

COLLECTING THE JUDGMENT

Collection Law From Start to Finish
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TABLE OF CONTENTS

| | |
|--|-----------|
| A. USE OF JUDGMENT LIENS ON REAL PROPERTY | 1 |
| B. USE OF JUDGMENT LIENS ON PERSONAL PROPERTY | 4 |
| C. POST-JUDGMENT DISCOVERY | 4 |
| D. WRITS OF EXECUTION, LEVY AND SALE BY SHERIFF | 4 |
| E. GARNISHMENT | 12 |
| F. ATTACHMENT | 15 |
| G. TURNOVER..... | 19 |
| H. EXEMPT PROPERTY | 22 |
| I. FRAUDULENT TRANSFERS | 24 |
| J. SELF-HELP REPOSSESSION | 26 |

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A. USE OF JUDGMENT LIENS ON REAL PROPERTY

Under Texas law, no lien on a judgment debtor's property is created by a judgment alone. *Citigroup Real Estate, Inc. v. Banque Arabe Internationale D'Investissement*, 747 S.W.2d 926, 929 (Tex. App.—Dallas 1988, writ denied). There are steps a judgment creditor must take to turn a judgment into cash.

When attempting to levy a judgment against real property, the judgment creditor must comply with the Texas Property Code requirements regarding the creation of a judgment lien to acquire a lien on real property owned by the judgment debtor. *See* Tex. Prop. Code §§ 52.001, *et seq.* The judgment creditor's first step in creating a judicial lien is to obtain an abstract of the judgment. *Rogers v. Peeler*, 271 S.W.3d 372, 375 (Tex. App.—Texarkana 2008, pet. denied).

When properly recorded and indexed, an abstract of judgment creates a judgment lien on nonexempt real property that is superior to the rights of subsequent purchasers and lienholders. *Id.* The purpose of an abstract of judgment is to create a lien against the judgment debtor's real property and to provide notice to subsequent purchasers and encumbrancers of the existence of the judgment and lien. *Id.*

An abstract of judgment should be promptly requested from the clerk of the court in which the judgment was entered. *See id.* § 52.002. The abstract of judgment must contain the following:

- (1) the names of the plaintiff and defendant;
- (2) the birthdate and last three numbers of the driver's license number of the defendant, if available to the clerk or justice;
- (3) the last three numbers of the social security number of the defendant, if available;
- (4) the number of the suit in which the judgment was rendered;
- (5) the defendant's address, or, if the address is not shown in the suit, the nature of the citation and the date and place of service of citation;
- (6) the date on which the judgment was rendered;
- (7) the amount for which the judgment was rendered and the balance due;

- (8) the amount of the balance due, if any, for child support arrearage; and
- (9) the rate of interest specified in the judgment.

Tex. Prop. Code § 52.003. It is a judgment creditor's responsibility to ensure that the clerk abstracts and indexes the judgment properly. *Texas American Bank/Fort Worth, N.A. v. Southern Union Exploration Co.*, 714 S.W2d 105, 107 (Tex. App.—Eastland 1986, writ ref'd n.r.e.).

Once the judgment has been properly abstracted, the judgment creditor should promptly record the abstract in each county in which the debtor owns, or is suspected to own, real property. *See, e.g., Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250 (S.D.N.Y. 1981), *rev'd on other grounds*, 107 S. Ct. 1519 (1987) (stating that abstracts could be filed in each county in Texas); *see* Tex. Prop. Code § 52.004(a). The county clerk is required to index the abstract by the name of each plaintiff and each defendant. Tex. Prop. Code § 52.004(b). Once filed and indexed by the clerk, this abstract creates a lien against the debtor's property and provides notice of both the judgment and the lien to subsequent purchasers and establishes the judgment creditor's priority in relation to subsequent lienholders. *McGlothlin v. Coody*, 39 S.W.2d 133, 134 (Tex. Civ. App.—Eastland 1931), *aff'd*, 59 S.W.2d 819 (Tex. Comm'n App. 1933, judgment *aff'd as recommended*); *Hoffman McBryde & Co. v. Heyland*, 74 S.W.3d 906, 912-13 (Tex. App.—Dallas 2002, pet. denied).

The abstract of judgment attaches to any real, non-exempt property of the judgment debtor that is located in the county in which the abstract is recorded and indexed, including real property acquired after such recording and indexing. Tex. Prop. Code § 52.001. It does not attach to the judgment debtor's personal property. *Donley v. Youngstown Sheet and Tube Co.*, 328 S.W.2d 192, 197 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.). Exempt property includes the judgment debtor's homestead and any other property exempt from seizure or forced

sale under Chapter 41 of the Texas Property Code or the Texas Constitution. Tex. Prop. Code § 52.001.

Because a judgment lien is statutorily created, substantial compliance with the statutory requirements is mandatory before the lien will attach. *Reynolds v. Kessler*, 669 S.W.2d 801, 804-05 (Tex. App.—El Paso 1984, no writ). If a judgment creditor fails to substantially comply with the statutory requirements, no lien exists, even against persons with actual knowledge of the judgment or of its filings in Texas. *Citigroup*, 747 S.W.2d at 931. Additionally, it is the debtor's duty to update the abstract to reflect any payments made by the judgment debtor against the judgment. *Gordon-Sewall & Co. v. Walker*, 258 S.W.233 (Tex. Civ. App.—Beaumont 1924, writ dismissed).

A judgment lien continues for 10 years following the date of recording and indexing of the abstract, except that if the judgment becomes dormant during that period the lien ceases to exist. Tex. Prop. Code § 52.006. A judgment becomes dormant if a writ of execution is not issued within 10 years following the date of recording and indexing of the abstract. Tex. Civ. Prac. & Rem. Code § 34.001(a). Alternatively, if a writ is issued during this time period, the judgment can still become dormant if a second writ is not issued within 10 years after issuance of the first writ. *Id.* § 34.001(b). In order to preserve both the existence and priority of the judgment lien, it is crucial that the judgment debtor (1) ensure that a writ of execution is issued within ten years following the date of recording and indexing of the abstract, and (2) record and index a new abstract within the same time period. Although recording a new abstract after this time period will create a new lien, the priority of the prior lien is lost. *See Burton Lingo Co. v. Warren*, 45 S.W.2d 750, 752 (Tex. Civ. App.—Eastland 1931, writ refused).

