

**NUTS AND BOLTS  
OF  
TURNOVER RECEIVERSHIPS**

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# Preface

It is important for our legal system that a court's judgments be enforced. The turnover receivership is a wonderfully flexible tool for doing that. The receiver works for and answers to the Court despite the fact that the creditor's attorney requested the appointment.

You may see case law calling receiverships a harsh remedy or a drastic remedy. This comes from cases talking about the several kinds of receiverships that are not turnover receiverships, and from opinions written before the turnover statute was enacted, in 1979. The receiverships discussed in this article all occur after the judgment, where the court has already decided who is right.

My view is that the turnover receivership is no more harsh than a writ of execution or a garnishment on a bank account. In most cases, the receivership is less harsh than the garnishment or execution, because the receiver can be more flexible and take precautions that a deputy or bank are unable to take without a court order. For example, a receiver can release the bank account much more quickly.

When considering the remedy, consider the person you are appointing, who will be working for *you*. The remedy is not unduly harsh, but the person may be. In June 2017, the legislature made it easier for creditors to obtain a turnover receivership, a sign that the legislature is supportive of the process. It is meant to be an available remedy<sup>1</sup>. The key is your receiver. Choose an experienced professional whose approach towards collections fits your expectations.

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<sup>1</sup> See, section XX C, below, discussing the receiver's bond. The bond is not to be set in an amount that would make it economically infeasible to get a receiver appointed for "even the smallest of judgments". This shows the turnover receivership is meant to be an available remedy.

## POP QUIZ

The Answers May Not Be What You Think!

(The answers follow.)

1. Which of these elements are required to prove up a turnover receivership?
  - a. Applicant has an unsatisfied judgment
  - b. 30 days have passed since the judgment
  - c. Applicant has exhausted its remedies
  - d. Other methods of collecting the judgment have failed
  - e. Judgment debtor owns non-exempt property
  - f. Judgment debtor's non-exempt property is difficult to levy upon by ordinary process
  - g. The property is in danger of being lost, moved or materially injured
  - h. Judgment debtor has notice of the hearing
  
2. How much should the Receiver's Bond be?
  - a. As much as the judgment
  - b. \$100 or so is fine
  - c. Depends on how much you like the attorney
  - d. No bond is required.
  
3. Sam Speculator bought real property from a substitute trustee at a foreclosure sale. Before the sale, a receiver had been appointed over the debtor's assets. No notice of the receivership was filed in the county's real property records, but the receiver claims that the Substitute Trustee's Deed from the sale is void, as a matter of law. Is that right?
  
4. Which of the following are required for a person to qualify as a receiver?
  - a. Licensed to practice law in Texas
  - b. Disinterested
  - c. A registered voter
  - d. A resident of the county
  - e. A Texas resident
  - f. Owns real property in Texas
  
5. Can debtor's counsel request a jury for a turnover hearing?
  
6. Creditor's counsel wants you to grant a receivership without notice to the other side. Can you grant it?
  
7. True or False: A turnover proceeding is premature if the judgment is being appealed, because the judgment is not yet final.
  
8. True or False: Wages are exempt in Texas.  
What if they call it "salary" instead wages?

## POP QUIZ ANSWERS

1. The elements are a, e.  
Learn more in sections IV, V, XX, and on page iii. Local practice may differ.
2. d.  
Learn more in section XX C. No Bond Is Required.
3. Yes.  
Learn more in section XIII. C.
4. b. & c. Well, actually, b & c might not be a requirement, either, but those are the established practice.  
Learn more in section XIX B
5. No.  
Learn more in section V G. No Right to a Jury on Receivership Proceedings.
6. Yes.  
Learn more in section V.E.
7. False.  
Learn more in Section X.
8. Trick Question. *Current* wages are exempt from seizure.  
It doesn't matter if they call it salary or wages, but that was a nice try on the part of a creative attorney back in 1889.  
Learn more in section III G.

How well did you do on the Pop Quiz? Hmm... maybe you ought to read the article, after all!

## The Turnover Statute

As amended, effective June 2017

### 31.002 Collection Of Judgment Through Court Proceeding.

- (a) 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:
- ~~(1) cannot readily be attached or levied on by ordinary legal process; and~~
  - (2) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.
- (b) The court may:
- (1) order the judgment debtor to turn over non-exempt 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;
  - (2) otherwise apply the property to the satisfaction of the judgment; or
  - (3) appoint a receiver with the authority to take possession of the non-exempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.
- (c) The court may enforce the order by contempt proceedings or by other appropriate means in the event of refusal or disobedience.
- (d) The judgment creditor may move for the court's assistance under this section in the same proceeding in which the judgment is rendered or in an independent proceeding.
- (e) The judgment creditor is entitled to recover reasonable costs, including attorney's fees.
- (f) A court may not enter or enforce an order under this section that requires the turnover of the proceeds of, or the disbursement of, property exempt under any statute, including Section 42.0021, Property Code. This subsection does not apply to the enforcement of a child support obligation or a judgment for past due child support.
- (g) With respect to turnover of property held by a financial institution in the name of or on behalf of the judgment debtor as customer of the financial institution, the rights of a receiver appointed under Subsection (b)(3) do not attach until the financial institution receives service of a certified copy of the order of receivership in the manner specified by Section 59.008, Finance Code.
- (h) A court may enter or enforce an order under this section that requires the turnover of non-exempt property without identifying in the order the specific property subject to turnover.

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## RECEIVERSHIP & TURNOVER

### I. INTRODUCTION AND SCOPE

This article discusses the basics of turnover law and the turnover receivership, including when turnover may be used against a third party. It shows what a turnover receiver can do, from the perspective of a receiver with over 20 years of experience, and explains what you need to know to begin using turnover receivers in your collections practice. The article begins with a discussion of turnover in general, and then moves to issues specific to receivership.

### II. HISTORY & 2017 UPDATE

Known as the "turnover" statute, Tex. Rev. Civ. Stat. Ann. art. 3827a was enacted in 1979. The statute was codified in 1985, as § 31.002 of the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code Ann. § 31.002 (West 2015). It has been amended in 1989, 1999, 2005 and 2017.

Prior to the turnover statute, it was too easy for a defendant to conceal property such as stock certificates and negotiable instruments from a levying officer. The traditional collection methods were inadequate for collecting intangibles such as accounts receivable and the debtor's interest in a cause of action. Under the turnover statute, the burden is placed on the defendant to identify and produce its leivable property and related documents. *Ex parte Johnson*, 654 S.W. 2d 415, 418 (Tex. 1983); *Cross, Kieschnick & Co. v. Johnston*, 892 S.W.2d 435, 438 (Tex. App.—San Antonio 1994, no writ); David Hittner, *Texas Post-Judgment Turnover & Receivership Statutes*, 45 Tex. Bar J. 417, 417-18 (1982) (citing House and Senate committee reports).

The statute was amended in June. The amendment was effective immediately. You no longer have to show that the judgment debtor owns property that is not readily leivable by ordinary process. To obtain turnover relief, you must only show that the judgment remains unsatisfied and that the defendant owns a non-exempt asset.

### III. THE TURNOVER STATUTE: CPRC § 31.002 COLLECTION OF JUDGMENT THROUGH COURT PROCEEDING

The statute is a procedural device intended to help the judgment creditor collect its judgment from the debtor. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223 (Tex. 1991). The statute provides that a judgment creditor is entitled to aid from a court in reaching the debtor's non-exempt assets. The creditor has to show that the judgment debtor owns assets that are non-exempt.

The statute is meant to put a reasonable remedy in the hands of the diligent creditor. *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604 (Tex.App.—Fort Worth 2006, pet. denied); *Henderson v. Chrisman*, 05-14-01507-CV (Tex.App.—Dallas April 27, 2016, no pet.). The statute is open-ended in that it allows a judgment creditor to get aid in collection from the Court in the form of an order which requires the debtor to bring to the Court all documents or property used to satisfy a judgment. *Id.*; *Beaumont Bank, N.A.*, 806 S.W.2d at 226.

"It should be noted that post-judgment receivers should be appointed to collect *only* a specified judgment(s) as set out in the post-judgment motion. They should not be appointed to collect for other, nonparty creditors or to collect claims of the judgment creditor which have not been reduced to judgment." (emphasis in original) David Hittner, 45 Tex. Bar J. 417, at 421.

Once a judgment is satisfied, the turnover order "looses its teeth and [is] of no further force and effect." *Pandozy v. Beaty*, 254 S.W.3d 613 (Tex. App.—Texarkana 2008, no pet.). (Issues in appeal regarding a turnover order were moot because the judgment was paid.)

#### A. § 32.001 (a): "Entitled" To Turnover Relief?

##### 1. Turnover Relief is Discretionary

The statute states that the judgment creditor is entitled to aid from the court (assuming the elements are proved). Tex. Civ. Prac. & Rem. Code Ann. § 31.002 (a) (West 2015). Some districts read the turnover statute as discretionary, because 31.002 (b) states the court *may* grant the turnover relief set out in subsections (b) (1) – (3). *Barlow v. Lane*, 745 S.W.2d 451, 454 (Tex.App.—Waco 1988, writ denied); *Charles v. Tamez* 878 S.W.2d 201 (Tex.App.—Corpus Christi 1994, writ denied); *Beeler v. Fuqua*, 351 S.W.3d 428 (Tex. App.—El Paso, 2011, pet. denied).

##### 2. The Creditor Is Entitled... To A Hearing

In 1988, the Fifth District held that a judgment creditor is entitled to a hearing on turnover, so long as the judgment has not been superseded. The trial court had dismissed an application for turnover for want of jurisdiction while an appeal was pending. *Anderson v. Lykes*, 761 S.W.2d 831, 833-34 (Tex. App.—Dallas 1988, orig. proceeding).

