of the marriage, said CD has produced in excess of $ 10,000.00 community interest which has been unaccounted for by Petitioner, though every withdrawal therefrom was payable to Petitioner BARBARA KAY BLAKE BEARD, and no one else. [10]

9 Barbara expressly identifies Findings of Fact 8, 9, 10, & 11 as findings for which there is no evidence or factually insufficient evidence. The remainder of the argument in this portion of her brief addresses the substance of findings 12-14 without identifying them by their numerical designations. *See Heritage Resources, Inc. v. Nationsbank, 895 S.W.2d 833, 837* (Tex. App.--El Paso 1995), *rev'd on other grounds, 939 S.W.2d 118 (Tex. 1996)* (lower court "discerned" what findings were at issue).

[**27]

10 The court's recitations about the CD notwithstanding, it appears that this finding actually relates to interest accrued on a separate account Barbara established at the First National Bank of Central Texas with a substantial inheritance she received during the marriage. Bramlet testified that the inheritance account earned $ 10,692.70 in interest. Conversely, the record reflects that the interest earned on the CD (about $ 4,000) was significantly less. Bramlet's counsel compounded the confusion in his post-trial brief in which he asserted that the CD had "undisputedly produced in excess of $ 10,000.00 in community interest." Our interpretation of this finding garners further support from the fact that the court awarded each of the parties 1/2 of the "community property interest of $ 10,693.00" the inheritance account allegedly accrued.

14. A reasonable fee for the services of Petitioner's attorney herein that were reasonably incurred by Petitioner was the sum of $ 1,500.00.

STANDARD OF REVIEW

On an appeal from a judgment rendered in a bench trial, we review the court's findings of [**28] fact in the same manner as jury findings. *See Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex. 1994)*; *Lucas v. Texas Dep't of Protective & Regulatory Servs., 949 S.W.2d 500, 502* (Tex. App.--Waco 1997, pet. denied). In such an appeal, a no-evidence or factual sufficiency challenge should be addressed to specific findings rather than the judgment as a whole. *See Northwest Park Homeowners Ass'n v. Brundrett, 970 S.W.2d 700, 704* (Tex. App.--Amarillo 1998, pet. denied); *Levine v. Maverick County Water Control & Improvement Dist., 884 S.W.2d 790, 796* (Tex. App.--San Antonio 1994, writ denied).

Bramlet contends that Barbara did not properly preserve her factual sufficiency points because she did not timely file a motion for new trial. However, the documentation accompanying the motion for new trial reflects that it was deposited in the mail on the thirtieth day after judgment. Accordingly, it was timely. *See TEX. R. CIV. P. 5, 329b(a).*

When an appellant asserts that there is no evidence to support an adverse finding on which she had the burden of proof, we construe the issue as an assertion that the contrary was established [**29] as a matter of law. *See Sterner v. Marathon Oil Co., 767 S.W.2d 686, 690 (Tex. 1989)*; *La Grange v. Nueces County, 989 S.W.2d 96, 99-100* (Tex. App.--Corpus Christi 1999, pet. denied); *Ex parte Thomas, 956 S.W.2d 782, 786 n.5* (Tex. App.--Waco 1997, no pet.). We first search the record for evidence favorable to the finding, disregarding all contrary evidence. *See Sterner,* [*55] *767 S.W.2d at 690*; *La Grange, 989 S.W.2d at 100.* If we find no evidence supporting the finding, we then determine whether the contrary was established as a matter of law. *Id.*

When an appellant contends that there is no evidence to support an adverse finding on which her opponent had the burden of proof, we consider only the evidence and inferences which tend to support the contested issue and disregard all evidence and inferences to the contrary. *Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997)*; *Tate v. Tate, 2000 Tex. App. LEXIS 5182*, *5-6, No. 08-99-00006- CV, 2000 WL 1060537, at *2 (Tex. App.--El Paso Aug. 3, 2000, no pet. h.). We will sustain such a point if: (a) there is a complete absence of [**30] evidence of a vital fact; (b) we are barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more

than a mere scintilla; or (d) the evidence conclusively establishes the opposite of the vital fact. *Id.* (citing Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-63 (1960)). "More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" [11] *Id.* (quoting *Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995)).*

11 The original quotation is from *Transportation Ins. Co. v. Moriel. See Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995)* (quoting *Moriel, 879 S.W.2d 10, 25 (Tex. 1994)).*

We treat a factual sufficiency challenge to an [**31] adverse finding on which the appellant had the burden of proof as an assertion that the finding is against the great weight and preponderance of the evidence. *See Croucher v. Croucher, 660 S.W.2d 55, 58 (Tex. 1983); Tate, 2000 Tex. App. LEXIS 5182*, *5-6, No. 08-99-00006- CV, 2000 WL 1060537, at *2; *Crow v. Burnett, 951 S.W.2d 894, 897* (Tex. App.--Waco 1997, pet. denied). When such a challenge is lodged against a finding on which the opponent had the burden, it is generally denominated as a factual sufficiency issue. In either event, we must examine the entire record. *See Ortiz v. Jones, 917 S.W.2d 770, 772 (Tex. 1996)* (per curiam); *Hitzelberger v. Samedan Oil Corp., 948 S.W.2d 497, 503* (Tex. App.--Waco 1997, pet. denied).

Because a divorce case invokes the clear-and-convincing standard, we will set aside the challenged finding only "if the trier of fact could not reasonably find the existence of the fact to be established by clear and convincing evidence." *Spangler v. Texas Dep't of Protective & Regulatory Servs., 962 S.W.2d 253, 257* (Tex. App.--Waco 1998, no pet.); *accord Tate, 2000 Tex. App. LEXIS 5182*, *7-8, No. 08-99-00006- CV, [**32] 2000 WL 1060537, at *2.

APPLICATION

1. Issues on Which Bramlet Had Burden of Proof

Barbara's challenges of Findings of Fact Nos. 8 and 10 contest the court's findings that Bramlet had a separate property interest in the ring and the parties' residence. These are issues on which Bramlet had the burden of proof. *See Tate, 2000 Tex. App. LEXIS 5182*, *3-5, No. 08-99-00006- CV, 2000 WL 1060537, at *2; *Licata v. Licata, 11 S.W.3d 269, 273* (Tex. App.--Houston [14th Dist.] 1999, pet. denied).

Bramlet alleges in his Third Amended Petition that he used $ 7,000.00 in separate [*56] property funds to pay for a diamond ring purchased during the marriage. He alleges that he paid $ 5,548.00 in separate property funds in satisfaction of a home improvement loan secured for improvements to the parties' residence. In Findings of Fact Nos. 8 and 10, the court found that Bramlet has a separate property interest in the ring and a reimbursement claim against the community estate for the separate property funds he paid toward the home improvement loan.

The Ring

Although Finding of Fact No. 9 recites the court's finding that Bramlet paid $ 7,000.00 [**33] in separate property funds toward the purchase of the ring, the judgment characterizes the ring as Barbara's separate property. The court did not require Barbara to reimburse Bramlet's separate estate for any funds contributed to the purchase of the ring even though the undisputed testimony is that Bramlet contributed $ 7,000.00 in separate property funds to the purchase of the ring. In light of the judgment, it appears that Finding of Fact No. 9 is immaterial and did not lead to the rendition of an improper judgment insofar as Barbara's asserted interest in the ring is concerned. [12]

12 Bramlet does not challenge the court's failure to award his separate estate an interest in the ring or to require reimbursement.

The Residence

Bramlet testified that they purchased a home in May 1993. At that time, they obtained a home improvement loan of $ 10,000.00 which was secured by a lien on the home. Bramlet alleges in his Third Amended Petition that he paid $ 5,548.00 in separate property funds in satisfaction [**34] of this home improvement loan. He testified that he obtained this money from the sale of 100 shares of stock in the Salado National Bank, which he acquired before their marriage. Barbara offered no evidence to contradict this testimony. However, she contends that this testimony is insufficient to establish Bramlet's reimbursement claim because it is not supported by documentation. We disagree.

A right of reimbursement arises when the funds of one marital estate are expended for the benefit of another. [13] *See Vallone v. Vallone, 644 S.W.2d 455, 459 (Tex. 1982); see also In re Marriage of Gill, 41 S.W.3d 255, 2001 Tex. App. LEXIS 1494*, *1-6, 2001 WL 225939, at *1-2 (Tex. App.--Waco 2001, no pet. h.); *Rusk v. Rusk, 5 S.W.3d 299, 309* (Tex. App.--Houston [14th Dist.] 1999, pet. denied); *Kimsey v. Kimsey, 965 S.W.2d 690, 700* (Tex. App.--El Paso 1998, pet. denied). In evaluating such a claim, the fact finder must offset the enhancement value to the benefitted estate against any

benefits returned to the paying estate. *See Penick v. Penick, 783 S.W.2d 194, 197-98 (Tex. 1988)*; *Rusk, 5 S.W.3d at 310*; [**35] *Kimsey, 965 S.W.2d at 700*; *see also Gill, 2001 Tex. App. LEXIS 1494*, *3-6, No. 10-00-163- CV, 2001 WL 225939, at *2 (applying statutory reimbursement claim under *sections 3.401* and *3.402* of Family Code). The court has broad discretion in evaluating this equitable claim. *See Penick, 783 S.W.2d at 198*; *Kimsey, 965 S.W.2d at 700.*

13 The reimbursements at issue in this case are governed by the common law. In 1999, however, the legislature amended the Family Code to provide for the creation of an "equitable interest" of the community estate in a separate property asset or of the separate estate in a community asset to the extent the contributing estate has enhanced the value of the benefitted estate. *See TEX. FAM. CODE ANN. §§ 3.401- 3.406* (Vernon Supp. 2001). These provisions apply to any divorce proceeding pending on or after September 1, 1999. *See* Act of May 26, 1999, 76th Leg., R.S., ch. 692, *§ 5(c)*, 1999 Tex. Gen. Laws 3292, 3295.

[**36]

The party claiming a right of reimbursement bears the burden of proving [*57] that expenditures were made which are reimbursable. *See Vallone, 644 S.W.2d at 459*; *Gill, 2001 Tex. App. LEXIS 1494*, *4-6, No. 10-00-163- CV, 2001 WL 225939, at *2; *Rusk, 5 S.W.3d at 310*; *Kimsey, 965 S.W.2d at 700*. Thus, the claimant must establish the extent to which the enhancement value realized by the benefitted estate exceeds those benefits received in return by the contributing estate. *See Zieba v. Martin, 928 S.W.2d 782, 788-89* (Tex. App.--Houston [14th Dist.] 1996, no writ); *Gutierrez v. Gutierrez, 791 S.W.2d 659, 665* (Tex. App.--San Antonio 1990, no writ).

The benefitted estate is enhanced by the payment of purchase-money debt to the extent the principal indebtedness is reduced. *See Penick, 783 S.W.2d at 197*; *Graham v. Graham, 836 S.W.2d 308, 310* (Tex. App.--Texarkana 1992, no writ). When payments are made toward a loan for improvements, enhancement can be measured by the extent to which the principal indebtedness is reduced and/or the extent to which the improvements have increased [**37] the market value of the property. *See Magill v. Magill, 816 S.W.2d 530, 534-35* (Tex. App.--Houston [1st Dist.] 1991, writ denied). In determining the extent to which the contributing estate has received offsetting benefits, the court may consider such things as rental income and tax benefits realized by the contributing estate. *See Penick, 783 S.W.2d at 197-98*; *Rusk, 5 S.W.3d at 310.*

Bramlet testified that he expended $ 5,548.00 in separate property funds to pay the home improvement loan. However, he offered no evidence regarding whether all or part of these funds were applied to reduction of the principal indebtedness. According to Bramlet, they "moved some walls around, repainted, refinished hardwood floors, put in new flooring, new carpet, just numerous things" with the proceeds from the home improvement loan. He testified that these improvements enhanced the value of the home by at least the amount ($ 10,000.00) expended. The record further reflects that the parties purchased the home for $ 145,000.00 in 1993 and it was worth $ 155,000.00 at the time of trial.

From this evidence, we cannot say that the court "could not reasonably [**38] find . . . by clear and convincing evidence" that the value of the home was enhanced by the $ 5,548.00 in separate property funds which Bramlet paid toward the home improvement loan. *See Tate, 2000 Tex. App. LEXIS 5182*, *7-8, No. 08-99-00006- CV, 2000 WL 1060537, at *2; *Spangler, 962 S.W.2d at 257*. Accordingly, we conclude that the record contains some evidence and factually sufficient evidence to support the court's finding that Bramlet enhanced the valued of the parties' residence with the $ 5,548.00 in separate property funds he used to pay the home improvement loan.

2. Issues on Which Barbara Had Burden of Proof

Barbara's complaints regarding Findings of Fact Nos. 9 and 12 attack the court's findings regarding the extent of her alleged separate property interests in the ring and a certificate of deposit issued by the Ennis State Bank. Her challenge to Finding of Fact No. 11 contests the court's decision not to reimburse the community estate for funds expended for a condominium which was Bramlet's separate property. Her complaint regarding Finding of Fact No. 13 challenges the court's determination that she failed to account for approximately $ 11,000.00 in [**39] interest allegedly accrued from a substantial inheritance she received during the marriage. Her attack on Finding of Fact No. 14 complains of the court's determination of those attorney's fees which she "reasonably incurred." These are issues on which Barbara had the burden of proof. *See Stewart Title Guar.* [*58] *Co. v. Sterling, 822 S.W.2d 1, 10 (Tex. 1991)* (attorney's fees); *Jensen v. Jensen, 665 S.W.2d 107, 110 (Tex. 1984)* (reimbursement); *Tate, 2000 Tex. App. LEXIS 5182*, *3-5, No. 08-99-00006- CV, 2000 WL 1060537, at *2 (separate property); *McCann v. McCann, 22 S.W.3d 21, 23* (Tex. App.--Houston [14th Dist.] 2000, pet. denied) (reimbursement); *Hartmann v. Solbrig, 12 S.W.3d 587, 594* (Tex. App.--San Antonio 2000, pet. denied) (attorney's fees); *Licata, 11 S.W.3d at 273* (separate property).

The Ring

Barbara's complaint regarding Findings of Fact Nos. 8 and 9 attacks the court's implied findings that her separate estate contributed only $ 4,350.00 toward the purchase of the ring. [14] However, the judgment recites that the ring is Barbara's separate property. In light of the judgment, it appears that [**40] Finding of Fact No. 9 is immaterial and did not lead to the rendition of an improper judgment insofar as Barbara's asserted interest in the ring is concerned.