B. USE OF JUDGMENT LIENS ON PERSONAL PROPERTY

In order to perfect a judgment lien on personal property, a form of execution is required. There is no lien on the personal property of the debtor created by simply filing an abstract of judgment, as is the case with real property. *United States v. Bollinger Mobile Sales*, 492 F. Supp. 496, 497 (N.D. Tex. 1980) (citing *Donley*, 328 S.W.2d at 197).

C. POST-JUDGMENT DISCOVERY

At any time after a final judgment has been entered, and so long as said judgment has not been suspended or otherwise become dormant, the judgment creditor may conduct discovery by any means authorized by the Rules for the purpose of obtaining information to aid in the enforcement of such judgment. Tex. R. Civ. P. 621a. The same rules governing pre-trial discovery apply to post-judgment discovery. *Id.*

In the context of post-judgment discovery, the deposition of the judgment debtor is particularly useful in locating and identifying nonexempt assets that will be subject to execution, levy, and sale in satisfaction of the judgment. Notice of such a deposition should be sent to the judgment debtor's attorney and the judgment debtor himself.

D. WRITS OF EXECUTION, LEVY AND SALE BY SHERIFF

1. Writs of Execution

A writ of execution is the principal process for the collection of money judgments. Tex. R. Civ. P. 621. The writ is issued by a clerk and delivered to any sheriff or constable in Texas, empowering the officer to seize a judgment debtor's nonexempt real or personal property (more on exemptions later) within the officer's county, sell the property at public auction, and apply the proceeds toward satisfaction of the judgment. Tex. R. Civ. P. 622, 630, 637. The levy of a writ of execution perfects the judgment creditor's judicial lien on that property and establishes the lien's

priority amongst competing claims. *See Texas Employer's Ins. Ass'n v. Engelke*, 790 S.W.2d 93, 95 (Tex. App.—Houston [1st Dist.] 1990, no writ). Again, the writ of execution is necessary when attempting to establish a judicial lien on personal property, which will not attach by filing an abstract of judgment alone as is the case with liens on real property. *See Herndon v. Cocke*, 138 S.W.2d 298, 300 (Tex. Civ. App.—El Paso 1940, no writ). A judicial lien is created on the defendant's personal property when the writ of execution is levied on the property by an officer. *Id.* A writ of execution is also an available enforcement mechanism when a judgment grants relief other than an award of money damages such as a judgment ordering the sale of specific property. Tex. R. Civ. P. 631.

(a) When can a writ be issued?

Issuance of a writ is not automatic and the judgment creditor or its attorney must request the clerk to issue the writ. Tex. R. Civ. P. 627. Ordinarily the clerk of the court can issue a writ of execution on the 31st day after the trial court's final judgment is signed, if no motion for new trial is filed. If a motion for a new trial or arrest of judgment has been timely filed, the earliest a writ of execution can be issued is the 31st day after the date the order overruling the motion was signed or the motion was overruled by operation of law, provided no supersedeas bond was filed or enforcement of the judgment was not otherwise suspended in some way. Tex. R. Civ. P. 627.

However, a writ may be issued any time before the 30th day after the judgment is signed by filing an affidavit stating the judgment debtor is about to move nonexempt personal property out of the county or is about to transfer personal property to defraud creditors. Tex. R. Civ. P. 628. Even if a writ was issued before enforcement of the judgment is superseded, enforcement must cease when the judgment debtor files a sufficient supersedeas bond or makes a deposit in lieu of a bond to the clerk of the trial court to suspend enforcement of the judgment pending

appeal. Tex. R. App. P. 24.1(f); Tex. R. Civ. P. 634.

A writ of execution may be issued at any time until 10 years have elapsed from rendition of the judgment. If no execution is sought within the 10 year period, the judgment becomes dormant. Tex. Civ. Prac. & Rem. Code § 34.001. However, if a writ is issued within that 10 year period, another writ can issue at any time until 10 years have passed from the issuance of the first writ. *Id.* The judgment creditor should still attempt collection of the judgment once a writ is issued by having the writ delivered to a sheriff or constable within the required time. *Williams v. Short*, 730 S.W.2d 98, 100 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (holding that issuance of a writ within the time period but delivered to sheriff after the time expired was ineffective to prevent the judgment from becoming dormant).

If the judgment does become dormant, it may be revived by “scire facias” or an “action of debt” brought no later than the second year after the judgment became dormant. Tex. Civ. Prac. & Rem. Code § 31.006. Additionally, dormancy may be avoided, with the 10 year time period tolled, if the court finds the judgment creditor exercised reasonable diligence to discover assets of the judgment debtor, but was unsuccessful because the assets were concealed fraudulently. *Estate of Stonecipher v. Estate of Butts*, 591 S.W.2d 806, 809-10 (Tex. 1979). For example, when a judgment creditor was reasonably diligent in conducting asset discovery, but the judgment debtor hid assets by conveying them to his brother and not recording the conveyance until after the time for reviving the judgment had passed, the court was justified in tolling the time period. *Harding v. Lewis*, 133 S.W.3d 693, 695-698 (Tex. App.—Corpus Christi 2003, no pet.).

(b) Form of the writ

Although a writ of execution may be drafted by the judgment creditor's attorney and given to the clerk for issuance, it is possible the clerk will elect to use the court's own form, especially when the judgment is for the recovery of money damages. Either way, the writ must comply substantially with the following requirements.