### 3. The Creditor May Be Entitled To Turnover In Dallas

A creditor may be entitled to turnover relief in the Fifth District. In 2010, The Fifth District held that a court abused its discretion in denying an application for a turnover order. The evidence showed that the judgment debtor, a corporation, owned 100% of the stock of another corporation and the debtor's principal testified that he was unwilling to turn over the stock. *Europa International Ltd v. Direct Access Trader Corp*, 315 S.W.3d 654 (Tex. App.-- Dallas, 2010, no pet.).

#### B. § 31.002 (a): "...Through Injunction Or Other Means..."

Besides having the power to compel the defendant to turn something over, the statute also allows a court to enforce its judgment by restraining the defendant from taking some action. *Miga v. Jenson*, Nos. 02-11-0074-CV, 02-11-00167-CV (Tex.App.--Fort Worth March 8, 2012).

#### C. § 31.002 (b) (1) Turnover to a sheriff or constable

The court may order the debtor to turn over its non-exempt assets and related documentation to a sheriff or constable. § 31.002 (b) (1).

#### D. §31.002(b) (2) The court may "otherwise apply the property"

The court may otherwise apply the property to the satisfaction of the judgment. §31.002 (b) (2). This section allows the court to order money placed into the registry of the court. Do not have property turned over directly to the creditor. "The potential for error or abuse where turnover is ordered directly to judgment creditors is obvious, considering that the statute allows *ex parte* entry of the order without notice and hearing." *Ex parte Johnson*, 654 S.W.2d 415, 419 (Tex. 1983); *Lozano v. Lozano*, 975 S.W.2d 63 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, pet. denied).

The same rule applies for cash as for tangible personal property. *Copher v. First State Bank of Pittsburg, Texas*, 852. S.W.2d 738 (Tex.App.--Fort Worth, 1993, no writ) (relying on *Ex Parte Johnson* and legislative history.)

The trial court in one case issued a writ of execution for the officer to sell internet domains, email addresses and telephone numbers at auction. The opinion sets out that the creditor is entitled to aid through injunction "*or other means*" (emphasis in opinion); that subsection (b)(2)'s options are permissive, and that the court "may" use the listed remedies. "The statute thus expressly gives the trial court powers beyond just mandatory injunctions (or appointing receivers) to achieve the statutory purpose of aiding judgment creditors in reaching hard to get assets to satisfy their judgments." *CRE8 International LLC v Elexis Rice*, 05-14-00377-CV (Tex.App--Dallas June 3, 2015, no pet.)

#### E. §31.002(b) (3) Turnover Receivership

The court may appoint a receiver with the authority to take possession of the non-exempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment. § 31.002 (b) (3).

#### F. § 31.002 (e) Attorney's Fees

The judgment creditor is entitled to recover its costs, including reasonable attorney's fees. § 31.002 (e). The plaintiff's costs includes the receiver's fee. Creditor's counsel should prove up attorney fees at the turnover hearing. Counsel may request fees for activities to collect the judgment beyond getting a receiver appointed. *Haden v. Sacks*, 332 S.W.3d 523, 531 (Tex.App.--Houston [1st Dist.] 2009, pet. denied.)

#### G. Exempt Property § 31.002 (a) (2)

##### 1. Debtor has the burden.

Exempt property is not subject to turnover. §31.002 (a) (2). It is proper to determine whether property is exempt in a turnover proceeding. *Stanley v. Reef Securities, Inc.*, 314 S.W.3d 659 (Tex.App.--Dallas 2010, no pet.); *Pace v. McEwen*, 617 S.W.2d 816, 819 (Tex.App.--Houston [14th Dist.] 1981, no writ).

The burden is on the defendant to show that property is exempt. *Henderson v. Chrisman*, 05-14-01507-CV (Tex.App.--Dallas April 27, 2016, no pet.); *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex.1991); *Goodman v. Compass Bank*, 05-15-00812-CV (Tex.App-- Dallas August 3, 2016, no pet.); *Stanley v. Reef Securities, Inc.*, 314 S.W.3d 659 (Tex.App.-Dallas 2010, no pet.); *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317, 324 (Civ. App.—Dallas, 1997, writ denied); *Jacobs v. Adams*, 874 S.W.2d 166, 167–68 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Rucker v. Rucker*, 810 S.W.2d 793, 795–96 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

However, once a homestead exemption has been established, the creditor who claims it was abandoned has burden to prove it. *Caulley v. Caulley*, 806 S.W.2d 795 (Tex.1991).

Not all property has to have its exempt status proven, for example property protected in the constitution or statute, such as Tex.Prop.Code.Ann. §42.002. *Roosth v. Roosth*, 889 S.W.2d 445, 460 (Tex.App.-Houston [14th Dist.] 1994,

writ denied). A debtor who no longer owns property that is ordered to be turned over bears the burden to show it. (*Roosth, at 460.*)

### Current Wages

Remember always the **current** in the current wages exemption. *Bell v. Indian Live-Stock Co.*, 11 S.W. 344 (Tex. 1889). Current wages are for the then current pay period. The exemption is intended to help people cover their daily living costs. It is not for people who can afford to have their employer hold their wages. In 1889, it was successfully argued that

“...this exemption was provided for the benefit of such employés as require their wages as they are earned to defray the expenses of their living, and not for the protection of persons who receive for their services \$200 per month, and whose circumstances are such that they are able to leave their earnings in the hands of their employer until the wages for more than three months have accumulated to their credit.”

*Id.*, at 346. Later cases where the employer is holding the defendant’s pay focus on whether the money was being involuntarily held by the employer (exempt!) or whether it was the defendant’s decision for the employer to hold the money (non-exempt!).

Case law prior to 1989 saying that paychecks cease to be “current” as they are received by the debtor, and therefore, may be ordered turned over, have been superseded by subsection (f), enacted in 1989. *See Davis v. Rayborn* 795 S.W.2d 716, (Tex. 1990), vacating *Davis v. Rayborn*, 754 S.W.2d 481 (Tex.App.--Houston [1<sup>st</sup> Dist.] 1988) because the case settled after the statute was amended. The 1988 opinion upheld a turnover order directing the debtor to turn over his paychecks as received. “The case law is clear that wages lose their current status when the wage earner is paid by his employer.” (citations omitted), *Id.*, at 483. But, you cannot seize it via turnover, unless it is for child support. §31.002 (f).

The term “current wages” implies a master servant relationship. *Karlseng v. Wells Fargo, N.A.* 05-13-01734-CV (Tex.App.--Dallas December 19, 2014, pet. denied) (The opinion contains references to several opinions for further study.); *Campbell v. Stuck*, 220 S.W.3d 562 (Tex.App.--Tyler 2007, no pet.).

“Current” means an obligation of the employer that is presently enforceable. *Caulley v. Caulley*, 806 S.W.2d 795 (Tex. 1991). (Compare with *Bell v. Indian Live-Stock Co.* (Tex. 1889), which says “Current Wages” means the current pay period.)

#### a) What if it is someone else’s wages?

Nice try. Didn’t work. A corporate debtor argued that the money in its garnished bank account was earmarked for its employees’ wages. This was not exempt. The exemption is for the protection of the debtor, not others. Also, the debtor could just as well use the money to pay the light bill. Putting it into a “Payroll Account” doesn’t change anything. *Simulis, L.L.C. v. G.E. Capital Corporation*, 276 S.W.3d 109 (Tex. App.-- Houston [1<sup>st</sup> Dist.] 2008, no pet.)

#### b) Income to the firm before it becomes wages.

Income coming into a business is not wages at that point, and so can be the subject of turnover. To start, an attorney’s income from his firm is business income, not current wages. *DeVore v. Central Bank & Trust*, 908 S.W.2d 605 (Tex.App.-- Fort Worth 1995, no writ).

In *Newman v. Toy*, turnover of business income to an attorney’s P.C. was proper. A comment later in the opinion recognizes that salary paid to the attorney by his P.C. would be exempt, but the order being discussed would trap future income to the firm before it was paid out as salary.

#### c) Savings Bonds

Savings bonds purchased through payroll deductions are current wages. *Goebel v. Brandley*, 174 S.W.3d. 359 (Tex.App.--Houston [14<sup>th</sup> Dist.] 2005, pet. denied).

## 2. §31.002 (f) Proceeds of Exempt Property

The proceeds of exempt property are not subject to turnover, except for enforcement of a child support obligation or a judgment for past due child support. §31.002 (f).

Section 31.002 (f) was added to the turnover statute in 1989, prohibiting the turnover of proceeds of, or disbursement of property exempt under any statute (except for enforcement of a child support obligation). Prior to § 31.002 (f), a debtor could be made to turnover checks from the trustee of a spendthrift trust on the theory that the money lost its exempt status once it left the trust. Similarly, proceeds from the sale of exempt property could be ordered

turned over. See, e.g., *Rucker v. Rucker*, 810 S.W.2d 793 (Tex. App.—Houston [14th Dist.] 1991, writ denied). Subsection (f) superseded these cases. *Burns v. Miller, Hiersche, Martens & Hayward P.C.*, 948 S.W.2d 317 (Tex. App.—Dallas, 1997, writ denied). Under subsection (f), the trustee’s distribution check is not subject to turnover, even in the hands of the debtor. And, if the debtor sells exempt property, the proceeds are not subject to turnover.

Sub (f) does not apply to child support. When a father was jailed for failure to turn over his current paychecks to the receiver for child support, his writ of habeas corpus was denied. (Actually, it was an award for attorney’s fees for obtaining a child support order, which counts as child support.) *Ex parte Wessell*, 807 S.W.2d 17 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1991, orig. proceeding).