14 In Finding of Fact No. 8, the Court found that Bramlet's separate estate contributed $ 7,000.00 toward the purchase of the $ 17,350.00 ring and the community estate contributed $ 6,000.00.

The Certificate of Deposit

Barbara's challenge regarding Finding of Fact No. 12 contests the court's finding regarding the extent of her separate property interest in a certificate of deposit at Ennis State Bank. Her seventh issue in part attacks the court's alleged failure to award her all the funds which she owned prior to marriage and applied to the purchase of a CD at this bank. Her twelfth issue questions the court's failure to find that Bramlet breached a fiduciary duty he owed her as husband and officer of the bank which issued these CD's.

Barbara testified that she placed $ 19,000 in a CD at the bank before their marriage in April 1990. She withdrew [**41] $ 7,384 in August 1990. According to other testimony, she applied at least a portion of this withdrawal ($ 4,350) to the purchase of the ring. A series of other renewals, deposits, and withdrawals reduced the principal balance of Barbara's separate property funds to $ 10,000.00, which was applied to the purchase of another CD on August 17, 1990. Because these transactions involved commingled funds (principal belonging to Barbara's separate property estate and interest to the community estate), we presume that Barbara withdrew community funds first in the absence of proof to the contrary. *See Smith v. Smith, 22 S.W.3d 140, 146* (Tex. App.--Houston [14th Dist.] 2000, no pet.).

The only contrary proof in the record is that Barbara expended $ 4,350.00 in separate property funds for the ring. Thus, we presume that the remainder of the withdrawals from these CD's consumed all the interest earned by the community estate to date in addition to a significant portion of Barbara's separate property estate. Because we presume community funds were withdrawn first from this commingled account, we conclude that the $ 10,000.00 principal balance of the August 1990 CD was Barbara's [**42] separate property.

We likewise presume that one-half of that portion of the prior withdrawals attributable to Barbara's separate property and not otherwise accounted for ($ 4,650.00) was a gift to the community. *See Cockerham v. Cockerham, 527 S.W.2d 162, 168 (Tex. 1975); Bahr v. Kohr, 980 S.W.2d 723, 726* (Tex. App.--San Antonio 1998, no pet.); *In re Marriage of Thurmond,* [*59] *888 S.W.2d 269, 273* (Tex. App.--Amarillo 1994, writ denied).

Barbara placed the principal and interest from her August 1990 CD into two separate CD's on March 1, 1991: one with a principal balance of $ 6,000.00 and one of $ 4,382.44. [15] $ 382.44 of the latter CD was community property as it was derived from interest accrued on the $ 10,000.00 CD issued in August 1990. Barbara renewed the $ 6,000 CD three times before she deposited its principal balance in a money market account on May 29, 1992. [16]

15 From the endorsements on this series of eleven CD's, the two March 1991 CD's can be clearly traced back to Barbara's original $ 19,000 CD.

16 Bank records reflect that Bramlet and Barbara both signed the deposit agreement for this account on May 13, 1992.

[**43] The Bank issued a separate CD payable to Barbara on September 19, 1990 in the principal amount of $ 2,500.00. The record contains no evidence regarding the source of funding for this CD. Accordingly, we presume that it was a community asset. *See Cockerham, 527 S.W.2d at 167; In re Marriage of Parker, 997 S.W.2d 833, 837* (Tex. App.--Texarkana 1999, pet. denied); *Scott v. Scott, 805 S.W.2d 835, 837* (Tex. App.--Waco 1991, writ denied). After various renewals and deposits, the bank issued a CD on February 15, 1991 in the principal amount of $ 11,000. The record attributes $ 5,000.00 of these deposits to funds from an account at the former Waco State Bank, which Barbara acknowledges to be a community account. The record contains no evidence of the source of the remaining $ 3,372.61 in deposits made to this CD. Accordingly, we presume that the entirety of this $ 11,000 CD was a community asset.

On March 18, 1991, the Beards combined the principal and interest from the $ 11,000 community CD and Barbara's $ 4,382.44 CD ($ 382.44 of which were community funds) into a $ 15,454.72 CD. The parties withdrew $ 454.72 from this CD, and the bank [**44] issued a $ 15,000 CD on April 15, 1991 payable to Barbara. Because these CD's represented commingled funds, we presume that the $ 454.72 withdrawal removed community funds in the absence of proof to the contrary. *See*

Smith, 22 S.W.3d at 146. Thus, $ 4,000.00 of the $ 15,000.00 CD was Barbara's separate property, and the remainder community. The parties regularly renewed this CD until May 13, 1992, when they opened the money market account.

When the Beards opened the money market account with the $ 15,000 in proceeds from this CD, $ 4,000.00 of the account was Barbara's separate property, and the remainder community. Barbara deposited the proceeds from her separate property $ 6,000.00 CD into this account on May 29, 1992. After a series of deposits and withdrawals (all of which we presume to involve community funds), the Beards withdrew $ 15,000 from the money market account in November 1992 to purchase a CD. This $ 15,000 CD is the predecessor to the one which the parties claim to be Barbara's separate property. Accordingly, we presume that the Beards placed the entirety of Barbara's $ 10,000.00 separate property funds from the money market account into this CD.

[**45] After a withdrawal (which we presume to be of community funds), the bank issued a $ 14,500.00 CD on May 11, 1993, payable to Barbara. According to the history noted above, $ 10,000.00 of these funds are Barbara's separate property, and the remainder community. Nonetheless, Bramlet and Barbara both testified that the $ 14,500.00 principal balance of this CD is Barbara's separate property. We treat [*60] this testimony as evidence that Bramlet gave the community funds in this CD ($ 4,500.00) to Barbara. *See In re Marriage of Morrison, 913 S.W.2d 689, 691* (Tex. App.--Texarkana 1995, writ denied).

At the beginning of the marriage, Bramlet was a vice-president at Ennis State Bank. At the time of trial, he was president. Bank records reflect a long series of transactions relating to Barbara's CD. However, Bramlet denied ever making any unauthorized withdrawals from the CD. Barbara on the other hand testified that she did not recall making any of the withdrawals save for the one involving the purchase of her ring. Nevertheless, her signature does appear on the deposit agreement for the money market account.

Because the court awarded Barbara the principal balance of the CD as [**46] her separate property and one-half of the interest as her share of the community estate and because Bramlet denied that he made any unauthorized withdrawals from these funds, we conclude that the record contains some evidence to support the challenged findings and that such findings are not contrary to the great weight and preponderance of the evidence.

The Residence

Barbara's seventh issue challenges in part the court's failure to confirm as her separate property an undivided three percent interest in the residence attributable to funds she allegedly contributed for closing costs in the purchase of the residence. Barbara's CPA testified that the parties applied $ 4,905.07 from her CD to these closing costs. He cited a May 26, 1993 withdrawal in the amount of $ 10,264.32 which the Beards used to purchase a cashier's check payable to the title company for the closing. The payment of this check reduced the Beards' money market account to a zero balance. The CPA attributed $ 5,359.25 of this withdrawal to community funds on deposit in the account and the remainder ($ 4,905.07) to Barbara's separate property interest in the account.

However, our review above of the history of [**47] the funds deposited at the bank reflect that the Beards withdrew Barbara's community funds from the money market account in November 1992 when they purchased a $ 15,000.00 CD. Accordingly, the remainder of the funds on deposit in the money market account are presumptively community funds. While the CPA's testimony reads otherwise, Barbara cannot have it both ways. If the CPA's theory were given credence, Barbara's $ 19,000.00 in separate property funds would have inexplicably blossomed to $ 23,905.07. [17]

17 As previously noted, the principal balance of Barbara's CD had decreased to the level of $ 10,000 in August 1990. Although Barbara claims that this happened because Bramlet made unauthorized withdrawals, we have already concluded that the court's contrary finding is not against the great weight and preponderance of the evidence. The $ 23,905.00 sum is derived by adding the clearly-established $ 10,000.00 principal balance of the CD in August 1990, the $ 4,350.00 admittedly spent on the ring in August 1990, the $ 4,650.00 in unexplained 1990 withdrawals, and the $ 4,905.07 Barbara claims to have contributed to closing costs.

[**48] For these reasons, Barbara failed to rebut the statutory presumption that the funds used to pay the closing costs came from the community estate. *See Cockerham, 527 S.W.2d at 167; Parker, 997 S.W.2d at 837; Scott, 805 S.W.2d at 837.* Accordingly, we conclude that there is some evidence to support the court's failure to award Barbara's separate property estate an interest in the parties' residence and such failure is not contrary to the great weight and preponderance of the evidence.

[*61] The Inheritance

The remainder of Barbara's seventh issue challenges that portion of the court's Finding of Fact No. 13 in

which the court determined that she had failed to account for more than $ 10,000.00 in interest which allegedly accrued from the inherited funds she deposited in a bank account with the First National Bank of Central Texas.

Barbara's brother Willard served as independent executor of their grandfather's sizable estate. Willard made periodic distributions, depositing Barbara's share directly in her account. Barbara opened this account with an initial deposit of $ 90,759.00 in September 1996. Between December 1996 and January 1997, [**49] three deposits totaling $ 129,794.00 were added. An additional deposit of $ 9,750.00 was made in August 1997. After the parties' separation, Barbara made one deposit of her earnings from work in the amount of $ 1,948.12. Two days later, she withdrew this same amount and deposited it in her checking account. The bank records reflect that this account earned $ 8,436.65 in interest between September 1996 and September 1997.

Barbara made several purchases with the funds in this account. She purchased porcelain candlesticks, an antique chest, a set of baccarat glasses, and a sterling silver tea service from Willard for $ 10,829.00. She characterizes the candlesticks as wholly community property, the tea service as wholly separate property, and the remainder as mixed. Barbara also purchased a set of chairs and a painting from others for $ 752.00. She characterizes these assets as primarily community property. [18]

18 Barbara characterizes the painting as 100% community property, the six chairs as 98% community, the antique chest as 28% community, and the baccarat glasses as 48% community.

[**50] Barbara also set aside $ 1,200.00 from these funds for federal income taxes and paid her attorney $ 36,000.00 from this account. Tracing all of these transactions through the account history, Barbara's CPA characterized the account (as of August 1997) to contain $ 183,046.43 in separate property funds and $ 2,202.47 in community funds.

Bramlet testified, based on his review of the bank records, that this account had earned $ 10,692.70 in interest through the end of October 1997. [19] The court found that Barbara had failed to account for the interest allegedly accrued. Accordingly, the court awarded Bramlet one-half of this stated sum as his share of the community interest in the account.

19 The bank records regarding this account offered in evidence by Barbara end at September 1997.

The bank records which Barbara offered in evidence clearly reflect that this account earned only $ 8,436.65 in interest as of September 29, 1997. The account earned $ 812.00 in interest in September 1997. The account balance remained [**51] relatively unchanged at the time of trial, and it defies logic to assume that the account earned an additional $ 2,250.00 in interest in October 1997. Bramlet proffered no additional evidence to support his assertion that the account earned $ 10,692.70 in interest. [20]

20 To the extent that Barbara's deposit of earnings could be included in the community property funds on deposit in this account, the record clearly reflects that she withdrew these earnings two days after depositing them and placed them in her checking account.

Conversely, Barbara identified six specific assets which were purchased with funds on deposit in this account. Her CPA classified the porcelain candlesticks, the set of chairs, and a painting as community [*62] assets; he characterized the antique chest and the set of baccarat glasses as mixed assets; and he designated the sterling silver tea service as Barbara's separate property. It appears that the CPA made these characterizations based on the amount of community funds (accrued interest) [**52] in the account at the time each of the purchases was made. The CPA applied the traditional formula that community assets were first expended from this account to pay for these purchases. *See, e.g., Smith, 22 S.W.3d at 146-47.*

Bramlet's unsupported testimony that Barbara's inheritance account accrued $ 10,692.70 in interest constitutes no more than a mere scintilla of evidence to support the court's finding. *See Merrell Dow Pharms., 953 S.W.2d at 711*; Calvert, 38 TEX. L. REV. at 363. However, Barbara produced bank records which clearly state the interest actually earned on the account. Her CPA carefully traced the account history and noted every transaction and the purpose or source for such transaction. With this evidence, Barbara conclusively established that the community interest in this account was only $ 2,202.47. *See Sterner, 767 S.W.2d at 690*; *La Grange, 989 S.W.2d at 100.*

The Condominium

Barbara's challenge to Finding of Fact No. 11 contests the court's decision not to reimburse the community estate for funds expended for a rental condominium which was Bramlet's separate property. In her [**53] eighth issue, Barbara complains in part that the court erred in failing to reimburse the community estate from Bramlet's separate estate for community funds and assets used to pay a debt on the condominium and losses sustained by the community from the condominium.

Bramlet purchased the condominium in 1983. When the Beards married, Bramlet owed $ 63,000.00 on a purchase money note secured by the condominium and held by Central National Bank in Waco. He also owed $ 4,000.00 on a separate purchase money note held by his father and his father's partner. Bramlet testified that they paid between $ 550.00 and $ 650.00 per month on the condominium debt. [21] He opined that the benefits received by the community estate from the condominium approximately equaled the amount expended on the purchase money note.

21 At least one of these notes had a variable interest rate. Based on the fact that the balance of the Central National Bank note decreased during the marriage but the other note increased, it appears that Bramlet's father did not require him to make any payments on this other note during the marriage.

[**54] When Barbara filed the divorce petition, the balance of the $ 63,000.00 note had been reduced to $ 55,472.00, but the $ 4,200.00 note had increased to $ 7,200.00. According to Bramlet's testimony, the community estate paid approximately $ 50,000.00 during the marriage toward the debt on the condominium. Barbara asks that the community estate be reimbursed by the amount the balance of the Central National Bank note was reduced ($ 7,528.00) during the marriage.

The Beards reported losses on their 1990 to 1996 income tax returns totaling $ 21,301.00 from the condominium. [22] Bramlet characterizes these losses as a benefit to the community estate because they reduced the Beards' taxable income. A utilization of the applicable tax rates for these reported losses indicates that the community realized a tax benefit of [*63] $ 7,062.00 for tax years 1990 through 1992 and for tax year 1996. [23] *See Pelzig v. Berkebile, 931 S.W.2d 398, 401* (Tex. App.--Corpus Christi 1996, no writ).

22 The Beards also reported $ 14,036.00 in losses which they could not claim on their 1993 to 1995 returns. The impact of these losses is discussed hereinafter with regard to Barbara's thirteenth issue.