The writ must be styled "The State of Texas." Tex. R. Civ. P. 629. It must be directed to any sheriff or any constable within the State of Texas, requiring the officer to:

- (a) execute the writ according to its terms;
- (b) "make" (collect) the costs that have been adjudged against the judgment debtor and the costs of executing the writ; and
- (c) return the writ to the clerk within either 30, 60, or 90 days, as directed by the judgment creditor or its attorney.

Id. A copy of the bill of costs taxed against the judgment debtor must be attached to the writ. *Id.* The judgment to be collected must be described by stating the court that rendered it, the date of its rendition, and the names of the parties in whose favor and against whom it was rendered. *Id.* When issued by a district or county clerk, the writ must be signed by the clerk officially and bear the seal of the court. *Id.* The return date is in effect an expiration date. Once the specified number of days passes, the power of the officer to act ceases. Any sale of property levied on after the return date will be void. *Long v. Castaneda*, 475 S.W.2d 578, 583 (Tex. App.—Corpus Christi 1971, writ ref'd n.r.e.).

If the judgment is for a sum of money, the writ must specify the sum recovered, the sum actually due on the date the writ is issued, and the applicable rate of interest on the sum due. Tex. R. Civ. P. 630. In such cases, the writ must also direct the officer to satisfy the judgment and

costs out of the nonexempt property of the judgment debtor. *Id.*

If the judgment is for the sale or recovery of specific property, the writ must describe the property and direct the officer to conduct a public sale of the property or to deliver the property to a designated party, as provided for in the judgment. Tex. R. Civ. P. 631, 632. When the judgment is for the recovery of personal property, or its value, the writ must command the officer, if the specific property cannot be delivered as ordered, to levy and collect a specified sum as the property's value out of the nonexempt property of the judgment debtor. Tex. R. Civ. P. 633.

2. Levy and Sale by the Sheriff

When an execution is delivered to an officer, he shall proceed without delay to levy the same upon the nonexempt property of the judgment debtor. Tex. R. Civ. P. 637. If able, the officer must contact the judgment debtor and ask him or her to point out property subject to execution. *Id.* When the debtor directs the officer to an item of property subject to execution, the officer will seize the property. *Id.* If the officer believes the property will not sell for enough to satisfy the execution and costs of sale, the officer can require the debtor to point to other eligible assets. *Id.* In the event no property is designated, the officer will seize any property of the defendant subject to execution. *Id.* If the creditor has conducted discovery and found the debtor has nonexempt assets, the creditor may point them out to the officer. *See id.*

A levy on real property is evidenced by the officer's written declaration, on the return of the writ of execution, that the officer has levied the writ on property described in the return. Tex. R. Civ. P. 639. This procedure does not require the officer to physically go on the land. *Id.* A levy on personal property in possession of the judgment debtor is performed by the officer's taking physical possession of it, when that is feasible. *Id.* A levy on personal property which

cannot reasonably be taken into the officer's physical possession is carried out by the officer's "tagging" the property by placing a notice on or in the vicinity of it to the effect that it is in the officer's custody under court authority. *See Smith v. Harvey*, 104 S.W.2d 938, 940 (Tex. Civ. App.—San Antonio 1937, writ ref'd). A levy on property owned by the debtor who is not entitled to actual possession of it can be completed by giving notice of the levy to a person having possession. Tex. R. Civ. P. 639.

Once the property is seized, the officer must keep all property secure. Tex. Civ. Prac. & Rem. Code § 34.061(a). If any injury or loss occurs due to the officer's negligence, the officer and sureties on the officer's official bond are responsible for payment of the value of property lost or the amount of the injury sustained. *Id.* 34.061 (b).

When the debtor is the surety for another party, and that fact appears on the face of the writ of execution, the writ must be levied first on the nonexempt property of the principal if any can be found in the county. Tex. Civ. Prac. & Rem. Code § 34.005. If the judgment remains unsatisfied, the surety's nonexempt assets become subject to levy. *Id.*

If an officer fails or refuses to levy on property subject to execution, the judgment creditor may have judgment for that amount against the officer and the surety on the officer's official bond by filing a motion, with five days' notice to the officer and surety, in the court from which the writ was issued. Tex. Civ. Prac. & Rem. Code § 34.065. The officer may defeat this claim by showing that he or she used good faith and reasonable diligence in the circumstances. *See id.* § 7.003.

A judgment debtor can regain possession of personal property taken by levy of execution if the debtor posts a surety bond with the officer, conditioned on the debtor delivering the property to the officer at a time and place specified in the bond, to be sold according to law, or

for the payment to the officer of the fair value of the personal property as stated in the bond. Tex. R. Civ. P. 644. This bond must be executed by an insurance company acting as a surety or two or more individuals whose financial circumstances are satisfactory to the officer. *Id.* This is distinguishable from a situation where a judgment underlying the writ is reversed or set aside. If the debtor is successful and obtains a reversal or other nullification of the judgment, the debtor is entitled to regain possession of any property seized through levy of execution but not sold at an execution sale. Tex. Civ. Prac. & Rem. Code § 34.021.

(a) Notice

Before any levied property can be sold, the officer executing the writ must give notice of the time and place of sale. Tex. R. Civ. P. 647, 650. When the notice is for the sale of real property, the notice must be published once a week for three consecutive weeks in a newspaper published in the county, if available, and must contain a brief description of the property to be sold, a statement of the authority by virtue of which the sale is to be made, the time of levy, and the time and place of sale. Tex. R. Civ. P. 647. The first notice must be published at least twenty (20) days before the date of sale. *Id.* If there is no newspaper published in the county, the officer must post the notice in three public places in the county, including the county courthouse door, for at least 20 days before the sale. Tex. R. Civ. P. 648; *see Micrea, Inc. v. Eureka Life Ins. Co.*, 534 S.W.2d 348, 358 (Tex. App.—Fort Worth 1976, writ ref’d n.r.e.) (“In general the ‘courthouse door’ is either of the entrances to the building provided for the holding of the district court.”). The officer is also required to give to the judgment debtor, or his or her attorney, written notice of the sale in person or by mail, which substantially conforms to the requirements of the published notice. *Id.* When the notice is for personal property, the officer is simply required to post notice on the courthouse door of the county where the property is located and at the place

where the sale will be held at least 10 days before the sale. Tex. R. Civ. P. 650.