Wages in the hands of a Chapter 13 Trustee after the bankruptcy is dismissed remain exempt from turnover. *Marrs v. Marrs*, 401 S.W.3d 122 (Tex.App.—Houston [14<sup>th</sup> Dist.] March 2011, no pet.). The result in *Marrs* may have been different if the debtor’s plan payments had not been paid directly to the trustee by her employer.

Proceeds from the sale of a homestead remain exempt for 6 months, even if the money is not used to purchase another homestead. Tex. Prop. Code §41.001 (c); *London v. London*, 342 S.W.3d 768 (Tex. App.—Houston [14th Dist.] 2011, no pet.). (Creditor knew Debtor had planned to use proceeds to pay other creditors, and obtained a turnover order compelling debtor to turn over the funds.)

Bear in mind that sub (f) is purely a creature of the turnover statute. If you think you may have a sub (f) issue, consider a garnishment.

### 3. Money In The Bank

Money in the bank is fair game (except specifically exempt accounts, such as IRAs). By putting the money into a bank account, a debtor/creditor relationship is created with the bank. The money has changed its character: it is no longer money, it is a debt owed by the bank to its customer. The money loses its exempt status. *Schultz v. Cadle Co.*, 825 S.W.2d 151, 153-54 (Tex. App—Dallas 1992, writ denied).

#### a) Exception: Social Security Payments

An exception is Social Security benefits. Social Security benefits enjoy a federal exemption that is not destroyed when the money is deposited into an account. 42 U.S.C.S. § 407 (a) (LEXIS L. Publg. 2007); *Philpott et al v. Essex County Welfare Board*, 409 U.S. 413 (1973).

#### b) Exception: IRA Distributions

Amounts distributed from a retirement plan are exempt for 60 days, if the amounts qualify as a non-taxable rollover contribution to another qualifying account. Tex. Prop. Code § 42.0021 (c).

#### c) *W.T.J. v. S.L.S.*

The trial court in *W.T.J. v. S.L.S.* enjoined the defendant from spending the money in his bank accounts to the extent that the balance would fall below \$18,000 on any given month, which was the money due to his ex-wife. This was held to be an abuse of discretion because it was not shown that the money had a source other than current wages. However, neither side seems to have raised the issue about the character of the wages changing by being deposited into a bank. This was not a case of a receiver seizing the money; the debtor was enjoined from using it. *W.T.J. v. S.L.S.*, No. 03-10-00335-CV (Tex.App.-- Austin August 2012, no pet.) (mem. op.).

#### d) Subsection (f) and wages in the bank.

It has been established as far back as 1927 that wages deposited into the debtor’s bank account lose their exemption. *Sutherland v. Young*, 292 S.W. 581 (Tex.Civ.App.--Waco 1927, no writ). So, under sub (f), are wages that have been deposited into the debtor’s bank account still fair game or are they proceeds of exempt property that remain exempt?

*Schultz v. Cadle Co.* is a sub (f) case out of Dallas. Schultz received a salary from a clinic that he had a 50% interest in. He directed the clinic to deposit his salary into another entity that he owned. He and his wife used the account for household expenses. Schultz claimed the wages remained exempt.

The Dallas Court of Appeals held that the debtor lost his exemption when he put the money into his other entity. It was viewed as simple income to that entity. The Court looked to *Sutherland v. Young*, quoting,

“We have reached the conclusion that, when wages are paid to and received by the wage-earner, they thereby cease to be current wages, and the exemption statute does not apply thereto. Appellant, having taken his wages and voluntarily placed them in the bank and thereby created the relation of debtor and creditor between himself and the bank, caused the funds to be subject to garnishment,

*the same as if he had invested the same in property that was not exempt to him under the statutes.*" (my emphasis). 825 S.W.2d 151, 153-54 (Tex. App.—Dallas 1992, writ denied).

Thus, the Dallas Court of Appeals keeps alive the long-standing rule from *Sutherland v. Young* that once money is deposited into a bank account, it loses its exemption.

In 1997, the Dallas Court of Appeals reversed a turnover order compelling the turnover of proceeds from a trust (among other things), under sub (f). *Burns v. Miller, Hiersche, Martens & Hayward P.C.*, 948 S.W.2d 317 (Tex. App.—Dallas, 1997, writ denied). However, *Miller, Hiersche* is distinguishable because it is a trust case. It does not have to do with seizing money that had been deposited into a bank account. *Schultz* is much more on point.

## H. Turnover of a Cause of Action

The general rule is that a cause of action, including a personal injury action, is assignable, absent a statutory bar. *Charles v. Tamez*, 878 S.W.2d 201 (Tex.App.—Corpus Christi 1994, writ denied); *D & M Marine, Inc. v. Turner*, 409 S.W.3d 853 (Tex. App.—Fort Worth 2013, no pet.). However, the general rule does not apply if the turnover would contravene public policy. *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306-07 (Tex. App.—Dallas 1992, no pet.).

### 1. Debtor's Action Against Creditor

It is against public policy to allow a creditor to obtain turnover of its debtor's cause of action against the creditor, because that would deprive the debtor of its day in court by extinguishing the debtor's cause of action. *Id.*

### 2. Malpractice Actions

It is against public policy to obtain turnover of a legal malpractice claim because that would be tantamount to forcing a defendant to litigate a claim against his will, particularly in a personal matter such as the attorney client relationship. The assignment of such a claim would relegate the legal malpractice action to the marketplace and convert it into a commodity to be exploited by someone who had no relationship at all with the attorney. *Charles v. Tamez* 878 S.W.2d 201, 207 (Tex.App.—Corpus Christi 1994, writ denied) (quoting a California case.)

### 3. Turnover of Counter Claim

The turnover of a counter claim against a third party, still in current litigation, was not proper in *In re Great Northern Energy, Inc.*, 493 S.W.3d (Tex.App.—Texarkana 2016, orig. proceeding). The creditor would not have an interest to pursue the claim with the same vigor as the debtor. Also, the counterclaim itself demonstrated defenses the defendant had against the plaintiff. Loss of the counter claim would impair Great Northern's defense of the claims against it. The trial court suggested the creditor could attach the proceeds of a settlement when it occurred.

## IV. THE TURNOVER HEARING

### A. The Turnover Hearing: Proving Up The Elements

The purpose of the hearing is to show the court that 1) the judgment remains unsatisfied and 2) the defendant owns non-exempt assets.

The statute requires a factual showing of the elements. *Schultz v. Fifth Judicial District Court of Appeals at Dallas*, 810 S.W.2d 738 (Tex. 1991) (abrogated on other grounds). It is reversible error (abuse of discretion) for a court to grant turnover relief without the showing required by the statute. *Clayton v. Wisener*, 169 S.W.3d 682, 683-84 (Tex. App.—Tyler 2005, no pet.); *Sivley v. Sivley* 972 S.W.2d 850 (Tex.App.—Tyler, 1998, no pet.); *Tanner v. McCarthy* 274 S.W.3d 311 (Tex.App.—Houston [1<sup>st</sup> Dist.], 2008, no pet.); *Anoco Marine Industrial, Inc. v. Patton Production Corp.*, No. 2-09-210-CV (Tex.App.—Fort Worth, April 8, 2010) (Need to show the judgment is unsatisfied).

A turnover order is proper if the elements are met. *Henderson v. Chrisman*, 05-14-01507-CV (Tex.App.—Dallas April 27, 2016, no pet.).

However, if there is already evidence in the record that satisfies the elements, an evidentiary hearing is not required. "Section 31.002 does not specify, or restrict, the manner in which evidence may be received in order for a trial court to determine whether the conditions of 31.002 (a) exist, nor does it require that such evidence be in any particular form, that it be any particular level of specificity, or that it reach any particular quantum before the court may grant aid under section 31.002." But, the trial court must determine that the elements have been satisfied before it enters the turnover order. *Tanner v. McCarthy*, 274 S.W.3d 311, 322 (Tex.App.—Houston [1<sup>st</sup> Dist.], 2008, no pet.). See also, *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 627 (Tex.App.—Fort Worth 2006, pet. denied). In *Main Place Custom Homes*, the trial court ordered turnover as part of the trial judgment. It was not necessary to

have held a separate hearing on turnover, but the order was reversed because the record did not show the elements had been established.

The evidence must actually be before the court at the hearing. In one case, the creditor filed a motion for sanctions at the same time it filed the application for turnover. On the same day, they also filed an application for a writ of garnishment. The turnover application was submitted with no evidence other than a copy of the judgment and an order denying another motion. There was no affidavit submitted with the application. On appeal, the creditor argued that the court had the discretion to consider all of the evidence before it, including evidence submitted in support of the motion for sanctions. Both motions were heard at the same time. However, the turnover order stated that the Court had considered the application and the arguments of counsel. Neither the application nor the arguments of counsel were evidence. There was evidence submitted with regard to the sanctions motion, but at the hearing the judge never reached the evidence. The sanctions issue was resolved on jurisdictional points. Although there was evidence submitted as part of the application for the writ of garnishment, that case was filed in a separate file number. That evidence was not before the court because that file was not before the court at the hearing. The turnover order was vacated. *HSM Development, Inc. v. Barclay Properties, Ltd.*, 392 S.W. 3d 749 (Tex.App.-- Dallas 2012, no pet.).

There was a similar ruling out of Corpus Christi, in 2013. The appellees, who had obtained three turnover orders, did not support their applications for turnover relief with affidavits or verifications. The appellants' responsive pleadings did contain affidavits. There was no evidence to support turnover. *Paul Black, et al. v. Toby Shor and Seashore Investments Management Trust*, 443 S.W.3d 170 (Tex.App.-- Corpus Christi 2013, pet. denied).