[**55]

23 We arrive at this calculation as follows. For 1990, the Beards reported a $ 6,128.00 loss and $ 102,924.00 in taxable income. In 1990, the applicable tax rate for married couples filing a joint return was 38.5% for taxable income in excess of $ 90,000.00. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, sec. 101, § 1(h)(2)(A), 100 Stat. 2085, 2098. Thus, the Beards realized a tax savings of $ 2,359.00 from the reported loss (38.5% of the $ 6,128.00 by which their taxable income in excess of $ 90,000.00 was reduced). For 1991 and 1992, the Beards reported $ 10,495.00 in losses and more than $ 99,000.00 in taxable income for each year. The applicable tax rate in these years was 31% for taxable income in excess of $ 78,400. *See* Revenue Reconciliation Act of 1990, Pub. L. No. 101-508, sec. 11101, § 1(a), 104 Stat. 1388, 1388-403. Thus, the Beards realized tax savings of $ 3,253 for these years. In 1996, the Beards reported a $ 4,678.00 loss and $ 131,014.00 in taxable income. The applicable tax rate in 1996 was 31% for taxable income between $ 89,150.00 and $ 140,000.00. *See* Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, sec. 13201, § 1(a), 107 Stat. 312, 457-58. Thus, the Beards realized a tax savings of $ 1,450.00 in 1996.

[**56] The Beards also reported business income on their tax returns which Bramlet testified to be management fee income. [24] According to Bramlet, his tenant paid him a management fee in lieu of rent. He attributed the entirety of the business income reported on the tax returns to this management fee. The six tax returns offered in evidence reflect a total of $ 41,067.00 in business income.

24 Business income reported on Internal Revenue Service Form 1040 must be explained in Schedule C. However, the tax returns offered in evidence include only the Schedules E on which the Beards reported their net losses each year on the condominium.

In sum, the purchase-money debt payments made with community funds enhanced the value of Bramlet's separate property condominium by the amount the balance of the Central National Bank note was reduced ($ 7,528.00) during the marriage. *See Penick, 783 S.W.2d at 197*; *Graham, 836 S.W.2d at 310*. In return, the community received $ 41,067.00 in management [**57] fee income and $ 7,062.00 in tax savings for tax years 1990 through 1992 and for tax year 1996. These benefits to the community total $ 48,129.00. Conversely, the Beards reported $ 35,337.00 in losses from the condominium. Even taking these losses into account however, the evidence reflects that the community estate received more than $ 13,000.00 in benefits from Bramlet's condominium.

Given the equitable nature of a reimbursement claim and the evidence in the record, we conclude that some evidence exists to support the court's finding and such finding is not contrary to the great weight and preponderance of the evidence.

Waste of Community Assets

The remainder of Barbara's eighth issue attacks the court's failure to reimburse the community estate from Bramlet's separate estate for community funds allegedly wasted by Bramlet in strip clubs.

Barbara discovered a questionable credit card receipt shortly before she filed the divorce petition. After it was confirmed that one of the charges on the bill had been incurred at a strip club in Arlington, Barbara hired a private investigator. When the investigator reported that Bramlet had gone to such an establishment twice the following [**58] week, she filed for divorce.

After obtaining and reviewing their financial records, Barbara was able to locate a 1991 charge of a similar nature along with several others in subsequent years. [*64] Bramlet testified that he went to a strip club about once per week during the last few years before trial. Based on this testimony and the records, Barbara's CPA estimated that Bramlet spent approximately $ 12,600.00 at such establishments. Bramlet disagreed with this estimate, though he conceded that he had "no idea" how much he had spent.

Barbara asked the court to reimburse the community estate from Bramlet's separate estate for this estimated expenditure of $ 12,600.00 in community funds. Bramlet countered that no reimbursement was warranted because these were reasonable expenditures, he did not spend community funds for such things as golfing, hunting, or fishing, and Barbara had herself wasted significant community funds. According to Bramlet, Barbara regularly spent $ 200.00 at a hair salon, she purchased two furs and two rings for approximately $ 11,000.00, and she regularly purchased expensive clothing and accessories. Barbara disagreed with Bramlet's testimony about the hair salon [**59] and her clothing and accessory purchases.

Given the testimony, we conclude that some evidence exists to support the court's finding and such finding is not contrary to the great weight and preponderance of the evidence.

Attorney's Fees

Barbara's complaint regarding Finding of Fact No. 14 challenges the court's determination of those attorney's fees which she "reasonably incurred." The court found that Barbara had incurred $ 1,500.00 in reasonable and necessary attorney's fees.

A party has no statutory right to attorney's fees in a divorce case which does not involve a child custody determination. *See Chiles v. Chiles, 779 S.W.2d 127, 129* (Tex. App.--Houston [14th Dist.] 1989, writ denied); *see also Pletcher v. Goetz, 9 S.W.3d 442, 448* (Tex. App.--Fort Worth 1999, pet. denied). Rather, a court may award attorney's fees as a part of the division of the parties' marital estate. *See Murff v. Murff, 615 S.W.2d 696, 699 (Tex. 1981)* (citing *Carle v. Carle, 149 Tex. 469, 474, 234 S.W.2d 1002, 1005 (1950)*); *Pletcher, 9 S.W.3d at 448*; *Chiles, 779 S.W.2d at 129.*

Barbara's counsel [**60] testified that she had incurred $ 54,000.00 in attorney's fees "through the start of trial" and that, with trial expenses added, $ 60,000.00 was a reasonable and necessary fee. Counsel offered additional testimony that $ 9,000.00 would be a reasonable and necessary fee in the event of an appeal. [25] Counsel offered several justifications for these fees.

> 25 Counsel testified that $ 5,000.00 would be appropriate for an appeal to this Court, $ 1,500.00 for filing or replying to a petition for review with the Supreme Court, and $ 2,500.00 if the petition were granted.

Counsel noted that Bramlet's father is a prominent McLennan County attorney and that Barbara was unable to locate a local attorney to take her case because of this. Barbara called a local attorney who testified that he had advised her brother that she should secure counsel from out of town. Her brother testified that he had spoken with several local attorneys, none of whom would take her case.

Counsel also justified the requested fees because his [**61] offices are in Austin, which resulted in increased travel expenses, because he had to come to Waco for two pre-trial hearings and because of the difficulties he had in obtaining copies of the Beards' financial records from Bramlet via discovery.

[*65] Bramlet countered with another local attorney who testified that a reasonable fee in McLennan County for a divorce involving only two primary community assets (the home and bank stock) and no children would be $ 1,500.00. He characterized the two pre-trial hearings as unnecessary. One of these hearings involved Bramlet's changing of the beneficiary designation on a term life insurance policy from Barbara to his children. [26] The attorney testified that such a hearing was unnecessary because Bramlet had the right to change this designation at any time. The second hearing involved Barbara's request for interim attorney's fees. The attorney testified that there would be no basis for a trial court to grant interim attorney's fees for a spouse who has separate property worth approximately $ 200,000.00.

> 26 This hearing was held on Bramlet's motion. According to the testimony, Bramlet filed the motion because Barbara would not consent to the change in beneficiaries.

[**62] Bramlet also contended that Barbara's counsel engaged in excessive and unnecessary pre-trial discovery and that most of the financial records which she contends were not timely disclosed were in her possession all along.

Given this testimony and the equitable nature of an attorney's fee award in a divorce case, we conclude that some evidence exists to support the court's finding on reasonable and necessary attorney's fees and such finding is not contrary to the great weight and preponderance of the evidence.

SUMMARY

We have determined that the record contains more than a scintilla of evidence to support the court's findings that: (1) Bramlet was entitled to reimbursement for the $ 5,548.00 in separate property funds he expended on the home improvement loan; (2) Barbara does not have a separate property interest in the residence; (3) the principal balance of the CD belongs to Barbara and the interest to the community; (4) Bramlet did not breach any fiduciary duty to Barbara as her husband or bank officer; (5) the community estate is not entitled to reimbursement for the funds expended on the condominium purchase-money loan; (6) the community estate is not entitled to reimbursement [**63] for the funds which Bramlet expended at strip clubs; and (7) Barbara reasonably incurred $ 1,500.00 in attorney's fees. Neither are such findings contrary to the great weight and preponderance of the evidence.

Conversely, we have determined that the court's finding regarding Bramlet's separate property interest in the ring is immaterial, that no more than a mere scintilla of evidence exists to support the court's finding that Barbara's inheritance account had earned $ 10,693.00 in interest for which she had failed to account, and that Barbara's evidence conclusively established that the community interest in this account was only $ 2,202.47.

Accordingly, we overrule Barbara's eighth, ninth, and twelfth issues. We overrule her third and seventh issues in part and sustain them in part. We do not reach that portion of Barbara's fourth issue which challenges the factual sufficiency of the evidence to support the court's finding on the interest earned by the inheritance account. We overrule the remainder of the fourth issue.

JUST AND RIGHT DIVISION

Barbara's tenth, eleventh, thirteenth, and fourteenth issues challenge the manner in which the court divided the community [*66] estate. [**64] She contends that she is entitled to a disproportionate share of the community estate "up to and including sixty-five percent" and that the court abused its discretion by purportedly giving the parties each a fifty percent share. Barbara avers that the court's division of the community estate in fact resulted in Bramlet receiving 61 percent of the assets and 43 percent of the liabilities while she received only 39 percent of the assets and 57 percent of the liabilities. Bramlet disputes these figures. [27]

27 Barbara provides both percentages and numbers. She contends that Bramlet received $ 38,257.50 (61%) of community assets and $ 9,248.38 (43%) of community liabilities, while she received $ 25,202.37 (39%) of assets and $ 12,248.51 (57%) of liabilities. She calculates that Bramlet received $ 29,009.12 (70%) of the net community estate, while she received $ 12,953.86 (30%). Bramlet disputes these figures, concluding that he received $ 24,839.93 (48%) of the net community estate, while Barbara received $ 26,546.15 (52%). These disparities are largely explained by: Bramlet's reduction of the value of the 401(k) accounts by estimated tax liabilities on those funds; Bramlet's crediting to Barbara of $ 7,018.00 for one-half of the passive activity loss carryover on his condominium; and Bramlet's deletion from Barbara's liabilities of $ 3,000.13 on a Visa account which he contends Barbara accumulated after the parties' separation.

[**65]

Section 7.001 of the Family Code requires a divorce court to divide the community estate "in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage." *TEX. FAM. CODE ANN. § 7.001* (Vernon 1998). A trial court has broad discretion in dividing the community estate. *See Schlueter v. Schlueter, 975 S.W.2d 584, 589 (Tex. 1998)*; *Murff, 615 S.W.2d at 698*; *Dutton v. Dutton, 18 S.W.3d 849, 852* (Tex. App.--Eastland 2000, pet. denied). The court exercises this discretion by considering many factors, including but not limited to:

> the spouses' capacities and abilities, benefits which the party not at fault would have derived from continuation of the marriage, business opportunities, education, relative physical conditions, relative financial condition [sic] and obligations, disparity of ages, size of separate estates, [] the nature of the property. . . . [and] a disparity in earning capacities or of incomes . . . .

Murff, 615 S.W.2d at 699; *accord Walston v. Walston, 971 S.W.2d 687, 691* [**66] (Tex. App.--Waco 1998, pet. denied). The court may also consider whether one of the parties to the marriage has wasted community assets. *See Schlueter, 975 S.W.2d at 589.*

We review the court's division of the community estate under an abuse-of-discretion standard. *See Murff, 615 S.W.2d at 698*; *Walston, 971 S.W.2d at 691*; *Dutton, 18 S.W.3d at 852*. We will not disturb such a determination unless "the trial court acted without reference to guiding rules or principles such that the court's division of community property was arbitrary and unreasonable." *Walston, 971 S.W.2d at 691*; *accord Dutton, 18 S.W.3d at 852*.

Barbara claims in her fourteenth issue that the court abused its discretion by dividing the community estate in a manner significantly different than that indicated in a series of "letter rulings" mailed to the parties by Judge Douglas between November 1997 and January 1998. However, a pre-judgment letter does not constitute competent evidence of the court's ultimate decision. *See Cherokee Water Co. v. Gregg County Appraisal Dist., 801 S.W.2d 872, 878 (Tex. 1990)*; [**67] *Maddox v. Cosper, 25 S.W.3d 767, 771 n.5* (Tex. App.--Waco 2000, no pet.). Accordingly, we overrule her fourteenth issue.

[*67] Barbara's tenth, eleventh, and thirteenth issues challenge the court's exercise of discretion on several fronts. She contends that she is entitled to a disproportionately greater share of the community estate than Bramlet because of: (1) the community funds she alleges were expended to enhance the value of Bramlet's condominium; (2) her separate property funds in the CD which she claims Bramlet improperly withdrew for the closing costs on their home, as security for their purchase of bank stock, [28] to pay income taxes, and for other unknown reasons; (3) the community funds Bramlet spent at strip clubs; (4) her separate property funds used for attorney's fees; and (5) Bramlet's sale of a tract of separate property at a loss of $ 4,328.00, which loss the community estate bore.

28 Barbara signed an assignment pledging her CD as collateral for the purchase of the bank stock. She testified that she agreed to this transaction.

[**68] We have already concluded that the record contains more than a scintilla of evidence that: the community estate received benefits from Bramlet's condominium property at least equal to those expended on the condominium; Barbara's CD funds have been substantially accounted for; the community funds Bramlet spent at strip clubs were offset by the funds Barbara spent at the hair salon and for clothing and accessories; and that Barbara incurred only $ 1,500.00 in reasonable and necessary attorney's fees. Because of this, we cannot say that Barbara's first four complaints demonstrate an abuse of discretion.

Regarding the fifth complaint, the record shows that Bramlet owned another piece of property located at 4102 Green Point Drive in Waco as his separate property. He sold this property at a loss during the marriage and the community estate paid the $ 4,328.00 debt still owed on this property. The court ordered Bramlet to reimburse Barbara with $ 2,164.00 to compensate her for this community loss. Thus, the court did account for this loss in its decree.

Barbara specifically alleges in her thirteenth issue that the court abused its discretion in dividing the community estate because the [**69] court: (1) failed to consider "the valuation of personalty and character of the personalty awarded to the respective parties"; (2) set aside the funds in a community account to Bramlet without requiring him to prove the amount of funds on deposit in the account; (3) awarded the parties the balances of their respective 401(k) accounts even though Bramlet has three-times more funds on deposit in his 401(k) account than she; (4) ordered her to pay one-half of a $ 9,500.00 credit card debt which Bramlet did not disclose during pretrial discovery; (5) ordered her to pay one-half of the ad valorem taxes on the residence even though the court had previously ordered Bramlet to place sufficient funds in escrow to satisfy this obligation up to the entry of a final decree; and (6) set aside one-half of a passive activity loss carryover on Bramlet's condominium to her.