If the property is real property, the sale must be on the first Tuesday of the month, between the hours of 10:00 a.m. and 4:00 p.m., after the period of time for notice of the sale has elapsed. Tex. R. Civ. P. 646a. The only requirement for the time of sale of personal property is that the sale take place after the period of notice has elapsed. *See id.* 650.

As to place, personal property may be sold at the courthouse door of the county where the property was taken, as stated in the notice of sale. Tex. R. Civ. P. 649. Personal property may also be sold at a place controlled by the officer such as an impound lot, storage facility, or where the property was seized if it is more convenient to exhibit it at such a place. *Id.* If property can be exhibited, it must be present at the sale and subject to the view of those attending the sale or the sale could be voided. *Hopping v. Hicks*, 190 S.W.1119, 1122-23 (Tex. Civ. App.—Amarillo 1917, writ ref'd). Real property must be sold on the courthouse steps of the county where the property is situated unless the court orders that a sale may be held where the property is located. Tex. R. Civ. P. 646a.

(b) The sale

When the sale occurs pursuant to the notice, the officer carrying out the writ of execution will conduct a public auction for the sale of the property seized and declare the property sold to the highest bidder. The judgment creditor should attend the sale, and if necessary, bid up to the amount of the judgment to keep the property from being sold for less than its market value, especially when the debtor has no other property subject to execution. If the judgment creditor is successful and bids no more than the amount of the judgment, arrangements must be made to pay the officer's expenses to levy on, keep, and sell the property.

Once the sale is complete the officer must execute and deliver to the purchaser a conveyance of all the right, title, interest, and claim that the judgment debtor had in the property sold. Tex. Civ. Prac. & Rem. Code § 34.045(a). Any such purchaser is considered an “innocent purchaser without notice” with respect to third party claims of interest in the property, but only if the purchaser would have been considered an innocent purchaser if the sale had been made voluntarily and in person by the judgment debtor. *Id.* § 34.046. The conveyance cannot give the purchaser any greater right in the property than that of the judgment debtor at the time. *3-C Oil Co. v. Modesta Partnership*, 668 S.W.2d 741, 748-49 (Tex. App.—Austin 1984, writ ref’d n.r.e.).

Once the sale is complete, the officer is entitled to deduct from the proceeds of the sale of personal property the reasonable expenses incurred by him in making the levy and keeping the property. Tex. Civ. Prac. & Rem. Code § 34.047(b). The balance of the proceeds is to be delivered to the judgment creditor as soon as possible. *Id.* § 34.047(a). If the proceeds of the sale exceed the balance due on the judgment, the excess amount is returned to the judgment creditor. *Id.* § 34.047(c). If the proceeds of the sale are insufficient to cover the amount of the judgment, the officer shall proceed to levy on additional non-exempt property as needed to satisfy the judgment. Tex. R. Civ. P. 651. An officer who receives a writ of execution is required to make “due return of the execution,” which means to state in writing exactly what was done to perform the officer’s duties pursuant to the writ and to file the statement with the clerk that issued the writ. Tex. R. Civ. P. 654, 655.

E. GARNISHMENT

Garnishment is a statutory proceeding in which the property, money, or credits of one person (the judgment debtor) in the possession of, or owing by another (the garnishee) are

applied to the payment of the debt of a debtor by means of a proper statutory process issued against the debtor and the garnishee. *Trahan v. Trahan*, 682 S.W.2d 332, 337 (Tex. App.—Austin 1984, writ ref'd n.r.e.). The Texas Supreme Court has pointed out that garnishment necessarily involves three parties: a creditor (garnishor), a debtor, and a third person (garnishee). *Orange County v. Ware*, 819 S.W.2d 472, 474-75 (Tex. 1991).

A post judgment garnishment is accomplished through obtaining a writ of garnishment. When collecting a judgment, a writ of garnishment is available when the plaintiff (garnishor/judgment creditor) has a valid, subsisting judgment and prepares an affidavit stating that, within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment. Tex. Civ. Prac. & Rem. Code § 63.001(3). A judgment is deemed final and subsisting for the purpose of issuing a post judgment writ of garnishment on and after the date it is signed, unless a supersedeas bond has been approved and filed in accordance with Rule 24 of the Texas Rules of Appellate Procedure. *See* Tex. R. Civ. P. 657. The application for the writ of garnishment must conform to the requirements set forth in Rule 658 of the Texas Rules of Civil Procedure. Tex. R. Civ. P. 658.

Garnishment actions should be filed in the court which rendered the judgment. *King & King v. Porter*, 252 S.W.1022 (Tex. 1923). The writ should be prepared by the clerk of the court and served on the garnishee. Tex. R. Civ. P. 659. The garnishee will be named as the defendant, and even though the debtor does not have to be named, the debtor must be served with a copy of the writ of garnishment, application, accompanying affidavits and the actual writ as soon as practical following service on the garnishee. Tex. R. Civ. P. 663a. The writ must display, in 10 point type and in a manner sufficient to advise a "reasonably attentive person" to its meaning:

“To _____, Defendant:

You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:

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 DISOLVE THE WRIT.”

Id. Failure to give this notice will render the garnishment void. *See Mendoza v. Luke Fruia Invs.*, 962 S.W.2d 650, 652 (Tex. App.—Corpus Christi 1998, no pet.).

When serving a writ of garnishment on a financial institution, the judgment creditor must comply with the requirements set forth in Section 59.008 of the Texas Finance Code. Tex. Fin. Code § 59.008. The writ must be served at the address designated as the address of the registered agent of the financial institution in a registration filed with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution. *Id.* § 59.008(a). Otherwise, the writ is ineffective as to the financial institution. *Id.* § 59.008(b).