In *Cortez v. Mann Bracken LLP*, the appellant failed to bring forth a sufficient record to demonstrate error. The appellate court must presume that the omitted documents would support the trial court's decision. No. 03-09-00615-CV (Tex.App.-- Austin, September 22, 2011, no pet.) (mem. op.).

Then again, the Third District Court of Appeals was not bothered that there was no record made at the turnover hearing in *Schulze v. Cap Collection JV7*. There was sufficient evidence in the record already. No. 03-03-00390-CV (Tex. App.—Austin Sept. 23, 2004, pet. dism'd) (mem. op.).

What if the evidence is "stale"? In *Blunck v. Blunck*, the judgment debtor argued (among other things) that his divorce decree wasn't good evidence of assets he still owned because the decree was a couple of years old. He also complained that his trust document and bankruptcy schedules were not evidence because they were not self-authenticating. Between all three, there was "some evidence" of a substantive and probative character to support the turnover order. The issue was overruled. No. 03-15-00128-CV (Tex.App.--Austin, February 18, 2016, pet. denied) (Mem. Op.).

**Practice Tip:** Do not confuse what you have to prove up (a piece of non-exempt property) with the relief that you can get. Proving up one item of non-exempt property does not limit turnover to that one item.

#### **B. Tanner v. McCarthy: Subsection (h) v. Subsection (a)**

In *Tanner*, the creditor's position was that because the turnover application and order do not need to mention specific assets to be turned over per §31.002 (h), no evidence is required and, therefore, a hearing is not necessary. 274 S.W.3d 311 (Tex.App.—Houston [1<sup>st</sup> Dist.], 2008, no pet.). The argument was that subsection (h) conflicts with subsection (a), which at the time required a showing that the judgment debtor owns non-exempt property that is difficult to levy upon.

The opinion makes it plain that there is no conflict between subsections (a) and (h).

The order and application do not have to mention any specific property. This does not conflict with the requirement that the applicant has to show the court *something*. In my view, the applicant proves up one piece of non-exempt property and the door opens wide. You do not have to describe the property, tipping off the debtor, in your application. Just be sure to prove it up.

The creditor's problem in *Tanner* was that he did not prove up any asset at all and argued that he did not have to.

A recent opinion following *Tanner* is *Blunck v. Blunck*, 03-15-00128-CV (Tex.App.--Austin, February 18, 2016, pet. denied) (Mem. Op.).

#### **C. The Elements**

The elements to prove up are that the applicant's judgment remains unsatisfied and that the judgment debtor owns assets that are non-exempt. Tex. Civ. Prac. & Rem. Code Ann. § 31.002 (a) (West 2015) (Amended June 2017).

If your post judgment collection procedures include serving post judgment interrogatories, make it a practice to also serve a Request For Admissions. When ignored, the admissions are deemed admitted, which proves up the elements. (Appendix 10).

**1. No injunction elements.**

The traditional elements for granting an injunction are not required under the turnover statute. *Henderson v. Chrisman*, 05-14-01507-CV (Tex.App.--Dallas April 27, 2016, no pet.).

**2. Do you have to prove up specific property?**

No. §31.002 (h). The statute puts the burden on the debtor to identify its non-exempt assets. *Tanner v. McCarthy*, 274 S.W.3d 311, 321; (Tex.App.—Houston [1<sup>st</sup> Dist.], 2008, no pet.); *Tanguy v. West*, No. 01-14-00455-CV (Tex.App.--Houston [1<sup>st</sup> Dist.], October 27, 2016, no pet.); *Blunck v. Blunck*, No. 03-15-00128-CV (Tex.App.--Austin, February 18, 2016, pet. denied) (Mem. Op.); *W.T.J. v. S.L.S.*, No. 03-10-00335-CV (Tex.App.-- Austin August 2012, no pet.) (mem. op.).

**a. Laundry List Order**

There is a new case out of Houston (14<sup>th</sup> District), *Gillet v. Zupt, LLC*, ruling that for each category of property in a laundry list order, you have to identify property. 14-15-01033-CV (Tex.App.--Houston [14<sup>th</sup> Dist.] February 23, 2017, no pet. hist.) *Gillet* follows a portion of the opinion in *Stanley v. Reef Securities, Inc.*, 314 S.W.3d 659 (Tex.App.--Dallas 2010, no pet.).

I strongly disagree with those portions in *Stanley* and with *Gillet v. Zupt, LLC*, because they go against the very purpose of the turnover statute and especially against the legislative intent of subsection (h) (Provided herein at Appendix 12.)

The statute puts the burden on the defendant to identify and turnover its non-exempt assets. *Ex parte Johnson*, 654 S.W. 2d 415, 418 (Tex. 1983); *Cross, Kieschnick & Co. v. Johnston*, 892 S.W.2d 435, 438 (Tex. App.—San Antonio 1994, no writ); David Hittner, *Texas Post-Judgment Turnover & Receivership Statutes*, 45 Tex. Bar J. 417, 417-18 (1982) (citing House and Senate committee reports). The point of the statute was to update early law that required a creditor to give a judgment creditor notice of what asset to hide. It was meant to be an “open-ended” remedy. *Hittner, Id.* The statute’s purpose is to put a reasonable remedy in the hands of a diligent judgment creditor, subject to court supervision. *CRE8 International LLC v Elexis Rice*, 05-14-00377-CV (Tex.App--Dallas June 3, 2015, no pet.).

After the statute was enacted, a line of cases developed holding that an order must state specific property to be turned over. Subsection (h) was enacted in 2005 to clarify that identification of specific property is absolutely not required.

When subsection (h) was in committee, opponents expressed a concern that a debtor might be held in contempt for failure to turn over non-existent property. For example, a debtor compelled to turn over all widgets would be at risk of contempt if he had no widgets to turn over.

The way to reconcile a fear that a debtor would have to answer for property that does not exist with the intent of the statute is to deal with it at a later contempt hearing. A creditor filing such a contempt motion would have to demonstrate that an asset actually existed and was in the possession or control of the debtor. A receiver who didn’t find any asset in a particular category would simply move on to find other kinds of assets.

The rulings that a piece of property from each category of property listed in a “laundry list” order must be proven flies in the face of the legislative intent and robs judgment creditors of one of their best tools for collection. If followed, collection law would revert back to where it was before 1979, when a creditor who found an undisclosed asset would have to go back to court, yet again, to apply the property to the satisfaction of its judgment.

**D. No Need To Show Creditor Exhausted Its Remedies**

You do not have to show that the creditor has exhausted other methods of collecting its judgment. *Universe Life Insurance Company v. Giles*, 982 S.W.2d 488 (Tex.App.—Texarkana 1998, pet. denied). *Hennigan v. Hennigan*, 666 S.W.2d 322, 323 (Tex.App.—Houston [14<sup>th</sup> Dist.] 1984, writ ref’d n.r.e.); *Childre v. Great Sw. Life Ins. Co.*, 700 S.W. 2d 284, 288 (Tex. App.—Dallas 1985, no writ).

It is not necessary to show that a writ of execution has been returned *nulla bona*. *Childre v. Great Sw. Life Ins. Co.*, 700 S.W. 2d 284, 288 (Tex. App.—Dallas 1985, no writ).

However, it is required in some Houston courts.

**E. Evidence That Did Not Support Turnover: The Suttles Case.**

In *Suttles v. Vestin Realty Mortgage I, Inc.*, the evidence supporting the turnover order was documents from the Secretary of State’s website showing that the defendant was a director, member, or officer for several businesses. Also, the Harris County Appraisal District records showed that a company was the owner of the defendant’s residence. There was a deed conveying the residence from one company to another and there was evidence that the defendant owned 15 properties in Victoria County. The turnover order was reversed, though, because the First District did not think any of that evidence supported turnover relief. *Suttles v. Vestin Realty Mortgage I, Inc.*, 317 S.W.3d 412 (Civ. App.—Houston [1st Dist.] 2010, no pet.).

The fact that the defendant was listed at the Secretary of State's website as a director or an officer, or a member of a limited liability company is no evidence of his ownership of those businesses. You do not have to own an interest to be an officer, a director or a member. *Suttles*, (citing Tex. Bus. Orgs. Code Ann. Sections 1.002(64) (West 2006); 1.002(54) (West 2006); 21.402 (West 2006) and 101.102(c) (West 2006)). The fact that the deed on the defendant's house was transferred from one company to another was not evidence that the defendant owned shares of either company.

The movant referred to the 15 properties as rental property. Proof that the defendant is entitled to payment of rents or other receivables is just the sort of proof envisioned by the drafters of the turnover statute. But, there was no evidence in the record that the 15 properties actually were rentals or that the defendant was entitled to the rents.

Note: when reading *Suttles*, bear in mind that it was written before the 2017 amendment. Parts of the opinion requiring a showing of property that is not readily leviable by ordinary process have been superseded by the amended statute.

#### **F. Persuading the Judge.**

It may be helpful to point out to a hesitant judge that the defendant has been uncooperative, that she hasn't responded to the discovery or didn't show up for her deposition. If other post judgment remedies have been unsuccessful, let the judge know. These are not required for obtaining turnover relief, but they might help the judge decide to sign your order.

It may help to assure the judge that the receiver will keep any money seized in trust until either there is an order signed allowing distribution, or an agreement with the defendant.

### **V. PROCEDURAL CONSIDERATIONS**

#### **A. Which Court?**

You may bring an application in the trial court. Or, you may bring an independent proceeding in any court of appropriate jurisdiction. Tex. Civ. Prac. & Rem. Code Ann. § 31.002 (a) & (d). If you bring an independent proceeding, bear in mind that you may be limiting the post judgment discovery you can bring against third parties. Post judgment discovery would be controlled by the original trial court. Tex. R. Civ. Proc. 621a.