Barbara does not clarify in what manner the court failed to consider "the valuation of personalty and character of the personalty awarded to the respective parties." We will not make this argument for her. *See Mesa Operating Co. v. California Union Ins. Co., 986 S.W.2d 749, 757 n.5* (Tex. App.--Dallas 1999, pet. [**70] denied); *TEX. R. APP. P. 38.1(h)*.

Barbara complains that the court abused its discretion by awarding Bramlet the entirety of a particular checking account without requiring him to prove the amount of funds on deposit in the account. In the decree, the court awarded to each of the [*68] parties those bank accounts under each party's sole management and control. Thus, the court awarded to Bramlet two checking accounts at Ennis State Bank, a savings account at that bank, a checking account at Fidelity Bank of Texas, and a checking account at Central National Bank of Waco. The court awarded to Barbara a checking account at Fidelity Bank of Texas and one at First National Bank of Central Texas. The only evidence in the record regarding the balances of any of these accounts is found in Barbara's inventory and appraisement which indicates that her Fidelity Bank checking account had a zero balance at the time of trial and the First National Bank checking account had a balance of $ 3,317.16.

Although the court awarded Bramlet five bank accounts without evidence of the amounts on deposit in any of them, Barbara complains only about a checking account at Ennis State Bank under the name "Bramlet F. [**71] Beard Expense Account." Barbara notes in her brief that Bramlet offered no evidence of the amounts on deposit in these accounts but focuses on the "expense account" because she contends that Bramlet did not disclose its existence in pre-trial discovery. Bramlet counters that the account was overdrawn by $ 167.28 in June 1997 and that he disclosed the existence of the account and its overdrawn balance in his inventory and appraisement. Bramlet did not file this inventory and appraisement but referenced it in his discovery responses. Barbara does not dispute these assertions in her reply brief.

Given that Barbara complains of only one of the five accounts the court awarded Bramlet even though he offered no evidence of any of their balances and considering the fact that the court awarded to each of the parties those accounts under his or her separate management and control, we cannot say that "the trial court acted without reference to guiding rules or principles such that the court's division of [the bank accounts] was arbitrary and unreasonable." *Walston, 971 S.W.2d at 691*; *accord Dutton, 18 S.W.3d at 852*.

Barbara avers that the court abused its [**72] discretion by awarding to each of the parties their 401(k) accounts without making adjustments for disparities in the balances of these accounts. According to the record, the balance of Bramlet's 401(k) account was $ 23,226.53, while the balance of Barbara's was $ 7,874.86. Bramlet responds that any disparities in the balances of these accounts is largely offset by the fact that the court awarded Barbara the Beards' only car, valued at $ 11,500.00. [29] Again, no abuse of discretion is shown.

29 Bramlet drives a car furnished by his employer.

Barbara claims that the court abused its discretion by requiring her to pay one-half of the $ 9,500.00 owed on a Visa account held in Bramlet's name because "that debt was never disclosed by [Bramlet] prior to the close of evidence in this case and [she] was deprived of discovery relating to the source and amount of this debt." Regardless of this assertion however, Barbara's September 1997 response to Bramlet's request for production identifies this particular account [**73] and provided copies of seven statements from March 1994 to July 1995 on this account. At trial, she offered the March 1997 statement for this account and cross- examined Bramlet about a strip-club expenditure reflected thereon. Because Barbara identified this particular account in pretrial discovery, she cannot now argue that she was deprived discovery regarding the charges incurred on this account.

[*69] Barbara argues that the court abused its discretion by ordering her to pay one-half of the 1997 ad valorem taxes on the residence even though the court had previously ordered Bramlet to place sufficient funds in escrow to satisfy this obligation. When Barbara filed her divorce petition, she requested temporary orders awarding her possession of the residence pending a final decree and requiring Bramlet "to pay certain existing community liabilities during the pendency of this suit."

The court heard Barbara's request for temporary orders in September 1997. No written temporary orders appear in the record. Instead, Barbara filed a partial reporter's record from the hearing. From this brief transcript, it appears that the court ordered Bramlet to make the house payments and keep the property [**74] taxes current pending a final decree. Barbara's counsel asked the court to clarify whether it was ordering Bramlet to escrow sufficient funds to cover the taxes. The court responded:

I don't care as long as there is money there to cover it for, you know, the pay off. If he's going to hold that money or be responsible for it at final division or whatnot. As long as the taxes aren't coming due, he's responsible for them at the rate of $ 242.00 a month until the separation. Now, you know, it'll come out of his--if he doesn't have to pay it, nobody's looking for it, it will come out at the division or whatnot. Okay? All right.

From our reading of this "order," the court did not clearly direct Bramlet to escrow these funds. Rather, it appears that the court intended that Bramlet be responsible for the ad valorem taxes up to the date of separation (June 1997) and that he pay this amount when these taxes became due. Conversely, if the final decree issued before the taxes became due, it appears that the court intended to apportion the ad valorem taxes in the final decree.

Regardless of the terms of this "order," such directive is interlocutory in character. *See TEX. FAM. CODE ANN.* [**75] *§ 6.507* (Vernon 1998). Because a court has broad discretion to issue such orders even on its own motion, we likewise presume that the court has ample authority to modify such orders. *Cf. Morgan v. Morgan, 657 S.W.2d 484, 493-94* (Tex. App.--Houston [1st Dist.] 1983, writ dism'd) (court has "broad discretion" to issue temporary orders in divorce action). Moreover, because the Family Code has a separate provision for the issuance of temporary orders pending appeal, we presume that temporary orders issued under *section 6.507* are supplanted by the terms of the final decree. *Cf. TEX. FAM. CODE ANN. § 6.709* (Vernon 1998) (temporary orders during appeal).

Because of the uncertainty of the court's temporary "orders" and because of the interlocutory character of such orders, we cannot say that the court abused its discretion by dividing the ad valorem taxes equally between Barbara and Bramlet.

The last contention in Barbara's thirteenth issue is that the court abused its discretion by awarding her one-half of a $ 14,036.00 passive activity loss carryover from Bramlet's condominium because such a loss can be applied against [**76] only future passive activity gross income. Because she has no ownership interest in the condominium and engages in no other passive activities, she contends that this loss carryover is worthless to her.

Section 469 of the Internal Revenue Code prescribes the treatment of passive activity losses. *See I.R.C. § 469 (West Supp. 2000)*. The ownership of rental property is generally considered to be a [*70] passive activity. [30] *Id. § 469(c)(2)*. The term "passive activity loss" means the amount by which aggregate losses from passive activities in a particular tax year exceed aggregate income from passive activities in that year. *Id. § 469(d)(1)*. Any passive activity loss realized in a particular tax year must be carried forward as a deduction allocable to passive activities in the next year. *Id. § 469(b)*.

30 A taxpayer's ownership of rental property is not considered to be a passive activity if more than one-half of the taxpayer's services are devoted to the business of real estate and the taxpayer performs more than 750 hours of work in this business (*i.e.*, the taxpayer is engaged primarily in the business of real estate development, construction, sales, rental, or management). *See I.R.C. § 469(c)(2), (7) (West Supp. 2000)*.

[**77]

However, *section 469(i)* provides for a $ 25,000.00 offset for rental activities in which the taxpayer and/or his spouse actively participated. [31] *Id. § 469(i)*. This provision excepts $ 25,000.00 of passive activity losses from the disallowance of *section 469(a)* and permits such losses to be offset against nonpassive income. *Id.*; *26 C.F.R. § 1.469-9(j)*. However, this offset is further limited to the extent that a taxpayer's adjusted gross income exceeds $ 100,000.00. *See I.R.C. § 469(i)(3)(A)*. [32] Specifically, the offset is reduced by fifty percent of the amount by which a taxpayer's adjusted gross income exceeds $ 100,000.00. *Id.*

31 Because Bramlet is the sole owner of the condominium, we presume that he actively participated in its operation.

32 This $ 100,000.00 figure is halved for married persons filing separate returns, as is the $ 25,000.00 offset. *See I.R.C. § 469(i)(5)(A) (West Supp. 2000)*.

The $ 14,036.00 in passive activity losses at issue accumulated from 1993 to 1995. [**78] In 1996, the Beards reported a net loss from the condominium of $ 4,678.00. Thus, they could not offset any of the passive activity losses from prior years. Additionally, because their adjusted gross income in each of these years exceeded $ 150,000.00, they could not take advantage of the $ 25,000.00 offset. [33]

33 This is so because the $ 25,000 offset is reduced by fifty percent of the adjusted gross income in excess of $ 100,000.00. *Id. § 469(i)(3)(A)* (West Supp. 2000). Thus, when a married couple's adjusted gross income reaches $ 150,000.00, the $ 25,000.00 offset is completely eliminated.

In 1997 however, the Beards were considered single persons for tax purposes because the court orally pronounced them divorced at the conclusion of the trial. *See In re Marriage of Wilburn, 18 S.W.3d 837, 840-41* (Tex. App.--Tyler 2000, pet. denied); *see also Boyer v. Commissioner, 235 U.S. App. D.C. 305, 732 F.2d 191, 194 (D.C. Cir. 1984)* (per curiam) (state law determines marital [**79] status of parties for federal tax purposes); *I.R.C. § 7703 (West 1989)* (defining how marital status is determined for federal tax purposes). The testimony reflects that neither of the parties had adjusted gross income in excess of $ 100,000.00 in 1997. Thus, they could both fully utilize the $ 25,000.00 offset when they filed their 1997 tax returns. For this reason, it appears that Barbara could fully deduct the $ 7,018.00 passive activity loss carryover deduction against her nonpassive income in 1997. Therefore, we cannot say that the court abused its discretion by awarding Barbara one-half of the $ 14,036.00 passive activity loss carryover from Bramlet's condominium.

For the reasons stated, we cannot say that "the trial court acted without reference to guiding rules or principles such that the court's division of community property was arbitrary and unreasonable." *Walston, 971 S.W.2d at 691*; *accord Dutton,* [*71] *18 S.W.3d at 852*. Accordingly, we overrule Barbara's tenth, eleventh, and thirteenth issues.

THE BANK STOCK

Barbara contends in her fifteenth issue that the court abused its discretion by failing to award the parties each a one-half undivided [**80] interest in the shares of bank stock they purchased during their marriage and appoint a trustee to make distributions, pay the debt secured by the stock, and hold the stock in trust until the

parties mutually agree to a disposition of all or part of the shares.

The record reflects that Bramlet's father owns a significant interest in the two banks at issue. His business partner and he own more than fifty percent of the stock in Oglesby State Bank, but less than fifty percent of the stock in the First National Bank of McGregor. Bramlet and Barbara acquired a fifteen percent share of stock in the Oglesby bank and less than a three percent share of stock in the McGregor bank. Barbara presented testimony from a local bank officer that Bramlet could ally his shares with those of his father's in such a manner that they could arrange for a sale of these banks under terms that the buyer not purchase Barbara's shares and not pay dividends on her shares.

However, this witness also testified that no prospective buyers had emerged for either of these small-town banks in the past twenty years and none were anticipated in the foreseeable future. In his personal dealings with Bramlet's father, |**81| he had never found him to treat minority shareholders unfairly. Bramlet testified that placing their bank stock in trust would unduly complicate their ownership interests. He further noted that laws exist to protect the interests of minority shareholders.

The court rejected Barbara's request that each party be awarded an undivided one-half interest in the stock and appoint a trustee to protect her interest. Instead the court ordered a partition in-kind.

From the testimony, we cannot say that the court's refusal to award each of the parties an undivided one-half interest in their shares of bank stock and appoint a trustee to hold these shares was arbitrary or unreasonable. *See id.* Accordingly, we overrule Barbara's fifteenth issue.

APPOINTMENT OF RECEIVER

Barbara argues in her sixteenth issue that the court abused its discretion by appointing a receiver to sell the residence to the highest bidder. However, after Barbara perfected this appeal, the holder of the purchase money note on the residence declared a default on the note and foreclosed on the property under the terms of the deed of trust. Thus, we overrule Barbara's sixteenth issue as moot.

CONCLUSION

We |**82| have determined that no more than a mere scintilla of evidence exists to support the court's finding that Barbara's inheritance account had earned $ 10,693.00 in interest. Accordingly, the court erred in awarding Bramlet $ 5,346.50 as his share of the community property interest in this account. Rather, the evidence conclusively establishes that only $ 2,202.47 of the funds in this account belonged to the community estate. For this reason, we modify the judgment to reflect that Bramlet receives $ 1,101.23 as his share of the community property interest in this account and that the remainder of the funds on deposit in this account belong to Barbara. We affirm the judgment as modified.

REX D. DAVIS

Chief Justice

Before Chief Justice Davis,

Justice Vance, and

Justice Gray

Affirmed as modified

Opinion delivered and filed April 18, 2001

LEXSEE 25 S.W.3D 767, 771

ORVILLE RAY MADDOX, Appellant v. JACK COSPER, Appellee

No. 10-99-162-CV

COURT OF APPEALS OF TEXAS, TENTH DISTRICT, WACO

25 S.W.3d 767; 2000 Tex. App. LEXIS 4976

July 26, 2000, Delivered
July 26, 2000, Filed

PRIOR HISTORY: [**1] From the 13th District Court Navarro County, Texas. Trial Court # 98-00-08206-CV.

DISPOSITION: Affirmed.

COUNSEL: For Plaintiff or Petitioner: Steve Kazanas, Attorney at Law, West, TX.

For Defendant or Respondent: Frank B. Murchison, Attorney at Law, Corsicana, TX.

JUDGES: Before Chief Justice Davis Justice Vance and Justice Gray.

OPINION BY: REX D. DAVIS

OPINION

[*769] Jack Cosper made the high bid at an auction for the purchase of three tracts of real property totaling 370 acres owned by Orville Ray Maddox. Cosper paid a fifteen percent earnest money deposit at the conclusion of the auction and was given a receipt. He later discovered that the house on the property did not have running water and demanded a refund of the earnest money. Maddox filed a declaratory judgment action to determine the rights of the parties to the money.

The parties filed competing motions for summary judgment. The court granted Cosper's motion and denied Maddox's. Maddox claims in two points that the court erred by: (1) granting Cosper's motion for summary judgment and denying his own; and (2) granting Cosper's attorney's fees.

BACKGROUND

Maddox signed a "Personal Property Auction Contract" with Alvin Kaddatz of Kaddatz Auctioneering for Kaddatz to sell at public auction three adjoining tracts of land Maddox owns on the border of Navarro and Limestone Counties. [1] The three tracts [**2] combined contain 370 acres. Maddox listed only "Norwest" in Hubbard as a lien holder against the property. He contracted with Kaddatz to provide merchantable title to the property and deliver such title to the purchaser.