The garnishee is required to answer the writ under oath. Tex. R. Civ. P. 665. If the garnishee fails to file an answer to the writ at or before the time directed in the writ, the court can enter a default judgment against the garnishee for the full amount of the judgment together with interest and costs that may have accrued in the main case and also in the garnishment proceedings. Tex. R. Civ. P. 667. However, if the garnishee is a financial institution, the court may enter a default judgment solely as to the existence of liability and not as to the amount of damages. Tex. Fin. Code § 276.002(a). The garnishor has the burden to establish the amount of actual damages proximately caused to the garnishor by the financial institution's default. *Id.* § 276.002(c). For good cause shown, the garnishor may recover reasonable attorney's fees incurred

in establishing such damages. *Id.* § 276.002(d)(2).

If the garnishee answers that it is not indebted to the judgment debtor, the court will enter a judgment discharging the garnishee, unless the plaintiff controverts the answer by affidavit stating he has good reason to believe, and does believe, that the answer of the garnishee is incorrect. Tex. R. Civ. P. 666, 673. The contested issues are tried as in other cases. Tex. R. Civ. P. 674, 676. If the garnishee answers that it is indebted to the defendant, the court will render judgment for the plaintiff against the garnishee for the amount so admitted or found to be due to the defendant from the garnishee, up to the full amount of the judgment, together with interest and costs of the suit in the original case and also in the garnishment proceedings. Tex. R. Civ. P. 668.

All debts and nonexempt personal property or “effects” held by the garnishee are subject to garnishment. *See* Tex. R. Civ. P. 669. In addition to traditionally exempt property, items not subject to garnishment include real property and current wages for personal services. *See Fitzgerald v. Brown, Smith & Marsch Bros.*, 283 S.W. 576, 578 (Tex. Civ. App.—Texarkana 1926, writ dismissed); Tex. Civ. Prac. & Rem. Code § 63.004. Certain wages that are traditionally exempt from execution become subject to garnishment once they are deposited in a bank account. Stuart R. Schwartz, *Enforcing and Collecting Judgments*, in 2 State Bar of Tex. Cont. Legal Ed., Advanced Civil Trial Course 13, 13-9 (2010). However, even if deposited in a bank account, welfare and social security benefits are still exempt from garnishment. *Id.* (citing Tex. Hum. Res. Code §§ 31.004, 32.036; 42 U.S.C. § 407).

F. ATTACHMENT

Attachment is not a common-law remedy, but is instead based in Texas statutes and procedural rules. *Lane v. Baker*, 601 S.W.2d 143, 145 (Tex. Civ. App.—Austin 1980, no writ).

The plaintiff (creditor) must file an application for the issuance of a writ after filing suit in the underlying case against the defendant (debtor). Tex. R. Civ. P. 592. A writ of original attachment is available to a creditor 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.

Tex. Civ. Prac. & Rem. Code 61.001. These requirements statutorily limit the situations where a writ of attachment is available in Texas. Section 61.002 of the Texas Civil Practice & Remedies Code allows for a writ of attachment to issue 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.

Tex. Civ. Prac. & Rem. Code 61.002. In addition to the statutory requirements that must be met in order to utilize attachment to collect a judgment, the sum of money sought must be ascertainable. *See E. E. Maxwell Co., Inc. v. Arti Décor, Ltd.*, 638 F. Supp. 749, 753 (N.D. Tex. 1986); *Cleveland v. San Antonio Building & Loan Ass'n*, 223 S.W.2d 226, 228 (Tex. 1949).

Even if a debt is not yet due, a writ of attachment can issue if the amount of the debt is certain.

See Tex. Civ. Prac. & Rem. Code § 61.004. The only exception to this requirement allows for a writ of attachment to issue when the defendant is a nonresident regardless of whether the action is based on tort or contract when personal service cannot be obtained by the party. *Id.* § 61.005. Additionally, as with writs of execution and other forms of collection, a writ of attachment cannot be used to seize statutorily exempt property.

If the case at hand meets these requirements, the plaintiff may file an application for a writ of attachment as part of the underlying case. *See* Tex. R. Civ. P. 592. This application must include a statement indicating that the statutory requirements are met, the specific facts relied upon to reach this conclusion, the maximum value of property to be attached, the amount of the bond, and the amount of the defendant's replevy bond. *Id.* A hearing is required before a writ of attachment is issued, but the hearing may be *ex parte*. *Id.* Additionally, the plaintiff must execute a bond: (1) payable to the defendant, (2) in an amount fixed by the court, and (3) conditioned on the plaintiff prosecuting the suit and, if necessary, paying damages for wrongful attachment. Tex. Civ. Prac. & Rem. Code § 61.023(a); Tex. R. Civ. P. 592a. The bond must be sufficient to adequately compensate the defendant in the event there is no prosecution and the plaintiff is liable for wrongful attachment. Tex. R. Civ. P. 592.

If all of these requirements are met, then a writ of attachment will issue, allowing an officer to levy against nonexempt property. The writ must be levied in the same manner as a writ of execution, discussed above. Tex. R. Civ. P. 598. The defendant must be served with copies of the writ, the application, accompanying affidavits and the court's order authorizing the issuance of the writ. Tex. R. Civ. P. 598a. When all of these steps are taken, a legitimately executed writ of attachment creates a lien on any attached real property, personal property held by the executing officer, or proceeds from the sale of attached property. Tex. Civ. Prac. & Rem. Code §

61.061.