If you bring an independent proceeding, plead facts that will make a prima facie case supporting venue.

Because you may seek turnover in any court of competent jurisdiction, a plaintiff may obtain turnover relief to satisfy several judgments against the same debtor, even though the judgments are from different courts. *Barrera v. State*, 130 S.W.3d. 253 (Tex.App.--Houston [14<sup>th</sup> Dist.] 2004, no pet.)

Sections 11.401 and 11.402 of the Business Organizations Code do not apply. These sections say that a receivership action against a domestic entity should be brought in a district court in the county where the business' registered office or principal place of business is. But, this only applies to the winding up and termination of Texas entities. It does not apply to a trial court's jurisdiction under §31.002 to appoint a receiver to collect the court's own judgment. *Remote Control Hobbies, L.L.C. v. Airborne Freight Corp.* No. 14-12-01088-CV (Tex. App.--Houston [14<sup>th</sup> Dist.] March 27, 2014, no pet.)

#### **B. No need to wait 30 days after the judgment.**

The creditor does not have to wait 30 days before turnover can be granted. The court in *Childre v. Great Sw. Life Ins. Co.*, 700 S.W. 2d 284 (Tex. App.—Dallas 1985, no writ) reasoned that a turnover receivership is in the nature of an attachment, so the 30 day waiting period required by Rule 627 for a writ of execution is not required. 700 S.W.2d, at 286-87. The Court also analogizes a turnover receivership to a garnishment, where no waiting period is required. *Id.* at 287.

#### **C. Watch Out for a Motion For New Trial**

If you don't wait 30 days, watch out for a motion for new trial. If the court grants a new trial, the judgment fails, making any turnover orders a nullity. *Scheel v. Alfaro*, 406 SW3d 216 (Tex. App.--San Antonio 2013, pet. denied), citing *Baca v. Hoover, Bax & Shearer*, 823 S.W.2d 734, 738-39 (Tex.App.--Houston [14<sup>th</sup> Dist.] 1992, writ denied.).

#### **D. The Court's Power To Grant Turnover Does Not Time Out.**

Turnover may be granted after the court has lost its plenary power. *Woody K Lesikar Special Trust v. Moon*, No. 14-10-00119-CV (Tex.App.--Houston [14th Dist.] August 9, 2011, pet. denied) (mem. op.). The court maintains jurisdiction to enforce its judgments.

#### **E. Turnover may be granted *ex parte*.**

Notice to the defendant and opportunity to be heard are not required by the turnover statute. *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1992, writ denied). *Cantu v. Seeman*, No. 01-09-00545-CV

(Tex.App.—Houston [1<sup>st</sup> Dist.] May 3, 2012, pet. denied) (mem. op.). An *ex parte* turnover order does not unfairly surprise a judgment debtor because the judgment puts the debtor on notice that post-judgment collection proceedings will follow. *Ex parte Johnson*, 654 S.W.2d 415, 418 n.1 (Tex. 1983); *Thomas v. Thomas*, 917 S.W.2d 425, 433-34 (Tex. App.—Waco, 1996, no writ); *Scheel v. Alfaro*, 406 S.W.3d 216 (Tex. App.—San Antonio 2013, pet. denied).

A good review of the constitutional issues is found in *Sivley v. Sivley and Sivley*, 972 S.W.2d 850 (Tex.App.—Tyler, 1998, no pet.):

“The question before us, however, is whether the trial court's failure to provide prior notice and a hearing before the issuance of the turnover order under Section 31.002 violated Don, Jr.'s constitutional rights to due process and trial by jury even though the turnover statute does not require it. Due process of law requires that an individual is entitled to notice and hearing before he is deprived of a property right. U.S. CONST. amend. XIV; TEX.CONST. art. I, § 19. The issue of whether post-judgment collection proceedings compromised constitutional due process principles was addressed by the Supreme Court of the United States in *Endicott--Johnson Corporation v. Encyclopedia Press*, 266 U.S. 285, 288--290, 45 S.Ct. 61, 69 L.Ed. 288 (1924). In *Endicott--Johnson*, the judgment debtor contended that a New York statute was in conflict with the constitutional due process clause because it authorized the issuance of a garnishment execution without giving notice to the judgment debtor or affording him a hearing. In holding that due process was not violated, the court reasoned as follows:

... the established rules of our system of jurisprudence do not require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment. Thus, in the absence of a statutory requirement, it is not essential that he be given notice before the issuance of an execution against his tangible property; after the rendition of the judgment he must take "notice of what will follow," no further notice being "necessary to advance justice."

*Endicott-Johnson Corporation*, 45 S.Ct. at 62—63; *Sivley*, 972 S.W.2d at 860.

In 1968, the United States Supreme Court turned down the opportunity to revisit *Endicott-Johnson Corporation*, in *Hanner v. DeMarcus*, 390 U.S. 736 (1968).

#### **F. Turnover heard upon submissions.**

The application may be heard upon submissions. *Goodman v. Compass Bank*, 05-15-00812-CV (Tex.App--Dallas August 3, 2016, no pet.)(Citing *Tanner v. McCarthy*, 274 S.W.3d 311, (Tex.App.—Houston [1<sup>st</sup> Dist.], 2008, no pet.)). The evidence may be already in the record. *Id.*

If you are going to try to obtain turnover upon submissions, be sure that your application includes an affidavit or that the elements are already in the record. There must be evidence that satisfies the statute. See, *Paul Black, et al. v. Toby Shor and Seashore Investments Management Trust*, 443 S.W.3d 170 (Tex.App.-- Corpus Christi 2013, pet. denied).

#### **G. No Right to a Jury on Receivership Proceedings.**

The right to trial by jury does not extend to receivership proceedings. Receivership property is in the hands of the law, so its management and control rests exclusively in the court. Jury intervention would impermissibly transfer control of the receivership from the court to a jury. *Unit 82 Joint Venture v. International Commercial Bank of China*, No. 08-13-00088-CV, slip op. (Civ. App.-- El Paso, November 5, 2014, rev'd on other grounds 377 S.W.3d 694 (Tex. 2012)) (Citing several cases.)

#### **H. Practice Tip**

Documents attached to a pleading are not evidence (and not part of the record on appeal) if they are not admitted as evidence. You still have to lay the predicate, too. Attaching a document to a pleading does not get you past having to lay the predicate. *Gerard Guerinot v. Donna Wetherell*, No. 01-12-00194-CV, (Tex.App.--Houston [1<sup>st</sup> Dist.], June 6, 2013).

### **VI. USING TURNOVER AGAINST THIRD PARTIES**

Turnover is a purely procedural device to aid in the collection of a creditor's judgment against the debtor. It is

not to be used to adjudicate the rights of a third party. It was improper for the trial court in *In re Farmers Insurance Exchange* to order the debtor's insurer to pay a claim, because turnover could not be used to determine whether the claim was covered. No. 13-14-00330-CV (Tex.App.--Corpus Christi-Edinburg December 4, 2014, orig. proceeding).

What if the defendant's property is in the hands of a third party? What if the third party says they own it? What if you think the third party is merely the debtor's alter ego? Can you use turnover in these situations?

### A. The General Rule

The general rule is that the turnover statute is not applied against someone who is not the judgment debtor. *Beaumont Bank N.A. v. Buller*, 806 S.W.2d 223, 227 (Tex. 1991). The turnover statute provides that the court may "order the judgment debtor to turn over non-exempt property..." (underline added) Tex. Civ. Prac. & Rem. Code Ann. § 31.002 (b) (1) (West 2015). The turnover statute is a procedural remedy not intended to alter the substantive rights of the parties. *Beaumont Bank, N.A.*, 806 S.W.2d at 230. It is enough that the judgment debtor can be held in contempt for failure to turn over property that he controls but is in the hands of a third party. *Parks v. Parker*, 957 S.W.2d 666, 668-669 (Tex.App.-- Austin 1997, no pet.) (Declining to follow the line of cases allowing turnover against a third party.)

### B. The Exception

There is a limited exception to the general rule, allowing turnover against third parties who hold property of the debtor. *Beaumont Bank*, at 226; *Schultz v. Fifth Judicial District Court of Appeals at Dallas*, 810 S.W.2d 738 (Tex. 1991) (abrogated on other grounds), *In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004)); *International Paper v. Garza* 872 S.W.2d 18 (Tex. App.—Corpus Christi, 1994, no writ); *Resolution Trust Corp. v. Smith*, 53 F.3d 72, 80 (5th Cir.1995); *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317 (Civ. App.—Dallas, 1997, writ denied)(Turnover is permissible if there is a finding that the property is subject to the control or possession of the debtor.)

In *Schultz*, the Court says that turnover may be against "one or more parties, other than the judgment debtor. Upon proof of the necessary facts, it authorizes the trial court to order affirmative action by the judgment debtor and others to assist the judgment creditor in subjecting such non-exempt property to satisfaction of the underlying judgment." (underline added.) A turnover order would act as an injunction against any third parties interested in the property rights being adjudicated. (*Schultz*, at 740.) *Schultz* was not a case about using turnover against third parties, so the analysis is dictum. However, courts use *Schultz* in recognizing that turnover may be used against a third party who holds the defendant's property, with the right set of facts.

The only discussion on the issue from the Supreme Court after *Schultz* comes from a concurring opinion in 1996, *Ex parte Swate* 922 S.W.2d 122 (Tex. 1996). The majority opinion is not about turnover. In the concurring opinion, Justice Gonzalez writes, "Thus, it is clear that the statute authorizes turnover orders enforceable by contempt only against the judgment debtor or to those who possess property subject to the control of the judgment debtor." 922 S.W.2d at 125. However, because the third party was not under the control of the judgment debtor and the property was not controlled by the judgment debtor, the trial court did not have jurisdiction to order turnover against the third party or enforce the order with contempt. "A turnover order is not a substitute for established remedies allowing a creditor to reach property owned by the judgment debtor claimed to be in the possession of a stranger to the lawsuit." *Id.*, at 126.