1 Maddox signed a second contract with Kaddatz for the auction of several items of personal property.

Kaddatz conducted the auction on January 10, 1998. At that time, a house, two metal buildings, and other improvements were located on the Maddox acreage. According to Cosper, Maddox's father Wilburn, who resided in the house, told him prior to bidding that water for the house was provided by "a good well down there that furnished all the water that [he] needed, and it never had gone dry." Sharon French of Waddell Abstract Company attended the auction to "handle the real estate transaction." French announced to prospective bidders that the successful bidder would be required to execute a real estate contract at the conclusion of the auction. She advised those present of delinquent taxes to [**3] which the property was then subject but did not mention any judgment liens against the property.

Cosper made a bid of $ 195,000 for the combined acreage, which was the high bid. Pursuant to the terms of the auction, Cosper tendered a check payable to Waddell Abstract Company for $ 29,250. French realized that she had failed to bring any contracts with her, so she gave Cosper a Kaddatz receipt reflecting the purchase by Cosper of "220 ac, 100 ac, 50 ac" for $ 195,000 and ac-

knowledging Cosper's payment of an "earnest money deposit in the amount of $ 29,250.00."

Cosper subsequently visited the property and determined that the well had run dry. His counsel mailed Maddox a letter on February 18 requesting a refund of the [*770] earnest money deposit because of the lack of water. The house located on the property was destroyed by fire at some point after Cosper's visit but prior to May 29. [2]

2 Cosper mentions this fact in his Motion to Transfer and Original Answer which he filed in the Hill County lawsuit. Cosper filed this pleading with the district clerk on June 1, but the certificate of service reflects that he faxed and mailed copies to Maddox's counsel on May 29. The excerpts from Maddox's July 28 deposition testimony attached to Cosper's summary judgment motion confirm that the house was destroyed by fire, but the record contains no evidence of when the fire occurred.

[**4] Maddox instituted his declaratory judgment suit on April 28 in Hill County. Waddell filed an interpleader action in Navarro County on May 29. The Hill County district court granted Cosper's motion to transfer venue on June 8 and ordered the transfer of Maddox's suit to Navarro County to be consolidated with the Waddell interpleader action. Kaddatz intervened in the lawsuit to assert his claim to six percent of the earnest money under the terms of his contract with Maddox.

Thereafter, Maddox filed a motion for summary judgment alleging that the receipt French gave Cosper constitutes a binding "memorandum of sale." Cosper filed his own summary judgment motion, asserting the following grounds for judgment:

. the earnest money receipt is not an enforceable contract because it does not contain a description of the property sufficient to satisfy the statute of frauds;

. the receipt is not an enforceable contract because it "does not describe the material conditions upon which the sale was made";

. he is entitled to terminate the agreement because Maddox failed to provide the disclosure notice required by *section 5.008 of the Property Code* for residential real estate sales;

. the agreement [**5] is unenforceable because the debt against the property exceeds the purchase price and Maddox cannot provide marketable title to the property; and

. he is entitled to a refund of the earnest money under the Uniform Vendor and Purchaser Risk Act because the house on the property was destroyed by fire through no fault of his own.

The court notified the parties by letter dated March 19, 1999 that it was granting Cosper's motion and denying Maddox's. In this letter, the court advised the parties that it was granting Cosper's motion because Maddox could not provide marketable title and because the house had been destroyed. The court signed a summary judgment on March 23 granting Cosper's motion and denying Maddox's. The judgment does not recite the basis for the court's ruling. The judgment awards Waddell and Cosper their attorney's fees and costs and severs Kaddatz's claim against Maddox.

Maddox filed a motion to set aside or modify the judgment on April 5. In this motion, Maddox challenged the court's award of attorney's fees to Cosper because the issue was "contested" and because the court made no mention of attorney's fees in its March 19 letter. The court heard Maddox's motion [**6] on April 22. The court signed a nunc pro tunc summary judgment on that same date modifying the judgment by including a directive to the district clerk to distribute the moneys deposited in the court's registry to Cosper and Waddell in accordance with the terms of the judgment. The nunc pro tunc judgment does not otherwise vary in substance from the original decree. Maddox filed his notice of appeal on May 28. [3]

3 Cosper contends that the notice of appeal is untimely because it was filed more than 30 days after the nunc pro tunc judgment was signed. However, he fails to account for Maddox's motion to modify the judgment. When such a motion is filed, an appellant has 90 days to file a notice of appeal. *See TEX. R. APP. P. 26.1(a)(2)*. Under the facts of this case, "a motion [to modify the judgment], filed before a corrected judgment is signed, extends the time for filing the [notice of] appeal . . . until ninety days after the date the corrected judgment is signed as long as the substance of the motion is such as could properly be raised with respect to the corrected judgment." *Clark v. McFerrin, 760 S.W.2d 822, 825* (Tex. Civ. App.--Corpus Christi 1988, writ denied); *accord Fredonia State Bank v. General Am. Life Ins. Co., 881 S.W.2d 279, 281 (Tex. 1994)*; *Alford v. Whaley, 794 S.W.2d 920, 922-23* (Tex. App.--Houston [1st Dist.] 1990, no writ).

[**7] [*771] STANDARD OF REVIEW

To prevail on a summary judgment motion, the movant must demonstrate that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *American Tobacco Co. v. Grinnell, 951*

S.W.2d 420, 425 (Tex. 1997); *Nixon v. Mr Prop. Management Co., 690 S.W.2d 546, 548 (Tex. 1985)*. We disregard all conflicts in the evidence and accept the evidence favoring the nonmovant as true. *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co., 391 S.W.2d 41, 47 (Tex. 1965)*; *Kehler v. Eudaly, 933 S.W.2d 321, 324* (Tex. App.--Fort Worth 1996, writ denied). We indulge every reasonable inference from the evidence in favor of the nonmovant and resolve any doubts in its favor. *American Tobacco, 951 S.W.2d at 425*.

"When the trial court does not specify the basis for its summary judgment, the appealing party must show it is error to base it on any ground asserted in the motion." *Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473 (Tex. 1995)*. We consider only those grounds "the movant actually presented to the trial court" in the motion. *Cincinnati Life Ins. Co. v. Cates, 927 S.W.2d 623, 625 (Tex. 1996)*. [**8] We do not consider grounds the nonmovant failed to expressly present to the trial court in a written response. *McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 343 (Tex. 1993)*; *TEX. R. CIV.P. 166a(c)*. If the non-movant fails to respond to a summary judgment motion, "the non- movant is limited on appeal to arguing the legal sufficiency of the grounds presented by the movant." *McConnell, 858 S.W.2d at 343* (citing *City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979))*.

When the parties have filed competing motions for summary judgment and one is granted while the other is denied, an appellate court may consider the propriety of the denial as well as the granting. *Commissioners Court v. Agan, 940 S.W.2d 77, 81 (Tex. 1997)*; *McCreight v. City of Cleburne, 940 S.W.2d 285, 287-88* (Tex. App.--Waco 1997, writ denied). If the pertinent facts are undisputed, the court can determine the issues presented as a matter of law. *McCreight, 940 S.W.2d at 288*. In this situation, the court will either affirm the judgment or reverse and render. *Jones v. Strauss, 745 S.W.2d 898, 900 (Tex. 1988)*; *Tobin v. Garcia, 159 Tex. 58, 64, 316 S.W.2d 396, 400-01 (1958)*. [**9] [4]

> 4 When the parties' motions are premised differently, the court may also reverse and remand. *See Sosa v. Williams, 936 S.W.2d 708, 711* & n.1 (Tex. App.--Waco 1996, writ denied).

PROPRIETY OF SUMMARY JUDGMENT

Maddox argues in his first point that the court erred by granting Cosper's summary judgment motion and denying his own because the earnest money receipt constitutes a binding contract. Cosper asserted five grounds for summary judgment in his motion, and the court did not specify the basis for its ruling. [5] Accordingly, we will affirm the judgment if any of Cosper's grounds are meritorious. *Star-Telegram, 915 S.W.2d at 473*.

> 5 The court's pre-judgment letter does not constitute competent evidence of the basis for the court's ruling. *Cherokee Water Co. v. Gregg County Appraisal Dist., 801 S.W.2d 872, 878 (Tex. 1990)*; *Mondragon v. Austin, 954 S.W.2d 191, 193* (Tex. App.--Austin 1997, pet. denied) (op. on reh'g).

[**10] One of the grounds asserted by Cosper in his summary judgment motion is that [*772] the earnest money receipt is not an enforceable contract because it does not contain a description of the property sufficient to satisfy the statute of frauds. The parties do not dispute that the statute of frauds applies to the sale of real property at auction. *Dawson v. Miller's Adm'r, 20 Tex. 171, 173 (1857)*; *Kirkman v. Amarillo Sav. Ass'n, 483 S.W.2d 302, 307* (Tex. Civ. App.--Amarillo 1972, writ ref'd n.r.e.); *Lobit v. McClave, 8 Tex. Civ. App. 531, 536, 28 S.W. 726, 728* (1894, writ ref'd); *see also Matthews v. AmWest Sav. Ass'n, 825 S.W.2d 552, 553* (Tex. App.--Beaumont 1992, writ denied). Maddox contends on appeal (and in his summary judgment motion) that the statute of frauds was satisfied in this case when Cosper signed the earnest money receipt, which Maddox characterizes as a "memorandum of sale." He relies on the Supreme Court's decision in *Brock v. Jones* for this proposition. [6] *8 Tex. 78 (1852)*. While it is true that the Court in *Brock* affirmed that an auctioneer's signing of the buyer's name to a memorandum [**11] of sale is binding on the buyer, the Court also held that the memorandum must satisfy the statute of frauds. *Brock*, 8 Tex. at 79-80.

> 6 Actually, Maddox cites Texas Jurisprudence 3d for this proposition. *See* 7 TEX. JUR. 3D *Auctions and Auctioneers* § 7 & n.23 (1997) (citing *Dawson v. Miller's Adm'r, 20 Tex. 171 (1857))*. However, *Dawson* does not stand for the proposition asserted. *See Dawson, 20 Tex. at 173-74*. Rather, the Supreme Court stated this rule in *Brock*, which is cited in *Dawson*. *See Brock, 8 Tex. 78, 79 (1852)* (cited in *Dawson, 20 Tex. at 174*).

To satisfy the statute of frauds, a real estate contract must provide a specific description of the property to be conveyed either within itself or by reference to other documents then in existence. *Jones v. Kelley, 614 S.W.2d 95, 99 (Tex. 1981)*; *Elizondo v. Gomez, 957 S.W.2d 862, 864* (Tex. App.--San Antonio 1997, pet. denied). The receipt [**12] French gave Cosper describes the property as "220 ac, 100 ac, 50 ac." The receipt does not otherwise describe the property, nor does it refer to any other document containing a more specific

description of the property. Accordingly, the receipt fails to satisfy the statute of frauds. *See Elizondo, 957 S.W.2d at 864.*

Nevertheless, a party may be excused from complying with the statute of frauds if there has been partial performance. *Boyert v. Tauber, 834 S.W.2d 60, 63 (Tex. 1992); Hooks v. Bridgewater, 111 Tex. 122, 126-27, 229 S.W. 1114, 1116 (1921); In re Marriage of Parker, 997 S.W.2d 833, 837* (Tex. App.--Texarkana 1999, pet. denied); *Elizondo, 957 S.W.2d at 864.* To establish this exception to the statute of frauds, the seller must show: (1) payment of consideration; (2) possession of the property by the buyer; and (3) permanent and valuable improvements by the buyer with the consent of the seller or other facts demonstrating that the seller would be defrauded if the agreement were not enforced. *Id.* It is undisputed that Cosper has never taken possession of the property. Accordingly, this exception [**13] to the statute of frauds does not apply.

Because the auction receipt does not contain a description of the property sufficient to satisfy the statute of frauds and because Maddox is not otherwise excused from compliance with the statute, Cosper conclusively established his entitlement to judgment as a matter of law. *See Grinnell, 951 S.W.2d at 425; Nixon, 690 S.W.2d at 548; McCreight, 940 S.W.2d at 288.* Accordingly, we overrule Maddox's first point.

ATTORNEY'S FEES

Maddox contends in his second point that the court erred in awarding attorney's fees to Cosper because the parties had no contract. However, he fails to account for the fact that he instituted his lawsuit under the Uniform Declaratory Judgments Act, which invests the trial court with discretion to award just and equitable attorney's fees. *See Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998); Brush v. Reata Oil & Gas Corp., 984 S.W.2d 720, 729* [*773] (Tex. App.--Waco 1998, pet. denied); *TEX. CIV. PRAC. & REM. CODE ANN. § 37.009* (Vernon 1997). Cosper requested attorney's fees in his counterclaim for declaratory [**14] relief and in his motion for summary judgment. He supported this request in his summary judgment motion with the affidavit of his counsel regarding reasonable and necessary attorney's fees.

Maddox does not challenge the amount of the attorney's fee award. *See Boucquet, 972 S.W.2d at 21; Brush, 984 S.W.2d at 730 n.8.* He contests only the trial court's authority to award attorney's fees. Because the Uniform Declaratory Judgments Act authorized the court to award attorney's fees, we overrule Maddox's second point.

We affirm the judgment.

REX D. DAVIS

Chief Justice

Before Chief Justice Davis

Justice Vance and

Justice Gray

Affirmed

Opinion delivered and filed July 26, 2000

MEMORANDUM

TO: Supreme Court Advisory Committee

FROM: Judge David Peeples

RE: Letter rulings by judges—first draft

DATE: May 12, 2011

At our March meeting we discussed the problem of letter rulings. I think there was consensus on three points: (1) Litigants need to know whether a letter ruling *starts* the appellate and plenary-power timetables or *stops* them. (2) The stakes are higher when a letter starts the timetables (expiration of appeal rights and plenary power) than when it stops them (which keeps the case in the trial court). (3) Clarity is important so litigants (and lawyers and judges) can know whether timetables have been affected or not. (On the issue of clarity, I repeat my view that we need bright-line rules, not a fact-specific, language-parsing search for the judge's actual intent, which would be the polar opposite of clarity.) The draft below seeks to implement these goals. For your convenience I have attached my March memo on this matter and also the subcommittee draft of a final judgment rule.