Similar to other collection practices, the debtor has means of protection at his or her disposal. The debtor may resort to replevy to regain possession of unsold and unclaimed attached property or the proceeds from a court-ordered sale of property. Tex. R. Civ. P. 599. The debtor does this by giving a bond, payable to the plaintiff, with sufficient surety, which must be approved by the levying officer. *Id.* This bond must be in the amount fixed by the court's order or for the value of the property at issue plus one year's interest from the date of the bond, conditioned on the defendant paying any judgment rendered against the debtor. *Id.* The creditor may, after receiving reasonable notice of replevy, request judicial review of the amount required for the bond. *Id.* After reasonable notice, a debtor may also substitute property of equal value to the property originally attached. *Id.*

A debtor may also bring an action for wrongful attachment and recover damages. Wrongful attachment occurs when there are no statutory grounds for attachment or the due process rights of the debtor have been violated. *Gossett v. Jones*, 123 S.W.2d 724, 725 (Tex. Civ. App.—Galveston 1939, no writ); *Capitol Barber & Beauty Supply v. Realistic, Inc.*, 611 S.W.2d 137, 138 (Tex. Civ. App.—Waco 1980, no writ). The creditor will face sole liability in the event of wrongful attachment, as the executing officers are not liable as long as the officer has complied with his statutory duty and exercised reasonable diligence. Tex. Civ. Prac. & Rem. Code § 7.003. A creditor may be liable for actual damages which directly and proximately result from the attachment such as the fair market value of the property seized, plus interest. *See Curtis v. Carey*, 393 S.W.2d 185, 190 (Tex. Civ. App.—Corpus Christi 1965, no writ). Additionally, if the debtor is a functioning business, the owner may recover special damages for the loss of goodwill. *See Scott v. Doggett*, 226 S.W.2d 183, 187-88 (Tex. Civ. App.—Amarillo 1949, writ

ref'd n.r.e.). While a levy on real property is done by attachment of a lien, and does not usually interfere with possession, which is necessary for actual damages, a wrongful attachment that defeats the sale of the property will cause actual damages to accrue on a showing that the sale was pending and would have been completed, but for the attachment, and this failure caused the value of the property to decrease. *See Bondies v. Glenn*, 119 S.W.2d 1095, 1097 (Tex. Civ. App.—Eastland 1938, writ dism'd). Again, it is important to act in a prudent manner, and to ensure that those under your control do the same, because if the property is wrongfully attached as a result of fraud, malice, or gross negligence, exemplary damages are recoverable. Tex. Civ. Prac. & Rem. Code § 41.003(a).

G. TURNOVER

The Texas Turnover Statute provides yet another avenue by which to pursue the satisfaction of a judgment in cases where traditional methods have been unsuccessful. A judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property that cannot readily be attached or levied on by ordinary legal process and is not exempt from attachment, execution, or seizure for the satisfaction of liabilities. Tex. Civ. Prac. & Rem. Code § 31.002(a). By way of example, shares of stock and accounts receivable are among the types of property that cannot be readily attached or levied on by ordinary legal process. *See Suttles v. Westin Rlty. Mortg. I, Inc.*, No. 01-09-01023-CV, 2010 WL 1611765 (Tex. App.—Houston [1st Dist.] April 22, 2010, no pet. h.).

In a turnover proceeding, the court may:

- Order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control, together with all documents or records related to the property, to a designated sheriff or constable for execution;
- Otherwise apply the property to the satisfaction of the judgment; or
- Appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.

Id. § 31.002(b). The court may enforce the order by contempt proceedings or by other appropriate means in the event of refusal or disobedience. *Id.* § 31.002(c). The turnover order can be requested in the same proceeding in which the judgment is rendered or in an independent proceeding, and the judgment creditor is entitled to recover reasonable costs, including attorney's fees. *Id.* § 31.002(d)-(e). The statute itself does not require notice and a hearing and it has been held that the failure to provide prior notice and hearing before the issuance of a turnover order does not compromise constitutional principles. *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 628 (Tex. App.—Fort Worth 2006, pet. denied); *Thomas v. Thomas*, 917 S.W.2d 425, 433-45 (Tex. App.—Waco 1996, no writ).

The judgment creditor bears the burden of tracing the assets to the judgment debtor. *In re C.H.C.*, 290 S.W.3d 929, 931 (Tex. App.—Dallas 2009, no pet.). The burden then shifts to the judgment debtor to show the property is exempt from execution. *See id.* A turnover order is issued if the judgment debtor fails to show that the property is exempt from execution or that it is no longer in the judgment debtor's possession. The order requires the debtor to bring to the court all documents or property used to satisfy a judgment. *Kennedy v. Hundall*, 249 S.W.3d 520, 524 (Tex. App.—Texarkana 2008, no pet.). The actual effect of the bill is to require the burden of production of property which is subject to execution to be placed with the debtor instead of a

creditor attempting to satisfy his judgment. *Id.* The statute authorizes the issuance of an order against only the judgment debtor. *Parks v. Parker*, 957 S.W.2d 666, 668-69 (Tex. App.—Austin 1997, no pet.). There is no provision for the issuance of a turnover order against a third party who possesses property belonging to the judgment debtor. *Id.*

A court may not enter or enforce a turnover order that requires the turnover of the proceeds of, or the disbursement of, property exempt under any statute, including Section 42.0021 of the Texas Property Code. Tex. Civ. Prac. & Rem. Code § 31.002(g). The following types of property have been found to be exempt from turnover:

- Paychecks, retirement checks, individual retirement accounts, and other such property exempted under the bankruptcy code. *Caulley v. Caulley*, 806 S.W.2d 795, 798 (Tex. 1991);
- Proceeds or disbursements from spendthrift trusts. *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317, 323 (Tex. App.—Dallas 1997, writ denied); and
- Rights in a pension or retirement plan. *Bergman v. Bergman*, 888 S.W.2d 580, 586 (Tex. App.—El Paso 1994, no writ).

Courts have held that the following types of property are properly subject to a turnover order:

- An attorney's accounts receivable of present or future, earned or unearned fees. *Thomas*, 917 S.W.2d at 435;
- Current wages earned as an independent contractor. *DeVore v. Central Bank & Trust*, 908 S.W.2d 605, 610 (Tex. App.—Fort Worth 1995, no writ); and
- Causes of action. *Associated Ready Mix, Inc. v. Douglas*, 843 S.W.2d 758, 762 (Tex. App.—Waco 1992, orig. proceeding).