The First District recognized the exception in 1989, in *Cravans, Dargan & Co. v. Peyton L. Travers Co.*, 770 S.W.2d 573, 576-77 (Tex. App.—Houston [1st Dist.] 1989, writ denied), but then declined to use it in 2003 in *Bay City Plastics, Inc. v. McEntire*, 106 S.W.3d 321, 325 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). In *Bay City Plastics*, the First District takes the view that the turnover statute can only reach property in the hands of a third party by compelling the judgment debtor to turn it over.

There is statutory authority for the exception, at least in one situation. Under Tex. Civ. Prac. & Rem. Code Ann. §31.010 (West 2015), the judgment debtor's bank may rely on a certified copy of a turnover order provided by a turnover receiver or a judgment creditor. The bank is a third party holding the defendant's property. Banks routinely honor a receiver's levy.

The courts split on whether the turnover statute authorizes the use of turnover against third parties who hold the judgment debtor's property. Several courts of appeals have recognized the exception. Some of these are discussed individually, below. Cases after *Ex parte Swate* that recognize the exception are *Roebuck v. Horn*, 74 S.W.3d 160 (Tex. App.—Beaumont 2002, no pet.); *Dale v. Finance America Corp.*, 929 S.W.2d 495 (Tex. App.—Fort Worth 1996, writ denied), *Premier Trailer Leasing, Inc. v. GTR Rental L.L.C.*, No. 02-09-00449-CV, (Tex.App.—Fort Worth, May 2011, no pet.) (mem. op.) (upholding an order compelling a third party corporation to turn over the debtor's stock distributions to the judgment creditor), *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948

S.W.2d 317 (Civ. App.—Dallas, 1997 writ denied), *Ross v. National Center for Employment of the Disabled*, 170 S.W.3d 635, 639 (Tex. App.—El Paso 2005, *reversed on other grounds*, 197 S.W.3d 795 (Tex. 2006)), and *Gerdes v. Kennamer*, 155 S.W.3d 541 (Tex. App.—Corpus Christi 2004, pet. denied).

### C. Expanding the Exception: *Dale & Ross*

Two of the cases that came after *Ex parte Swate* take the exception even further: *Dale v. Finance America Corp.*, 929 S.W.2d 495 (Tex. App.—Fort Worth 1996, writ denied) and *Ross v. National Center for Employment of the Disabled*, 170 S.W.3d 635 (Tex. App.—El Paso 2005, *reversed on other grounds*, 197 S.W.3d 795 (Tex. 2006)). They start with a rule from *Beaumont Bank N.A.* that once you trace property to the judgment debtor, a presumption arises that the assets are in her possession and the burden then shifts to her to account for it. (The asset in *Beaumont Bank, N.A.*, was cash, which is fungible, so the Court presumed that Mrs. Buller, as administrator for the judgment debtor's estate, had all of the money traced to her. She had the burden to account for it. *Beaumont Bank N.A.*, 806 S.W.2d at 226.)

*Dale v. Finance American Corp* uses the presumption as the basis for turnover where the debtor has not put on any evidence. Mr. Dale was the judgment debtor. Mrs. Dale was the third party. The court ordered them to turn over documents and property, including property in trusts. The Dales did not put on evidence at the hearing, so they were unable to rebut the presumption that the property traced to Mr. Dale was in his possession and control. The creditors had showed that Mr. Dale controlled, through Mrs. Dale, trusts that had funneled over a million dollars to him and his companies. *Dale*, 929 S.W.2d at 499. Turnover against Mrs. Dale, the third party, was upheld because they did not overcome the presumption that the asset was in defendant's possession and control.

*Ross v. National Center for Employment of the Disabled* expands when turnover can reach the defendant's property in the hands of a third party. Under *Ross*, if you can show that the judgment debtor owns a controlling interest in the third party, you can get turnover. 170 S.W.3d 635 (Tex. App.—El Paso 2005, *reversed on other grounds*, 197 S.W.3d 795 (Tex. 2006)) (Turnover order failed because the underlying judgment failed.)

The First District follows Dale, in *Schulze v. Cap Collection JV7*, No. 03-03-00390-CV (Tex. App.—Austin Sept. 23, 2004, pet. dismissed) (mem. op.), but the Third Court of Appeals (Austin) does not. *Parks v. Parker*, 957 S.W.2d 666 (Tex. App.—Austin 1997, no pet.)

### D. Reconciling *Beaumont Bank, Schultz and Swate*

In *Beaumont Bank* 806 S.W.2d at 226 (Tex. 1991) and *Schultz*, 810 S.W.2d at 740, the Texas Supreme Court says that turnover may be used to recover the debtor's property in the hands of a third party. Also, in *Beaumont Bank*, the Texas Supreme Court says that the purpose of the turnover hearing is to ascertain whether an asset is in the possession or control of the judgment debtor. *Beaumont Bank*, at 227.

Also, in *Bay City Plastics*, “The turnover statute allows a trial court to order a judgment debtor to turn over the property that is owned by the judgment debtor if it is subject to the judgment debtor's control. The trial court, then, is permitted to determine what property meets those statutory requirements.” (citations omitted). *Bay City Plastics, Inc. v. McEntire*, 106 S.W.3d 321, 325 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). The statute is a procedural device to determine whether an asset is in the defendant's possession or control. *Main Place Custom Homes, Inc. v. Honaker* 192 S.W.3d 604, 628 (Tex.App.—Fort Worth 2006, pet. denied).

However, some commentators strongly disagreed that the exception for third parties is authorized by the statute. How can a court make a finding that the debtor owns a piece of property in the hands of a third party without tacitly finding that the third party does not own it? It seems to be two sides of the same coin. The answer is that the court's order placing the third party's assets into the receivership does not bind the third party. The third party can claim its superior rights to the property at the time the property is to be sold. *CRE8 International LLC v. Elexis Rice*, 05-14-00377-CV (Tex.App.—Dallas June 3, 2015, no pet.).

In *Beaumont Bank, N.A.*, Mrs. Buller accounted for the Buller estate's assets very poorly: she said she spent it all and she could not show what most of it was spent on. The Texas Supreme Court only upheld the portion of the turnover order directed to her as administrator. The parts of the turnover order against her as an individual were reversed because, as an individual, she was a third party and it was not shown that she had any property of the debtor. Ms. Cox, in *Swate*, did not hold property of the debtor so turnover against her was improper. However, in *Dale*, the creditors traced control of trusts ostensibly run by Mrs. Dale to Mr. Dale, so turnover against Mrs. Dale, a third party was upheld. Mr. Dale controlled the property in Mrs. Dale's possession.

### E. Alter Ego Actions Against Third Parties

A third party cannot be treated as if it were the debtor merely because the creditor claims the third party is the debtor's alter ego. “This argument would permit [the judgment creditor] to skip the trial on the merits in this case with respect to the alter ego issue and declare itself the winner.” *United Bank Metro v. Plains Overseas Group, Inc.*, 670

S.W.2d 281 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1983, no writ). The creditor has to bring a new lawsuit. “We construe that the legislature’s purpose in enacting the turnover statute was to facilitate the collection of assets from the judgment debtor to the judgment creditor.” *Republic Ins. Co. v. Millard*, 825 S.W.2d 780, 783 (Tex.App.—Houston [14<sup>th</sup> Dist.] 1992, no writ). The statute does not allow judgment creditors and debtors to initiate and incorporate in the proceeding an entirely different lawsuit against a third party who is not part of the original judgment. (*Id.* at 783).

In *Bolloré S.A. v. Import Warehouse, Inc.*, 448 F.3d 317 (5th Cir. 2006), the trial court held a two day hearing against third parties on an alter ego theory. The creditor argued on appeal that the hearing counted as the third parties’ separate trial, but the Fifth Circuit disagreed and vacated the orders. *Id.*, at 324. The third parties had been personally served with a subpoena deuces tecum, but they had not been served with a summons as required by Rule 4 of the Federal Rules. The court did not have jurisdiction to alter the substantive rights of the third party without proper service of process. (*Id.*, footnote 5.)

#### **F. Newman v. Toy**

If the court orders turnover of the judgment debtor’s shares in a corporation and you can prove that the judgment debtor owns all of the stock, the receiver can sell the corporation’s property so long as the rights of the corporation’s creditors are not prejudiced. *Newman v. Toy*, 926 S.W.2d 629 (Tex. App.—Austin 1996, writ denied). This is not piercing the corporate veil, it is the receiver stepping into the defendant’s shoes as the sole shareholder. A case following *Newman v. Toy* is *W.T.J. v. S.L.S.*, No. 03-10-00335-CV (Tex.App.-- Austin August 2012, no pet.) (mem. op.). Caution: *Newman v. Toy* and *W.T.J v. S.L.S.* are not LLC cases. See Section VIII, below if the entity is a partnership, limited partnership or an LLC.

#### **G. How To Get Turnover Against Third Parties Without Getting Into Trouble.**

Obtain an order granting a receiver the defendant’s property rights, including the defendant’s contract rights. The receiver makes demand upon the third party for the defendant’s property or for money owed to the defendant. The order is not against the third party; it transfers to the receiver the defendant’s power to demand the property. The receiver must bring an independent action against the third party if the third party will not comply. But, this follows, as the defendant would have to bring an independent action to recover its property from an unwilling third party.