Three other points: I was not able to spend as much time on this as I wanted to; this is a draft for discussion, not a proposal for approval. After our discussion, we might want to discuss again whether the problem of letter rulings is better addressed by case law than by rule. I decided to keep everything in one rule for purposes of discussion; we can decide later whether and how to break this into different parts and put them in different rules.

FORMALITY OF JUDGMENTS AND ORDERS.

(1) Issuance of ruling. Rulings may be announced from the bench, or by formal written order, letter or memorandum, electronic mail, or other reasonable means.

(2) Formal order required. Rulings that start timetables, including final judgments and orders overruling motions for new trial, must be contained in a signed formal written order.

(3) Formal order not required. Rulings that do not start timetables, including orders concerning discovery and scheduling, those granting a new trial or setting aside an earlier order, and other interlocutory rulings, may be contained in a letter or memorandum signed by the judge without a more formal writing.

(4) Enforceability and preservation of error. Whether an order is enforceable and whether it preserves error is governed by other law and does not depend on its formality.

intend that letter rulings will *be* the final and appealable order. Even when judges intend to grant complete/final relief in a letter, they almost always envision that there will eventually be a formal, signed judgment or order.

3. **Interlocutory letter rulings are common.** Many letter rulings are interlocutory anyway, and issues of finality and appealability will not arise. And frequently there is no intent to write up a formal order ever; all the parties need is the judge's decision, and there will never be a formal typewritten order in the form of a pleading. Discovery is probably the most common example of this.

4. **Clarity and ease of application.** Every rule of procedure should aim for clarity and ease of application. This means we should avoid inquiries into the judge's subjective intent. The appellate cases usually focus on such language as, *I will grant the motion, I am denying the motion, The motion for new trial is granted, I ask Attorney Jones to prepare and circulate an order,* etc.

5. **Easy to create finality.** Remember that when judges really intend finality, they can simply put clear finality language in their letters. The *Lehmann* language comes to mind.

6. **E-mail.** As time goes by will letter rulings gradually vanish, as e-mail displaces all these hard-copy letters? Does e-mail's superiority to hard copy (quicker and easier) explain the dwindling number of these cases?

Several cases on this subject are collected in *Perdue v. Patten Corp.*, 142 S.W.3d 596, 600-603 (Tex. App.—Austin 2004, no pet.). Excerpts from *Perdue* are attached.

From: Richard Orsinger [mailto:richard@momnd.com]
Sent: May 12, 2011 2:41 PM
To: undisclosed-recipients
Subject: RE: SCAC -- Amendment to Tex. R. Civ. P. 116 regarding electronic publication of citation by publication (correcting typographical error)

Dear SCAC members:

Our discussion at the SCAC meeting on March 25, 2011, reflected a desire for a change to Tex. R. Civ. P. 116 that would require (not just permit) publication at the newspaper's web site or on the government web site designed for this purpose, if either if available.

The Office of Court Administration is willing to put together a state web site as a prototype, and they are open to the possibility of maintaining such a web site on a permanent basis if the technology and cost can be worked out. The person I have been communicating with at the OCA does not believe that the Supreme Court can impose a new filing fee to cover the cost of a new state web site, and thinks it unlikely that the Court can reallocate any of the existing filing fees for that purpose. On the other hand, he didn't rule out the possibility that the OCA would absorb the cost of such a web site in its normal budget. The OCA will not be able to be very interactive on this question while the Legislature is in session.

Here are possible changes to Rule 116, taking into account the foregoing:

[First part of rule]

Rule 116. Service of Citation by Publication

The citation, when issued, shall be served by the sheriff or any constable of any county of the State of Texas or by the clerk of the court in which the case is pending, 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. In all suits which involve the title to land or partition of real estate, such publication shall be made in the county where the land, or a portion thereof, is situated, if there be a newspaper in such county, but if not, then in an adjoining county to the county where the land or a part thereof is situated, where a newspaper is published.

[Then add one of the following options]

[Option 1: either electronic newspaper or OCA web site]

In addition to the publication outlined above, the citation shall also be published in the electronic version of the newspaper, or in the Internet website maintained by the Office of Court Administration as a repository for this purpose, if either is available. The electronic publication shall be for a continuous period of twenty-eight (28) days before the return day of the citation.

[Option 2: both electronic newspaper and OCA web site]

In addition to the publication outlined above, the citation shall also be published in the electronic version of the newspaper, as well as on the Internet website maintained by the Office of Court Administration as a repository for this purpose, if available. The electronic publication shall be for a continuous period of twenty-eight (28) days before the return day of the citation.

Discussion

David Peeples expressed an interest in knowing what cost there would be to adding electronic newspaper publication to traditional paper publication. Here is the information I have gathered.

San Antonio's Daily Commercial Recorder—the legal newspaper where many notices are published is the Daily Commercial Recorder. The cost of publishing citation required by TRCP 116 is $2.34 per line for one day. Since Rule 116 requires four publishings, the cost for four publishings is $9.36 per line. The Daily Commercial Recorder includes that in the electronic version of their newspaper, but that electronic version is only available to persons who subscribe to it. The electronic version keeps the citation posted continuously for the 28 days period before answer day. If you wish to have The Daily Commercial Recorder publish the citation at the San Antonio Express News' web site, it costs $37.00 for 14, which must be doubled to achieve the 28 days required by TRCP 116, for a total additional cost of on-line publication of $74.00. Recap—electronic publication is available at no additional cost at the Daily Commercial Recorder website; electronic publication at the Express-News web site costs $74.00, above and beyond the print publication cost.

Dallas Morning News

They charge $2.50 per newspaper line for the printed citation by publication. That amount is multiplied times the number of days you want to run the notice. If you want to have an internet posting in addition to the printed notice, there is $25.00 internet fee. If you post the citation on the internet, it will stay on line for 7 days and then be removed. If you want to repost it, it will cost another $25.00,etc. However, if you tell them at the outset that you want each printed notice to be posted as well, then there is just one charge of $25.00 for 28 days of on-line posting.

Ft. Worth Star Telegram

They charge a per line, per day price. $6.06 per line for Monday –Saturday, $7.24 per line for Sunday. There is a $10.00 fee to add an online notice. You would need to let them know up front that you want to run the notice 4 times or you will be charged the $10.00 fee each time.

Houston Chronicle

They charge $100.00 per day for printing 100 lines. Each line over 100 is $1.00 per line per day. One hundred lines for 4 days would be $400.00. There is no additional charge for the on-line posting. The initial posting will online through the date the last posting expires.

Rules 106(b) and 244

Professor Carleson suggest two companion rule changes.

1) Rule 244 providing for appointment of an attorney ad litem. Add language that corresponds with the transcript of the last meeting to the effect that requires the attorney ad litem to make reasonable efforts to locate the defendant served by publication.

2) Rule 106b. Amend to make clear that substituted service may be made electronically when the court is satisfied that service by that method is reasonably calculated to give the D notice. (Mullane v Hanover standard)

Thanks.

Richard

From: Richard Orsinger [mailto:richard@momnd.com]
Sent: May 12, 2011 1:32 PM
To: undisclosed-recipients
Subject: RE: SCAC -- Amendment to Tex. R. Civ. P. 116 regarding electronic publication of citation by publication

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Thanks.

Richard

Nathan Hecht

From: Richard Orsinger [richard@momnd.com]
Sent: Wednesday, May 11, 2011 11:44 AM
To: Elaine Carlson; Alexandra Albright; Nina Cortell; Professor Dorsaneo; Tommy Jacks; Judge Peeples; Schenkkan, Pete; Frank Gilstrap; Gene Storie; Nathan Hecht
Subject: RE: SCAC-Rule 15-165a Subcommittee--proposed change to Rule 116 on citation by publication; new version of possible change to Rule 116

Dear Subcommittee: As I see the discussion at the SCAC meeting on March 25, 2011, the Committee preferred a rule change that would require (not just permit) publication at the newspaper's web site or on the government web site designed for this purpose, if either if available. Please comment on the language set out below, and suggest changes or additions.

The Office of Court Administration is willing to put together a state web site as a prototype, and they are open to the possibility of maintaining such a web site on a permanent basis if the technology and cost can be worked out. The person I have been communicating with at the OCA does not believe that the Supreme Court can impose a new filing fee to cover the cost of a new state web site, and thinks it unlikely that the Court can reallocate any of the existing filing fees for that purpose. On the other hand, he didn't rule out the possibility that the OCA would absorb the cost of such a web site in its normal budget. The OCA will not be able to be very interactive on this question while the Legislature is in session.

Here is are possible changes to Rule 116, taking into account the foregoing:

[First part of rule]

Rule 116. Service of Citation by Publication

The citation, when issued, shall be served by the sheriff or any constable of any county of the State of Texas or by the clerk of the court in which the case is pending, 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. In all suits which involve the title to land or partition of real estate, such publication shall be made in the county where the land, or a portion thereof, is situated, if there be a newspaper in such county, but if not, then in an adjoining county to the county where the land or a part thereof is situated, where a newspaper is published.

[Then add one of the following options]

[Option 1: either electronic newspaper or OCA web site]

In addition to the publication outlined above, the citation shall also be published in the electronic version of the newspaper, or in the Internet website maintained by the Office of Court Administration as a repository for this purpose, if either is available. The electronic publication shall be for a continuous period of twenty-eight (28) days before the return day of the citation.

[Option 2: both electronic newspaper or OCA web site]

In addition to the publication outlined above, the citation shall also be published in the electronic version of the newspaper, as well as on the Internet website maintained by the Office of Court Administration as a repository for this purpose. The electronic publication shall be for a continuous period of twenty-eight (28) days before the return day of the citation.

May 12, 201

Proposed Changes to Rules 106(b) and 244

Professor Carleson has suggested two changes to go along with requiring electronic publishing of citation by publication.

1) Rule 106b. Amend to make clear that substituted service may be made electronically when the court is satisfied that service by that method is reasonably calculated to give the D notice. (Mullane v Hanover standard)

Current Rule (proposed new language underlined):

Rule 106. Method of Service

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by Rule 103 by

(1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

(b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service

(1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit; or

(2) by digital transmission or by publication through electronic media, where the affidavit or evidence shows that such transmission or electronic publication will be reasonably effective to give the defendant notice of the suit; or

(3) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

IN THE SUPREME COURT OF TEXAS

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

FINAL REPORT OF THE ANCILLARY PROCEEDINGS TASK FORCE

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

TO THE HONORABLE SUPREME COURT:

I. INTRODUCTION

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

The following persons served on the Task Force:

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

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

II. PROCESS OF REVIEW

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

III. RECOMMENDATIONS

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

IV. CONCLUSION

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

Table of Contents

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

PART VI. Rules Relating To Ancillary Proceedings

SECTION 1. INJUNCTIONS

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

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

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

(2) state why immediate and irreparable injury, loss, or damage will result if the temporary restraining order is not granted;

(3) state why the applicant has no adequate remedy at law;

(4) state why the applicant has a probable right to recover on a cause of action; and

(5) if sought without notice to the adverse party or its attorney, demonstrate through specific facts, supported by verification or affidavit, that:

(A) notice was not possible or practicable; or

(B) the applicant will sustain substantial damage before notice can be served and a hearing held.

(b) *Verification.* All facts supporting the application must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence. Pleading on information and belief is insufficient to support the granting of the application.[3]

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

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

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

(c) *Time for Hearing.* The court may conduct a hearing on the application at such time and upon such notice, if any, as directed by the court.

(d) *Order.* A court may grant the application with or without written or oral notice to the adverse party or its attorney. Unless provided otherwise by the Texas Family Code or other statute, every order granting an application for a temporary restraining order must:

(1) state the date and hour of issuance;

(2) state why immediate and irreparable injury, loss, or damage will result if the temporary restraining order is not granted;

(3) state why the applicant has no adequate remedy at law;

(4) state why the applicant has a probable right to recover on a cause of action;

(5) describe in reasonable detail, and not by reference to the petition or other document, the act or acts sought to be mandated or restrained;

(6) set a specific date and time for hearing on the application for the temporary or permanent injunction sought;

(7) state the amount and terms of the applicant's bond, if a bond is required;

(8) if granted without notice to the adverse party or its attorney:

(A) state why it was granted without notice; and

(B) set a hearing of the application for a temporary injunction that is at the earliest possible date, taking precedence over all matters except older matters of the same character;

(9) state the duration of the order;

(10) state that the order is binding on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise; and

(11) be filed promptly in the clerk's office.

(e) *Duration and Extension.*

(1) The duration of a temporary restraining order may not exceed fourteen days from the date of issuance.

(2) The court may extend the duration of a temporary restraining order for a like period not to exceed fourteen days. The reasons for the extension must be stated in the order.

(3) The parties may agree to extend the duration beyond the above-referenced time periods.

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

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

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

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

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

Rule INJ 2 (593). Temporary Injunctions[5]

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

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

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

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

(2) state why immediate and irreparable injury, loss, or damage will result if the temporary injunction is not granted;

(3) state why the applicant has no adequate remedy at law; and

(4) state why the applicant has a probable right to recover on a cause of action.

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

(c) *Notice and Hearing.* The application cannot be granted without notice to the adverse party and an evidentiary hearing. The court must conduct the hearing at such time and upon such reasonable notice as the court may direct. An application for temporary injunction cannot be granted without evidence of each element in the hearing.

(d) *Order.* Every order granting an application for a temporary injunction must:

(1) state the date and hour of issuance;

(2) state why immediate and irreparable injury, loss, or damage will result if the temporary injunction is not granted;

(3) state why the applicant has no adequate remedy at law;

(4) state why the applicant has a probable right to recover on a cause of action;

(5) describe in reasonable detail, and not by reference to the petition or other document, the act or acts sought to be mandated or restrained;

(6) state that the temporary injunction shall apply until trial on the merits with respect to the ultimate relief sought;

(7) set the cause for trial on the merits with respect to the ultimate relief sought;

(8) state the amount and terms of the applicant's bond, if a bond is required; and

(9) be filed promptly in the clerk's office.

(e) *Effect of Appeal.* Unless ordered otherwise, the appeal of a temporary injunction may not delay the trial.

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

(g) *Motion to Dissolve or Modify.*[6] On reasonable notice to the party who obtained the temporary injunction, which may be less than three days, a party may move for dissolution or modification of the temporary injunction. The court must hear and determine the motion as expeditiously as practicable. If the grounds for the motion to dissolve or modify are based on an issue of fact, the motion must be supported by specific facts shown by affidavit, verified denial, testimony, or other evidence.

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

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

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

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

Rule INJ 3 (594). Permanent Injunctions

(a) *Pleading.* To be awarded a permanent injunction, a party's pleading must:

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

[6] The existing rules also contain a "Bond on Dissolution" provision. The Injunctive Rule Subcommittee recommends deleting that rule completely. *See* Attachment A.