A turnover order is in the nature of a mandatory injunction and is appealable. *Kennedy*, 249 S.W.3d at 524. A trial court's decision will not be overturned, even when it is based on an erroneous conclusion of law, if the judgment is sustainable for any reason. *Honaker*, 192 S.W.3d at 627. Whether there is sufficient evidence to support the turnover order is a relevant

consideration in determining whether the trial court abused its discretion. *Id.*

H. EXEMPT PROPERTY

Regardless of the amount owed on the judgment, Texas law has set aside certain property owned by the debtor as exempt and out of a judgment creditor's reach in all circumstances.

These exemptions are based in the Texas Constitution and the Texas Property Code. Concerning real property, the Texas Constitution provides that a debtor's homestead cannot be seized for the payment of a debt except for certain specific indebtedness such as purchase money, taxes, repairs, and other specified obligations. Tex. Const. Art. XVI § 50.

The Texas Constitution also provides protections for personal property from forced sale. Tex. Const. art. XVI, § 49. This protection is codified in Chapter 42 of the Texas Property Code and divides the property into two categories. The first category includes items exempted up to a total fair market value of the debtor's equity of \$60,000 for a married person or \$ 30,000 for a single adult. Tex. Prop. Code § 42.001(a). The second category includes personal property exempted and not included in the aggregate total. Tex. Prop. Code § 42.001(b). Items covered by the first category include:

1. Home furnishings, including family heirlooms.
2. Provisions for consumption.
3. Farming or ranching vehicles and implements.
4. Tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession.
5. Wearing apparel.
6. Jewelry up to and including a total value of \$7,500 for a single adult and \$15,000 for a married person.
7. Two firearms.
8. Athletic and sporting equipment, including bicycles.
9. A two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of a family or single adult who holds a driver's license or who does not hold a driver's license but who relies on another person to operate the vehicle for the benefit of the nonlicensed person.
10. The following animals and forage on hand for their consumption: two horses, mules,

or donkeys, and a saddle, blanket, and bridle for each; 12 heads of cattle; 60 head of other types of livestock; and 120 fowl.

11. Household pets.

Tex. Prop. Code § 42.002. In the event that the debtor's personal property exceeds the number or amount stated in the statutory limitations, the debtor can designate otherwise exempt property to be sold at execution. Tex. Prop. Code § 42.003.

The second category includes personal property exempt from seizure with no regard to statutory limitations. The exempt personal property includes:

- (1) current wages for personal services, except for the enforcement of court-ordered child support payments;
- (2) professionally prescribed health aids of a debtor or a dependent of a debtor;
- (3) alimony, support, or separate maintenance received or to be received by the debtor for the support of the debtor or a dependent of the debtor; and
- (4) a religious bible or other book containing sacred writings of a religion that is seized by a creditor other than a lessor of real property who is exercising the lessor's contractual or statutory right to seize personal property after a tenant breaches a lease agreement for or abandons real property.

Tex. Prop. Code § 42.001(b). The following personal property items are also exempt, regardless of any statutory limitations:

- (1) unpaid commissions for personal services not to exceed 25% of the aggregate limitations. Tex. Prop. Code § 42.001(d).
- (2) certain retirement benefits and funds. Tex. Prop. Code § 42.0021.
- (3) college savings plans. Tex. Prop. Code § 42.0022.
- (4) cemetery lots held for the purpose of sepulcher. Tex. Prop. Code § 41.001.
- (5) property that the judgment debtor sold, mortgaged, or conveyed in trust if the purchaser mortgagee, or trustee points out property of the debtor sufficient to satisfy the execution. Stuart R. Schwartz, *Enforcing and Collecting Judgments*, in 2 State Bar of Tex. Cont. Legal Ed., Advanced Civil Trial Course 13, 13-9 (2010).
- (6) Assets in the hands of the trustee of a spendthrift trust for the benefit of the judgment debtor. Tex. Prop. Code § 112.035.
- (7) Certain insurance benefits. Tex. Ins. Code §§ 1108.051-.053.

Again, these exemptions, for the most part, are not conditional meaning that, no matter how much the debtor owes you, this property cannot be levied or garnished to satisfy the judgment

and you must focus your efforts on other nonexempt property.

I. FRAUDULENT TRANSFERS

No one likes to give up their property, whether justified or not, and sometimes debtors use the exemptions found under Texas law to maneuver otherwise accessible property so as to avoid a judgment creditor's grasp. The law dealing with fraudulent transfers is found primarily in Chapter 24 of the Texas Business and Commerce Code, the Uniform Fraudulent Transfer Act (UFTA), and Chapter 42 of the Texas Property Code. Both statutes seek to prevent debtors from placing otherwise nonexempt property under an exempted category so as to essentially defraud a judgment creditor and prevent the creditor from collecting on a valid judgment.

The UFTA governs the transfer of assets. For purposes of the statute, an asset is the property of the debtor, with the exception of: (1) property encumbered by a valid lien; (2) property generally exempt under non-bankruptcy law; and (3) interests in property held in tenancy by the entireties to the extent that it is not subject to process by a creditor holding a claim against only one tenant. Tex. Bus. & Com. Code § 24.002(2). Certain transactions are only fraudulent if made between the debtor and an "insider" of the debtor. *Id.* § 24.002(7)(A). While the UFTA lists out examples of insiders, this list is not exhaustive and, when determining whether a transfer was made to an "insider", courts have typically focused on: (1) the closeness of the relationship between the transferee and debtor, and (2) if the transaction was conducted at arms length. *Telephone Equip. Network v. TA/Westchase*, 80 S.W.3d 601, 609 (Tex. App.—Houston [1st Dist.] 2002, no pet. h.); *Matter of Holloway*, 955 F.2d 1008, 1010-11 (5th Cir. 1992). Additionally, whether the debtor received a reasonably equivalent value for a transfer may aid in determining whether the transfer was fraudulent or not. *See* Tex. Bus. & Com. Code 24.004. If the judgment creditor can establish the debtor's transaction was carried out with the

intent to defraud, delay, or hinder the judgment creditor, the court will find the transaction was fraudulent. *See id.* § 24.005(a)(1). The intent is determined at the time of the transfer. *Roland v. U.S.*, 838 F.2d 1400, 1402 (5th Cir. 1988).