I draw a distinction between the receiver stepping into the shoes of the debtor to demand the debtor’s contract rights or property from a third party, and the court ordering turnover against the third party. The order in *Plaza Court, Ltd. v. West* didn’t just order third parties to turn over property-- it actually put the third parties into receivership! 879 S.W.2d 271 (Tex. App.—Houston [14th Dist.] 1994 no pet.). No wonder the order was ruled improper.

“[The turnover statute is not] a super-venue device by which the original trial court can reach out and assume jurisdiction for trial purposes of potential lawsuits involving third parties.” *Republic Ins. Co. v. Millard*, at 783.

If the third party claims an interest in the property, the receiver or the creditor should bring a new lawsuit.

#### **H. A Unified Rule & Exception**

To sum, the rules derived from *Beaumont Bank, Dale and Ross* are:

- 1) no turnover against a third party who is a stranger to the underlying judgment, except
  - a) if the judgment debtor controls the non-exempt property in the hands of the third party; or
  - b) if the judgment debtor owns a controlling interest in the third party which owns / controls the non-exempt property.
- 2) If the third party claims an interest in the property, the creditor or the receiver should sue the third party in a new case.

Practice Tip: If you represent the third party, be wary of intervening. See, *CRE8 International LLC v Elexis Rice*, No. 05-14-00377-CV (Tex.App--Dallas June 3, 2015, no pet.), at section VI K 14, below.

#### **I. Consider a Garnishment**

If a third party has money or personal property that you think belongs to the debtor, consider a garnishment. Garnishment can be used to determine a third party’s right to property.

**J. Third Party Should Consider Not Subjecting Itself To The Court's Jurisdiction.**

Intervening subjects a third party to the Court's jurisdiction in *CRE8 International LLC v Elexis Rice*, No. 05-14-00377-CV (Tex.App--Dallas June 3, 2015, no pet.) (Discussed in section VI K 14, below.)

**K. Some Third Party Cases Examined More Closely**1. *Beaumont Bank N.A. v. Buller*

806 S.W.2d 223, 227 (Tex. 1991)

The judgment debtor, Mr. Buller, had died. Mrs. Buller said that she spent all of the proceeds from a \$100,000 certificate of deposit. The trial court signed a turnover order against Mrs. Buller, individually and as executrix. The Texas Supreme Court only affirmed the turnover order only against Mrs. Buller in her representative capacity. Because she was not the judgment debtor, the best a court could do under the turnover statute is to have her turn over the debtor's assets. She said she did not have any. The Supreme Court did not believe that she had spent all of the money and they placed the burden on her to account for it. But that was little help to Beaumont Bank. (The court of appeals' opinion indicates that there was no evidence that Mrs. Buller still possessed assets of the estate by the time of the turnover hearing. Also, Mrs. Buller claimed a community interest in the funds of her deceased husband's estate. *Buller v. Beaumont Bank, N.A.*, 777 S.W.2d 763, at 764 (Tex. App.--Beaumont 1989) (reversed 806 S.W.2d 233 (Tex. 1991)). As Justice Mauzy said in his dissent, the real problem was that the turnover statute is the wrong vehicle for resolving this kind of dispute. (806 S.W.2d at 229).

The burden was on Mrs. Buller to account for all of the cash, because cash is fungible. "All accounted for cash is presumed to be in the possession of the debtor; simply asserting 'I spent it' is unacceptable." *Beaumont Bank.*, at 227. But to the extent that she could show that some of the money was spent, it is not in her possession or control and that portion of the money must be deducted from the total she was to turn over.

2. *Schultz v. Fifth Judicial District Court of Appeals at Dallas*

810 S.W.2d 738 (Tex. 1991) (abrogated on other grounds, *In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004)).

Schultz was a judgment debtor who appealed the turnover order and filed a supersedeas bond. The issue was whether the trial court had jurisdiction to entertain a contempt motion after the appeal, for Schultz's failure to comply with the turnover order. During its discussion of the turnover statute and whether a turnover order is a final, appealable judgment, the Court writes, "*It may be against one or more parties other than the judgment debtor.* Upon proof of the necessary facts, it authorizes the trial court to order affirmative action by the judgment debtor and others to assist the judgment creditor in subjecting such non-exempt property to satisfaction of the underlying judgment. Such an order acts as a mandatory injunction against the judgment debtor and, if there are such parties, against the receiver *and any third parties interested in the property rights being adjudicated.* (Id., at 740, emphasis added.)

Note: *Schultz* was abrogated by *In Re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004), in which the Supreme Court changed its decision regarding whether the trial court could entertain a contempt motion during an appeal. *In Re Sheshtawy* does not discuss turnover.

3. *Ex parte Swate*

922 S.W.2d 122 (Tex. 1996)

Debtor's first ex-wife won a judgment against him and had a receiver appointed. The receiver obtained an order compelling the debtor's second ex-wife, Cox, to turn over money she had just gotten from the debtor in her divorce. She did not turn over the money and was jailed for contempt. The majority opinion granted her writ of habeas corpus, based on the contempt issues. Justice Gonzalez, concurring, said that he would have also granted the writ based on turnover issues. Looking at § 31.002 (b) (1), he writes, "Thus, it is clear that the statute authorizes turnover orders enforceable by contempt only against the judgment debtor *or to those who possess property subject to the control of the judgment debtor.*" (Id., at 125, emphasis added.) Cox was not the judgment debtor or under his control, so the turnover order against her was improper. (Id., at 125). The concurring opinion then looks at the case law establishing the general rule that a trial court does not have jurisdiction to order turnover from a stranger to the judgment. "A turnover order is not a substitute for established remedies allowing a creditor to reach property owned by the judgment debtor claimed to be in the possession of a stranger to the lawsuit." (Id., at 126.)

In my view, Cox did not possess property owned by the defendant or under his control, so the exception allowing turnover against a third party did not apply.

4. *Ross v. National Center for Employment of the Disabled*

170 S.W.3d 635 (Tex. App.—El Paso 2005, reversed on other grounds, 197 S.W.3d 795 (Tex. 2006)).

*Ross* contains a clear explanation of the law, with good discussions of *Beaumont Bank, N.A.*, *Schultz*, *Dale*, and

*Plaza Court Ltd.* Ross owned two corporations that had a letter of credit for \$1.2 million. Ross controlled the corporations; therefore, he controlled the letter of credit. Ross had been ordered to turnover his stock in the corporations, but he did not. The trial judge recognized that if the stock had been turned over, the judgment creditor could have exercised the letter of credit and there would be no need for the turnover relief against the corporations. *Ross*, 170 S.W.3d at 642.

The Court wrote, “Once the judgment creditor traces the assets to the judgment debtor, a presumption arises that those assets were in his possession and the burden then shifts to the judgment debtor to account for the assets.” *Id.* at 640. Applying *Plaza Court*, this presumption applies to assets held by a corporate entity as long as the trial court finds that the true judgment debtor owned at least a controlling majority of the stock. Such a finding justifies the issuance of a turnover order against assets of a non-judgment debtor. *Id.* The trial court’s order compelling the bank to turn over the proceeds from the letter of credit was affirmed. (The turnover order was later reversed, because the underlying judgment was reversed.)

5. *Cravans, Dargan & Co. v. Peyton L. Travers Co.*  
770 S.W.2d 573, 576-77 (Tex. App.–Houston [1st Dist.] 1989, writ denied)

A cash bond held by a third party, the State Board of Insurance, was not under the debtor’s control, so a judgment denying turnover relief against the Board was proper. It follows that if the Board did hold property under the debtor’s control, turnover may have been granted. The opinion recognizes this, saying, “As discussed below, the turnover statute allows appellant to obtain only property within the possession or control of the judgment debtor.” (*Id.*, at 575.) The debtor was an insurance agency that had not obtained errors & omissions coverage, so it was required to post a cash bond to maintain its license. The State Board of Insurance had not deposited the defendant’s cashier’s check yet, so the creditor argued that the defendant had control of the money.

6. *Bay City Plastics, Inc. v. McEntire*  
106 S.W.3d 321, 325 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2003, pet.denied).

The First District decides, after *Swate*, that the way the turnover statute reaches the defendant’s property in the hands of third parties is by ordering the judgment debtor to turn it over. It was proper for the trial court to determine whether the debtors owned property in the hands of the third parties.

7. *Plaza Court, Ltd. v. West*  
879 S.W.2d 271 (Tex. App.—Houston [14th Dist.] 1994 no pet.)

The judgment creditors did not prove that the judgment debtors owned a controlling interest in the third party, so the turnover order was vacated. However, the court recognized that a turnover order could have been used if there was a finding that the property in the hands of the third party was subject to the possession or control of the judgment debtor (citing *Norsul Oil & Mining Ltd.*) (The presumption placing the burden on the debtor to account for the asset was not discussed in this case. The third parties put on evidence that they were owned by another entity.)

The trial court found that the judgment debtor had transferred property to two corporations (third parties) in sham transactions. The corporations were placed into receivership. The order also compelled them to turn over the defendant’s property. The Fourteenth District reversed the turnover order because there was no independent proceeding against the third parties, based on *Ex parte Swate* and *Parks v. Parker*, 957 S.W.2d 666 (Tex. App.—Austin, 1997, no pet.).

8. *Norsul Oil & Mining Ltd. v. Commercial Equipment Leasing Co.*  
703 S.W.2d 345 (Tex. App.—San Antonio 1985, no writ)

Stock in the hands of third party was subject to a turnover order because it was owned by the judgment debtor and subject to the debtor’s possession or control. “The intimate and interwoven relationship of the three judgment debtors to Norsul [the third party] was plainly established, i.e., two as directors of Norsul, one as chairman of the board of Norsul, and the company as recipient of shares of stock in exchange for acquisition by Norsul of a subsidiary company belonging to the Forsters [the judgment debtors].” 703 S.W.2d at 348.