(2) state why immediate and irreparable injury, loss, or damage will result if the permanent injunction is not granted; and

(3) state why the applicant has no adequate remedy at law.

(b) *Verification.* All facts supporting the plea for a permanent injunction must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for belief are specifically stated. A permanent injunction cannot be granted without evidence of each element in the trial.

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

Rule INJ 4 (595). Applicant's Bond or Other Security[7]

(a) *Requirement of Bond.* Unless otherwise provided by statute,[8] a writ of injunction may not be issued unless the applicant has filed with the clerk a bond:

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

(2) with sufficient surety or sureties to be approved by the clerk; and

(3) conditioned that the applicant will abide the decision which may be made in the cause, and that the applicant will pay all sums of money and costs that may be adjudged against the applicant if the temporary restraining order or temporary injunction shall be dissolved in whole or in part.

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

(c) *Bond in Family Code Case.* To the extent permitted by the Texas Family Code, the court in its discretion may dispense with the necessity of a bond in connection with an ancillary injunction.[9]

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

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

[9] This language comes from existing Rule 693a.

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

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

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

Rule INJ 5 (596). Contents of Writ of Injunction[10]

(a) *General Requirements.* Unless provided otherwise by statute, every writ of injunction, whether it be a temporary restraining order, temporary injunction, or permanent injunction must:

(1) be styled "The State of Texas";

(2) be dated and signed by the clerk officially;

(3) bear the seal of the court;

(4) state the names of the parties to the proceedings, the name of the applicant, the nature of the application, and the court's action on the application;

(5) be directed to the person or persons enjoined; and

(6) have a copy of the order granting the application for the writ attached.

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

(b) *Command of Writ.* The writ must command the person or persons to whom it is directed to, until the time specified:

(1) cease and refrain from performing the acts enjoined in the court's issuing order or judgment, a copy of which must be attached to the writ; and

(2) to the extent the injunction is mandatory in nature, obey and execute the terms of the issuing order or judgment, a copy of which must be attached to the writ.

(c) *Setting of Hearing or Trial.* If the writ is a temporary restraining order, it must state the date and time for the temporary injunction hearing. If the writ is a temporary injunction, it must state the date and time for trial on the merits.

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

(e) *Form of Writ.*

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

"The State of Texas.

"To _____, [Respondent]:

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

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

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

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

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

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

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

"The State of Texas.

"To _____, [Respondent]:

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

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

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

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

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

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

"The State of Texas.

"To _____, [Respondent]:

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

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

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

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

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

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

Rule INJ 6 (597). Delivery, Service, and Return of Writ[11]

(a) *Delivery of Writ.*

(1) The clerk issuing a writ of injunction must deliver the writ to the sheriff, constable, or other person authorized by Rule 103, or the applicant, who must then deliver the writ to the sheriff, constable, or other person authorized by Rule 103.

(2) If several persons are enjoined, residing in different counties, the clerk must issue additional copies of the writ as requested by the applicant.

(b) *Service of Writ.*

[11] This draft rule is derived from existing Rule 689.

(1) A temporary restraining order or other writ of injunction is not effective until served upon the person(s) to be enjoined. The writ may be served by any person authorized by Rule 103 of the Texas Rules of Civil Procedure. Only a sheriff or constable may serve a temporary restraining order or other writ of injunction that requires the actual taking of possession of a person, property, or thing, or a writ requiring that an enforcement action be physically enforced by the person delivering the writ.

(2) The person authorized to serve the writ, upon receipt, must:

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

(B) as soon as practicable, serve the writ on the party enjoined.

(c) *Return of Writ.*

(1) The return must be in writing and signed by the sheriff, constable, or other person authorized by Rule 103 executing the writ. The return must be filed with the issuing clerk within the time stated in the writ.

(2) The action of the sheriff, constable, or other person authorized by Rule 103 must be endorsed on or attached to the writ, showing how and when the writ was executed.

Rule INJ 7 (598). Scope of the Writ of Injunction[12]

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

Rule INJ 8 (599). Orders that are Issued Before the Petition is Filed[13]

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

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

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

(a) *Filing and Docketing.* The party for whom the order is granted must file the order and the petition as soon as practicable with the clerk of the proper court.

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

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

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

Rule INJ 10 (601). Disobedience[16]

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

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

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

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

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

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

Rule INJ 12 (603). Bond on Dissolution[18]

[NO RULE CONTENT RECOMMENDED]

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

[18] The Injunctive Rule Subcommittee recommends deleting existing Rule 691. *See* Attachment A. Rule 691 reads:

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

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

Injunction Statutes
Texas Civil Practice & Remedies Code

§ 65.011. Grounds Generally

A writ of injunction may be granted if:

(1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant;

(2) a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual;

(3) the applicant is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions;

(4) a cloud would be placed on the title of real property being sold under an execution against a party having no interest in the real property subject to execution at the time of sale, irrespective of any remedy at law; or

(5) irreparable injury to real or personal property is threatened, irrespective of any remedy at law.

§ 65.012. Operation of Well or Mine

(a) A court may issue an injunction or temporary restraining order prohibiting subsurface drilling or mining operations only if an adjacent landowner filing an application claims that a wrongful act caused injury to his surface or improvements or loss of or injury to his minerals and if the party against whom the injunction is sought is unable to respond in damages for the resulting injuries.

(b) To secure the payment of any injuries that may be sustained by the complainant as a result of subsurface drilling or mining operations, the party against whom an injunction is sought under this section shall enter into a good and sufficient bond in an amount fixed by the court hearing the application.

(c) The court may appoint a trustee or receiver instead of requiring a bond if the court considers it necessary to protect the interests involved in litigation concerning an injunction under this section. The trustee or receiver has the powers prescribed by the court and shall take charge of and hold the minerals produced from the drilling or mining operation or the proceeds from the disposition of those minerals, subject to the final disposition of the litigation.

§ 65.013. Stay of Judgment or Proceeding

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

§ 65.014. Limitations on Stay of Execution of Judgment

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

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

rendition of the judgment; or

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

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

§ 65.015. Closing of Streets

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

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

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

§ 65.016. Violation of Revenue Law

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

§ 65.017. Cigarette Seller, Distribution, or Manufacturer

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

(1) Section 48.015, Penal Code; or

(2) Section 154.0415, Tax Code.

§ 65.018. to 65.020 [Reserved for expansion]

§ 65.021. Jurisdiction of Proceeding

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

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

§ 65.022. Return of Writ; Hearing by Nonresident Judge

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

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

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

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

§ 65.023. Place for Trial
(a) Except as provided by Subsection (b), a writ of injunction against a party who is a resident of this state shall be tried in a district or county court in the county in which the party is domiciled. If the writ is granted against more than one party, it may be tried in the proper court of the county in which either party is domiciled.
(b) A writ of injunction granted to stay proceedings in a suit or execution on a judgment must be tried in the court in which the suit is pending or the judgment was rendered.

§ 65.024. to 65.030 [Reserved for expansion]

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

§ 65.032. to 65.040 [Reserved for expansion]

§ 65.041. Bond Not Required for Issuance of Temporary Restraining Order for Certain Indigent Applicants
A court may not require an applicant for a temporary restraining order to execute a bond to the adverse party before the order may issue if:
(1) the applicant submits an affidavit that meets the requirements of Section 65.043 to the court; and
(2) the court finds that the order is intended to restrain the adverse party from foreclosing on the applicant's residential homestead.

§ 65.042. Bond Not Required for Issuance of Temporary Injunction for Certain Indigent Applicants (a) A court may not require an applicant for a temporary injunction to execute a bond to the adverse party before the injunction may issue if:
(1) the applicant submits an affidavit that meets the requirements of Section 65.043 to

the court; and

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

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

§ 65.043. Affidavit

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

(1) identity;

(2) income, including income from employment, dividends, interest, and any other source other than from a government entitlement;

(3) spouse's income, if known to the applicant;

(4) description and estimated value of real and personal property, other than the applicant's homestead;

(5) cash and checking account;

(6) debts and monthly expenses;

(7) dependents; and

(8) any transfer to any person of money or other property with a value in excess of $ 1,000 made within one year of the affidavit without fair consideration.

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

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

(d) The affidavit must be verified.

§ 65.044. Contest of Affidavit

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

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

(1) after service of a temporary restraining order in the case; or

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

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

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

(1) any income from a government entitlement that the applicant receives; or

(2) the value of the applicant's residential homestead.

(e) The court may order the applicant to post and file with the clerk a bond as required by the Texas Rules of Civil Procedure only if the court determines that the applicant is financially able to execute the bond.
(f) An attorney who represents an applicant and who provides legal services without charge to the applicant and without a contractual agreement for payment contingent on any event may file an affidavit with the court describing the financial nature of the representation.

§ 65.045. Conflict with Texas Rules of Civil Procedure
(a) To the extent that this subchapter conflicts with the Texas Rules of Civil Procedure, this subchapter controls.
(b) Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this subchapter.
(c) The district courts and statutory county courts in a county may not adopt local rules in conflict with this subchapter.

SECTION 2. ATTACHMENT

Rule ATT 1 (604). Application for Writ of Attachment and Order

(a) *Pending Suit Required for Issuance of Writ.* An application for a writ of attachment may be filed at the initiation of a suit or at any time during the progress of a suit.

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

(1) state the nature of the applicant's underlying claim;

(2) state the statutory grounds for issuance of the writ as provided in Chapter 61 of the Civil Practice and Remedies Code and the specific facts justifying attachment; and

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

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

(d) *Order.*

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

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

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

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

(5) *Amount of Property to be Attached.* The order must state the dollar amount to be satisfied by attachment.

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

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

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

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

Rule ATT 2 (605). Applicant's Bond or Other Security

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

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

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

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

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

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

Rule ATT 3 (606). Contents of Writ

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

(b) *Command of Writ.* The writ must command the sheriff or constable to levy on so much of the respondent's property as may be found within the county and that approximates the amount set by the court order, and to keep the property safe and preserved subject to further order of the court.

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

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

"To _____, Respondent:

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

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

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

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

"The State of Texas.

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

"We command that you promptly attach so much of the property of [Respondent], if it be found in your county, as shall be of sufficient value to make the sum of _____ dollars, and the probable costs of suit, to satisfy the demand of [Applicant], and that you keep the attached property safe and preserved, unless replevied, that the same may be liable to further proceedings before the court in

_____ County, Texas. You will return this writ on or before [30, 60, 90] days from the date of issuance of the writ showing how you have executed the same."

Rule ATT 4 (607). Delivery, Levy, and Return of Writ

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

(1) the sheriff or constable; or

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

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

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

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

(3) levy on property in an amount that the sheriff or constable determines to be sufficient to satisfy the writ.

(c) *Method of Levy.*

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

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

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

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

(C) seizing the property and holding it in a bonded warehouse, or other secure location in which case the applicant may be held responsible for the costs. In the event the property is released to the respondent by the court, the respondent must pay all expenses

associated with storage of the property. Storage fees may be taxed as costs against the non-prevailing party.

(d) *Return of Writ.*

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

(2) The sheriff's or constable's action must be endorsed on or attached to the writ. In the return, the sheriff or constable must state what action the sheriff or constable took in levying, describe the property attached with sufficient certainty to identify it and distinguish it from property of like kind, and state when the property was seized and where the property is being held. When property has been replevied, the sheriff or constable must deliver the replevy bond to the clerk or justice of the peace to be filed with the papers of the suit.

Rule ATT 5 (608). Service of Writ on Respondent After Levy

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

Rule ATT 6 (609). Respondent's Replevy Rights

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

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

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

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

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

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

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

(2) *Method of Substitution.* No personal property under levy of attachment shall be deemed released until the property to be substituted is delivered to the location named in the order; no real property under levy of attachment shall be deemed released until the order authorizing substitution is filed of record with the county clerk of each county in which the property is located. The original property under levy of attachment may not be released until the respondent pays all costs associated with the substitution of the property, including all expenses associated with storage of the property.

(3) *Status of Lien.* Upon substitution, the attachment lien on the released property is deemed released, and a new lien attaches to the substituted property. The new lien is deemed to have been perfected as of the date of levy on the original property.

Rule ATT 7 (610). Applicant's Replevy Rights

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

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

(c) *Order.* The order must set the amount of the applicant's replevy bond equal to the lesser of the value of the property or the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court. The bond must be made payable to the respondent in the amount set by the court's order, with sufficient surety or sureties as approved by the clerk or the justice of the peace. The order must also include the conditions of the applicant's replevy bond as provided in this rule.

(d) *Conditions of Applicant's Replevy Bond.* The applicant's replevy bond must be conditioned on the applicant satisfying to the extent of the penal amount of the bond any judgment which may be rendered against the applicant in the action. The bond must also contain the conditions that the applicant will:

(1) not remove the personal property from the county;

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

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

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

(5) to the extent that the:

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

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

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

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

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

Rule ATT 8 (611). Dissolution or Modification of Order or Writ

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

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

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

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

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

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

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

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

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

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

Rule ATT 9 (612). Judgment

(a) *Judgments on Replevy Bond.*

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

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

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

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

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

Rule ATT 10 (613). Perishable Property

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

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

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

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

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

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

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

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

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

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

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

Rule ATT 12 (615). Amendment of Errors

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

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

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

Attachment Statutes
Texas Civil Practice & Remedies Code

§ 61.001. General Grounds

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

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

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

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

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

§ 61.002. Specific Grounds

Attachment is available if:

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

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

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

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

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

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

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

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

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

§ 61.0021. Grounds for Attachment in Suit for Sexual Assault

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

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

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

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

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

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

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

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

SECTION 4. SEQUESTRATION

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

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

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

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

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

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

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

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

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

(d) *Order.*

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

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

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

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

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

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

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

(8) *Respondent's Replevy Bond.*

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

(i) the value of the property; or

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

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

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

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

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

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

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

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

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

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

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

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

Rule SEQ 3 (632). Contents of Writ

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

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

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

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

"To _____, Respondent:

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

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

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

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

"The State of Texas.

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

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

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

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

(1) the sheriff or constable; or

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

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

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

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

(c) *Method of Levy.*

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

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

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

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

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

(d) *Return of Writ.*

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

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

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

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

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

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

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

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

(A) not remove the property from the county;

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

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

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

(E) to the extent that the:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) not remove the property from the county;

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

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

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

(E) to the extent that the:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule SEQ 9 (638). Judgment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule SEQ 11 (640). Perishable Property

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

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

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

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

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

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

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

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

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

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

Rule SEQ 13 (642). Amendment of Errors

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

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

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

Sequestration Statutes
Texas Civil Practice & Remedies Code

§ 62.001. Grounds

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

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

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

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

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

§ 62.002. Pending Suit Required

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

§ 62.003. Available for Claim Not Due

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

§ 62.004. to 62.020 [Reserved for expansion]

§ 62.021. Who May Issue

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

§ 62.022. Application

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

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

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

(3) the facts justifying issuance of the writ.