The defrauded creditor has a few remedies at his or her disposal to satisfy a judgment under the UFTA. A creditor may seek to obtain avoidance of the transfer in order to satisfy its claim. Tex. Bus. & Com. Code § 24.008(a)(1). The creditor may also obtain an attachment against the transferred property or an injunction against further action to dispose of the transferred property. *Id.* § 24.008(a)(2), (3). When the creditor has already obtained a judgment against the debtor, the creditor may be permitted to levy execution, as detailed previously, on the transferred asset or the proceeds from the transfer. *Id.* § 24.008(b). Also discussed previously, it is important the creditor acts in a legitimate way at all times in its relationship with the debtor in attempts to collect on a judgment. The avoidance of a transfer is an equitable remedy, and only available if the creditor comes into court with clean hands. *Jackson Law Office v. Chappell*, 37 S.W.3d 15, 26-27 (Tex. App.—Tyler 2000, pet. denied). The creditor must bring suit against a fraudulent transfer within four years after the transfer was made, or, if this time has lapsed, within one year after the transfer was or could reasonably have been discovered. Tex. Bus. & Com. Code § 24.010(a)(1). However, if the basis for the suit against the fraudulent transfer is that the transfer was made to an insider, this suit must be brought within one year after the transfer was made. *Id.* § 24.010(a)(3). Again, it is important to move as soon as possible after the discovery of a possible fraudulent transfer. At least one court of appeals has ruled that these time periods operate as a statute of repose as opposed to a statute of limitation, and as such, the claim is completely abolished after the relevant time period lapses. *See Duran v. Henderson*, 71 S.W.3d 833, 838-39 (Tex. App.—Texarkana 2002, pet. denied).

Additionally, under Chapter 42 of the Texas Property Code, which governs exemptions on certain property, there is an exception which states that there is no exemption on otherwise exempt property if a debtor uses nonexempt property to “acquire, obtain an interest in, make improvements to, or pay indebtedness” on exempt personal property with an intent to “defraud, delay, or hinder” another party seeking to obtain property to which the party may be entitled. Tex. Prop. Code § 42.004. Again, the creditor must assert a claim under this section within two years of the fraudulent transaction, or, if the claim is unliquidated or contingent at the time of the transaction, the party must assert the claim within one year after the claim is reduced to judgment. *Id.*

J. SELF-HELP REPOSSESSION

The execution process is not the only way to collect on a debtor’s obligation. In the case of a secured transaction, upon a party’s default, a secured party has the right to take possession of the collateral without resort to the judicial process, as long as the secured party proceeds without breach of the peace. Tex. Bus. & Com. Code § 9.609. The right to repossess collateral arises only on default, and the secured party is liable for wrongful repossession if there has been no default. *Id.* The duty imposed on a secured party to avoid a breach of the peace is a non-delegable duty. *Mbank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 152-54 (Tex. 1992) (creditor liable for actions of independent contractors who carry out repossession).

A secured party who exercises the option of self-help repossession assumes the responsibility of caring for the property and the debtor’s interest in it prior to sale. Tex. Bus. & Com. Code § 9.207; *Prudential Corp. v. Bazaman*, 512 S.W.2d 85, 94 (Tex. Civ. App.—Corpus Christi 1974, no writ). The parties cannot waive this requirement, but they may agree what constitutes reasonable care of the property. *Bank One, Texas, N.A. v. Stewart*, 967 S.W.2d 419,

438 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). However, the risk of accidental loss or damage remains on the debtor, and the secured party may charge any reasonable expenses involved in preserving the property to the debtor. Tex. Bus. & Com. Code § 9.207(b)(1)-(2).

A secured party may not contractually avoid the statutory duty to repossess without breaching the peace. *Id.* § 9.602(6). The inclusion of any such clause in retail installment contracts or retail charge agreements can subject the secured party to statutory penalties. *See* Tex. Fin. Code § 345.355-.356. This clause will also be rendered unenforceable. *See Southwestern Inv. Co. v. Mannix*, 557 S.W.2d 755, 763 (Tex. 1977).

A debtor is not left without protections in the repossession process. The debtor may challenge a creditor's repossession of collateral by bringing a suit for trespass and conversion of property. *Ford Motor Credit Company v. Cole*, 503 S.W.2d 853, 855 (Tex. Civ. App.—Fort Worth 1973, writ dismissed). The debtor's damages should put the debtor in the position it would have been in had no violation occurred. Tex. Bus. & Com. Code § 9.625, UCC Comment 3. Additionally, the debtor may also be able to recover damages for loss of use of the collateral as a result of the wrongful possession. *See Ford Motor Credit Co. v. Garcia*, 595 S.W.2d 602, 604-605 (Tex. Civ. App.—Waco 1980, no writ).

In addition to actual damages, there are exemplary damages at stake for a secured party or its agent who repossesses collateral knowing it has no right to title or possession or if it or its agents act maliciously. *See First Security Bank & Trust Co. v. Roach*, 493 S.W.2d 612, 618-619 (Tex. Civ. App.—Dallas 1973, writ refused n.r.e.). Malice may be implied when evidence shows that the conversion was made under circumstances indicating bad faith, or that the converter knew it had no legal right to repossess the collateral. *See First Nat. Bank of McAllen v. Brown*, 644 S.W.2d 808, 810-811 (Tex. App.—Corpus Christi 1982, writ refused n.r.e.). In sum, secured

parties should use caution when delegating the repossession of collateral because such parties will be held responsible for the actions of those acting in their name.