§ 62.023. Required Statement of Rights

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

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

(b) The statement must be printed in 10-point type and in a manner intended to advise a reasonably attentive person of its contents

§ 62.024. to 62.040 [Reserved for expansion]

§ 62.041. Motion for Dissolution; Stay

(a) The defendant may seek dissolution of an issued writ of sequestration by filing a written motion with the court.

(b) The right to seek dissolution is cumulative of the right of replevy.

(c) The filing of a motion to dissolve stays proceedings under the writ until the issue is determined.

§ 62.042. Hearing on Motion

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

§ 62.043. Dissolution

(a) Following the hearing, the writ must be dissolved unless the party who secured its issuance proves the specific facts alleged and the grounds relied on for issuance.

(b) If the writ is dissolved, the action proceeds as if the writ had not been issued.

§ 62.044. Compulsory Counterclaim for Wrongful Sequestration

(a) If a writ is dissolved, any action for damages for wrongful sequestration must be brought as a compulsory counterclaim.

(b) In addition to damages, the party who sought dissolution of the writ may recover reasonable attorney's fees incurred in dissolution of the writ.

§ 62.045. Wrongful Sequestration of Consumer Goods

(a) If a writ that sought to sequester consumer goods is dissolved, the defendant or party in possession of the goods is entitled to reasonable attorney's fees and to damages equal to the greater of:

(1) $ 100;

(2) the finance charge contracted for; or

(3) actual damages.

(b) Damages may not be awarded for the failure of the plaintiff to prove by a preponderance of the evidence the specific facts alleged if the failure is the result of a bona fide error. For a bona fide error to be available as a defense, the plaintiff must prove the use of reasonable procedures to avoid the error.

(c) In this section, "consumer goods" has the meaning assigned by the Business & Commerce Code.

§ 62.046. Liability for Fruit of Replevied Property

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

§ 62.047. to 62.060 [Reserved for expansion]

§ 62.061. Officer's Liability and Duty of Care

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

§ 62.062. Compensation of Officer

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

§ 62.063. Indemnification of Officer for Money Spent

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

SECTION 2. ATTACHMENT

Rule ATT 1 (604). Application for Writ of Attachment and Order

(a) *Pending Suit Required for Issuance of Writ.* A writ of attachment may be issued at the initiation of a suit or at any time before final judgment.

Derived from Rule 592 and CPRC 61.003. Statute precludes attachment prior to suit.

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

(1) state the nature of the applicant's underlying claim;

Added to provide trial court with basic context. The term "applicant" has been substituted for "plaintiff" throughout the revisions. "Respondent" replaces "defendant."

(2) state the statutory grounds for issuance of the writ as provided in Chapter 61 of the Civil Practice and Remedies Code and the specific facts justifying attachment; and

Derived from Rule 592 and CPRC 61.001 and 61.002. With the exception of 61.0021 (providing for attachment in sexual assault and indecency cases, the statutes require an applicant to state both general and specific statutory grounds.

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

Rule 592 currently requires the court to state, in its attachment order, the maximum value of property to be attached. Under CPRC 61.022(a)(2), the applicant must state "the amount of the demand." The re-wording clarifies that the relevant amount is the dollar amount to be satisfied rather than the value of the property. Attachment should remain available even if the value of the property exceeds the amount sought to be attached.

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

Derived from Rule 592. "Verified" was added to comport with common practice. CPRC 61.022 requires the filing of an "affidavit."

(d) *Order.*

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

Derived from Rule 592.

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

Derived from Rule 592.

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

Derived from Rule 606 and CPRC 61.021.

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

Derived from Rule 592.

(5) *Amount of Property to be Attached.* The order must state the dollar amount to be satisfied by attachment.

Derived from Rule 592 which requires the order to "specify the maximum value of property that may be attached." The re-wording clarifies that the relevant amount is the dollar amount to be satisfied rather than the value of the property. Attachment should remain available even if the value of the property exceeds the amount sought to be attached.

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

First part of sentence derived from Rule 593 and 594. Second part derives from Rule 592.

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

Derived from Rule 592 and CPRC 61.023. The current rule uses "wrongfully suing out the writ of attachment" while the statute uses "wrongful attachment."

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

Derived from Rules 592 and 599 which provide the respondent with the option to replevy based on the value of the attached property as estimated by the attaching officer. Constables we consulted did not wish to be involved in determining the amount of the replevy bond by valuing the property. The committee therefore added "property value" into this section to permit the court to determine the replevy bond amount.

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

Derived from Rule 592, but expanded to clarify when multiple writs may issue and to impose a duty on the applicant to advise the officer of the existence of multiple writs to minimize the chance for excessive levy.

Rule ATT 2 (605). Applicant's Bond or Other Security

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

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

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

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

Derived from Rules 592, 592a and CPRC 61.023. The statute requires "two or more good and sufficient sureties."

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

New rule that clarifies the applicability of Rule 14c.

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

Derived from Rules 592a and 599 to make them consistent. The wording of the last sentence was changed to clarify that a written order is required.

Rule ATT 3 (606). Contents of Writ

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

Derived from Rules 593, 594 and 596. The clause "tested as other writs" has been replaced by clearer language.

(b) *Command of Writ.* The writ must command the sheriff or constable to levy on so much of the respondent's property as may be found within the county and that approximates the amount set by the court order, and to keep the property safe and preserved subject to further order of the court.

Derived from Rules 593, 592 and 597.

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

Derived from Rule 606 and CPRC 61.023. Rule 606 currently requires the officer to return the writ "at or before 10 o'clock a.m of the Monday next after the expiration of fifteen days from the date of issuance of the writ." The language has been changed to conform attachment practice to that of other writs returnable in 30, 60 or 90 days as directed by the applicant.

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

"To _____, Respondent:

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

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

"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION

OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE OR MODIFY THIS WRIT."

Derived from Rule 598a. Type has been changed from 10-point to 12-point. Another statement has been added to provide express notice that federal and state exemptions may apply.

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

"The State of Texas.

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

"We command that you promptly attach so much of the property of [Respondent], if it be found in your county, as shall be of sufficient value to make the sum of _____ dollars, and the probable costs of suit, to satisfy the demand of [Applicant], and that you keep the attached property safe and preserved, unless replevied, that the same may be liable to further proceedings before the court in _____ County, Texas. You will return this writ on or before [30, 60, 90] days from the date of issuance of the writ showing how you have executed the same."

Derived from Rule 594 with modifications made for clearer language and to add the 30, 60 90 return dates.

Rule ATT 4 (607). Delivery, Levy, and Return of Writ

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

(1) the sheriff or constable; or

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

Derived from Rule 596.

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

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

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

(3) levy on property in an amount that the sheriff or constable determines to be sufficient to satisfy the writ.

Derived from Rules 596 and 597.

(c) *Method of Levy.*

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

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

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

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

(C) seizing the property and holding it in a bonded warehouse, or other secure location in which case the applicant may be held responsible for the costs. In the event the property is released to the respondent by the court, the respondent must pay all expenses associated with storage of the property. Storage fees may be taxed as costs against the non-prevailing party.

Derived from Rule 598 which states that the writ of attachment shall be levied in the same manner as a writ of execution. See Rules 639-643 for execution. The language was modified to make it clearer.

(d) *Return of Writ.*

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

(2) The sheriff's or constable's action must be endorsed on or attached to the writ. In the return, the sheriff or constable must state what action the sheriff or constable took in levying, describe the property attached with sufficient certainty to identify it and distinguish it from property of like kind, and state when the property was seized and where the property is being held. When property has been replevied, the sheriff or constable must deliver the replevy bond to the clerk or justice of the peace to be filed with the papers of the suit.

Derived from Rules 596 and 606 and CPRC 61.021. Language was modified to make it clearer.

Rule ATT 5 (608). Service of Writ on Respondent After Levy

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

Derived from Rule 598a.

Rule ATT 6 (609). Respondent's Replevy Rights

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

Derived from Rule 599. The added language is to clarify that the bond may be filed with the court or the sheriff, and that a copy of the bond must be served on the respondent. The final sentence clarifies where any motion must be filed.

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

Derived from Rule 599. Currently, the rule provides the respondent with the option to replevy based on the value of the attached property as estimated by the attaching officer. Constables we consulted did not wish to be involved in determining the amount of the replevy bond by valuing the property. The language was therefore omitted.

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

New rule that clarifies the applicability of Rule 14c

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

evidence; otherwise, the parties must submit evidence. After a hearing, the court must issue a written order on the motion.

Derived from Rule 599 and consistent with proposed new rule ATT 2(c). In addition, the right to seek review is provided to any party.

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

New rule designed to clarify that possession of the property is to be released to the respondent within a reasonable time, if the bond has not been successfully challenged. In addition, the new rule imposes a burden of paying all expenses associated with storage of the property before it may be released.

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

The current rule provides that "no property on which liens have become affixed since the date of levy on the original property may be substituted." The new rule is more definitive but still allows the court discretion.

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

Derived from Rule 599.

(2) *Method of Substitution.* No personal property under levy of attachment shall be deemed released until the property to be substituted is delivered to the location named in the order; no real property under levy of attachment shall be deemed released until the order authorizing substitution is filed of record with the county clerk of each county in which the property is located. The original property under levy of attachment may not be released until the respondent pays all costs associated with the substitution of the property, including all expenses associated with storage of the property.

Derived from 599 with clarifying language added with regard to the timing of release, filing of record, and payment of expenses.

(3) *Status of Lien.* Upon substitution, the attachment lien on the released property is deemed released, and a new lien attaches to the substituted property. The new lien is deemed to have been perfected as of the date of levy on the original property.

Derived from Rule 599. Language modified to make it clearer.

Rule ATT 7 (610). Applicant's Replevy Rights

This is a new section. The current rules do not provide the applicant with replevy rights in attachment. The sequestration rules do provide an applicant a right of replevy. The attachment subcommittee opted to provide replevy rights primarily because of escalating storage costs. The applicant may be able to store the property at a cost lower than what would be charged by the constable or respondent. The applicant must, however, file a motion with the court.

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

Adapted from ATT 6, regarding Respondent's Replevy Rights.

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

Added to clarify that an applicant does not have an absolute right to replevy.

(c) *Order.* The order must set the amount of the applicant's replevy bond equal to the value of the property as established by the evidence, plus one year's interest thereon at the legal rate from the date of the bond. The bond must be made payable to the respondent in the amount set by the court's order, with sufficient surety or sureties as approved by the clerk or the justice of the peace. The order must also include the conditions of the applicant's replevy bond as provided in this rule.

Adapted from Rule 592, 599 and proposed rule ATT 1(d)(8).

(d) *Conditions of Applicant's Replevy Bond.* The applicant's replevy bond must be conditioned on the applicant satisfying to the extent of the penal amount of the bond any judgment which may be rendered against the applicant in the action. The bond must also contain the conditions that the applicant will:

(1) not remove the personal property from the county;

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

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

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

(5) to the extent that the:

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

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

Adapted from Rules 599 (respondent's replevy) and 708 (applicant's replevy in sequestration).

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

New rule that clarifies the applicability of Rule 14c.

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

Adapted from proposed Rules ATT 5 and 6(a).

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

Adapted from proposed Rule ATT 6(e).

Rule ATT 8 (611). Dissolution or Modification of Order or Writ

(a) *Motion.* Any party, or any person who claims an interest in the property under levy of attachment, may move the court to dissolve or modify the order or writ, for any ground or

cause, extrinsic or intrinsic. The motion must be verified and must admit or deny each finding set forth in the order directing the issuance of the writ. If the movant is unable to admit or deny the finding, the movant must set forth the reasons why the movant cannot do so.

Derived from Rule 608.

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

Derived from Rule 608

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

Derived from Rule 608

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

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

Derived from Rule 608 Language added to clarify that the underlying order should also be set aside.

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

Derived from Rule 608

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

Derived from Rule 608.

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

Derived from rule 614. Language added to provide for the release of the property and payment of expenses.

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

Rule 608 permits the filing of a motion by "an intervening party who claims an interest in such property," but does not otherwise address the "intervening party." Most of this proposed rule is new. It provides an expedited procedural vehicle for a third-party claimant as an alternative to the trial of right of property. The statutes provide only for the trial of right of property.

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

New rule adapted from CPRC 62.043 and 62.044 pertaining to sequestration. In sequestration, the writ must be dissolved before a claim for wrongful sequestration may be filed. In addition, attorney fees are made available by statute for sequestration. There is no comparable statute for attachment, but the committee believes the same procedure and privilege should apply to attachment.

Rule ATT 9 (612). Judgment

(a) *Judgments on Replevy Bond.*

(1) *Judgment Against Respondent on Replevy Bond.* If the underlying suit is decided against a respondent who replevied the attached property, final judgment must be

rendered against all of the obligors on the respondent's replevy bond, jointly and severally, according to the terms of the replevy bond, either for the amount of the judgment plus interest and costs, or for an amount equal to the value of the property replevied as of the date of replevy, plus interest as provided in the bond.

The current attachment rules, unlike the sequestration rules, do not address judgments on the bonds. CPRC 61.063, however, does address judgment on a respondent's replevy bond. The committee believes the rules should address judgment on both bonds, and, accordingly, has included this new rule, adapted from the sequestration rules.

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

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

This is a new rule to address the assessment of costs.

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

Rule ATT 10 (613). Perishable Property

This rule combines language from Rules 600-605. It has been re-written and appears in substantially the same form in the rules for sequestration, garnishment and distress warrants.

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

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

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

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

The rules have been revised to provide for a motion practice.

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

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

The rule was revised to delete the requirement of a bond by the applicant because the applicant, under the proposed rule, now may seek to replevy.

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

This rule was added to clarify the process of an order of sale.

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

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

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

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

Derived from Rule 607. Language added to provide for a description of the condition of replevied property as of the date and time of replevy.

Rule ATT 12 (615). Amendment of Errors

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

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

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

Derived from Rule 609 which allows amendment only on application to the court and notice to the opponent. Changes were made to allow free amendment to correct any errors before the court signs an order and to allow free amendment of clerical errors after the order has been signed but before the writ has been served. After levy, amendment may be permitted only after motion, notice and hearing.