9. *Republic Ins. Co. v. Millard*  
825 S.W.2d 780 (Tex. App.—Houston [14th Dist.]1992, no writ)

In this case, the court required an insurance company to litigate a bad faith claim within the context of a post judgment turnover action, where the insurer was not a party to the original suit. The turnover statute was not the proper proceeding for what was essentially a new lawsuit alleging bad faith claims.

“We construe that the legislature’s purpose in enacting the turnover statute was to facilitate the collection of assets from the judgment debtor to the judgment creditor.” (Id., at 783). “Respondent [the trial judge], in his order, properly ordered a turnover to the Trevinos [the judgment creditors] of all causes of action Culver and Davis [the judgment debtors] might have, now or in the future, against any liability insurance carriers, specifically including Republic [the third party]. Clearly respondent had the authority to enter such an order under the turnover statute. However, he did not have the authority under the turnover statute to assume jurisdiction over Republic in this turnover action and order a consolidation and trial of the bad faith claims against it in his court.” (Id., at 784).

10. *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*  
948 S.W.2d 317 (Civ. App.—Dallas, 1997, writ denied)

The turnover order compelled the judgment debtor to write to the trustees of spendthrift trusts directing them to make future distributions to the receiver. The trial court had jurisdiction to direct the debtor to write the letters, but the letters were not binding on the trustees.

The Dallas court recognized the exception, but found there was no evidence that the defendant had control of the property held by third parties (the corpus of a spendthrift trust and money paid by the trustees to other third parties for the debtor’s benefit). Also, the property was proceeds of exempt property, and, therefore, exempt.

11. *International Paper v. Garza*  
872 S.W.2d 18 (Tex. App.—Corpus Christi, 1994, no writ)

The judgment debtor had transferred an asset to International Paper Company (IPC). The judgment creditor joined IPC in a turnover proceeding, based on a fraudulent conveyance. IPC answered and specially excepted to the pleadings because they were a third party and the turnover statute is limited to property within the ownership, possession or control of the judgment debtor. The trial court denied the special exceptions and IPC sought a writ of mandamus.

The Corpus Christi Court of Appeals recognized that turnover may be used to recover the judgment debtor’s property. Mandamus was denied because IPC would have the right to appeal a turnover order issued against them.

In a footnote, the Court writes, “We disagree with *Republic Insurance Co. v. Millard*, 825 SW2d 780, 782 (Tex.App.—Houston [14<sup>th</sup> Dist.] 1992, orig. proceeding), to the extent that it suggests that mandamus is an appropriate remedy to review the trial court’s inclusion of a third party to the underlying judgment as a party defendant for the first time in a post-judgment turnover proceeding. Clearly, under the rationale of *Schultz*, the third party has an adequate remedy by appeal.” (*International Paper*, at 19).

12. *In re Catherine Karlseng*  
No. 05-14-00049-CV (Tex. App.—Dallas Feb. 12, 2014, orig. proceeding).

The judgment was against Catherine Karlseng’s husband, Robert. Robert, a name partner at a law firm, claimed to be only an employee of his firm. Catherine was set up as an employee of the law firm, but the judgment creditor sought to establish that she did not actually work there and that her salary was really Robert’s business income as an independent contractor. Robert’s judgment creditor obtained an order against Catherine to turn over “all income and other amounts derived by Catherin Karlseng, directly or indirectly, from Defendant’s work as a lawyer and his law firm” and to turn over other assets related to that income. Catherine was not a party to the lawsuit against Robert. Her writ of mandamus was granted. “A judgment may be enforced against a non-party to the judgment only by bringing a separate suit alleging a basis for enforcing the judgment against that party.” (citations omitted.) The trial court could not order her to turn over property in which she claimed an ownership interest without conducting proceedings in which she is a party and afforded an opportunity to assert her claim to the property.

13. *In Re Old American County Mutual Fire Insurance Company*  
No. 13-14-00231-CV (Tex. App.—Corpus Christi Sept 25, 2014, orig. proceeding).

*In Re Old American* provides a recent summary of the law regarding using turnover against third parties. The opinion cites numerous cases that would be a good starting point for research. The opinion recognizes a split in opinions as to whether turnover can be used to reach the debtor’s property in the hands of a third party, but does not explore the ramifications, because the parties did not raise the issue. *Id.*, footnote 4.

Rosales was injured in a car crash with Mr. and Mrs. Moreno. Twenty months after the default judgment, Rosales obtained a turnover order assigning the Moreno’s potential claim against their insurance company, Old American County Mutual Fire Insurance Company, to Rosales. Rosales served Old American with proper process and, later, a motion for summary judgment. However, instead of bringing a new lawsuit, the pleadings were brought within the context of the turnover proceeding. Old American brought a writ of mandamus. Rosales argued that although the trial court had lost its plenary power, it retained the power to enforce its judgments. Rosales characterized the proceeding

against Old American as part of the trial court's efforts to enforce its judgment against the insured, and argued that Texas law favors the liberal joinder of claims. Old American argued that you cannot use turnover to determine the substantive rights of third parties. The Thirteenth District granted mandamus, instructing the trial court to withdraw its order denying Old American's plea to the jurisdiction and to enter an order dismissing Rosales's claims against Old American.

The important holdings of the opinion are (citations omitted):

The turnover statute may not be used to determine substantive rights of third parties. (But, they did not reach the issue of whether turnover may be used when the third party holds the debtor's non-exempt property.)

The turnover statute does not create a right in the judgment creditors and debtors to initiate and incorporate in the turnover proceedings an entirely different lawsuit against a third party who is not a part of the original judgment.

A judgment may be enforced against a non-party to the judgment only by bringing a separate suit alleging a basis for enforcing the judgment against that party.

Also, the case serves as a general reminder that a post judgment order cannot be inconsistent with the original judgment require performance of obligations in addition to the obligations imposed by the final judgment. "This is particularly true when such orders purport to adjudicate the rights of non-parties."

#### 14. CRE8 International LLC v Elexis Rice

No. 05-14-00377-CV (Tex.App--Dallas June 3, 2015, no pet.)

Rice obtained an agreed judgment against Pliant, a guarantor on a debt. Rice sought turnover against Pliant of several domain names, email addresses and a telephone number. Pliant did not respond, but third party CRE8 International intervened. CRE8's attorney appeared and participated in the hearing. At the end of the hearing, the trial judge had a writ of execution issued and ordered the domain names, telephone number and email addresses to be auctioned.

Cre8 appealed, saying that turnover cannot be used to determine the property rights of third parties, and that turnover is a procedural device not to be used against third parties.

However, turnover may be used to determine the debtor's property. There was evidence that Pliant owned or controlled the domain names. He was the listed on the domain records under the fields for Registrant, Admin, and Tech. There were documents showing that the email addresses and telephone numbers were his. It was not an abuse of discretion for the trial court to determine that Pliant owned the properties, except the court of appeals reversed as to one of the telephone numbers.

Unfortunately for Cre8, intervening was a bad idea. The opinion acknowledges that a finding that the property belonged to Pliant would not ordinarily bind Cre8. The opinion goes on to say, "Cre8 could have sat on the sidelines and later attacked the sale by proving superior rights had Rice won, but it chose to forgo that step and to inject itself into the matter. Cre8 having done so cannot now complain that the trial court ruled against it on the ownership issue."

## VII. USING TURNOVER TO REACH PROPERTY OUTSIDE OF TEXAS

A court may compel the defendant to turn over property located outside of Texas. In *Reeves v. Fed. Sav. & Loan Ins. Corp.*, 732 S.W.2d 380 (Tex. App.—Dallas 1987, no writ), Reeves had been ordered to turn over certain real property located in Portugal, along with all indicia of ownership. Although the receiver might have to go to great lengths to actually convey title of land in Portugal to a buyer, an order to turn over the property was held to be proper. Although the trial court had not ordered Reeves to convey the property, it could have. "The Supreme Court of Texas has expressly stated that 'a court of equity having jurisdiction over [a] person may compel him to make [a] conveyance [of realty], although the land is in another State.'" *Reeves*, 732 S.W. 2d at 382 (citing *Tex. & Pac. Ry. Co. v. Gay*, 86 Tex. 571, 590 (1894)); *See, also, Lozano v. Lozano*, 975 S.W.2d 63 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, pet. denied).

The court's authority over property located outside of Texas is its *in personam* jurisdiction to compel the judgment debtor to turn over indicia of ownership of property outside of the state or be held in contempt.

Although not an *in rem* proceeding, it is expected that the courts of the situs would recognize such an order as a final determination of a personal obligation to convey, analogous to that arising from a valid contract. *McElreath v. McElreath*, 345 SW.2d 722, 727 (Tex. 1961). Therefore, after moving through the local requirements to prove up and enforce the turnover order, a receiver should be able to obtain an order in that jurisdiction enabling the sale of the property.

## VIII. SEIZING A PARTNERSHIP OR L.L.C. INTEREST & TURNOVER

A charging order is the exclusive remedy by which a judgment creditor of a partner may satisfy a judgment out of the judgment debtor's partnership interest. This applies to general partnerships Tex. Bus. Orgs. Code Ann §152.308; to limited partnerships § 153.256; and to limited liability companies § 101.112.

In *Scheel v. Alfaro*, 406 SW3d 216 (Tex. App.--San Antonio 2013, pet. denied), sanctions were upheld against a plaintiff's counsel who had the judgment debtor's interest in several LLC's sold by a receiver, without a charging order. The sale was reversed, but for other reasons than the charging order statute.

The charging order constitutes a non-foreclosable lien on the debtor's interest. Tex. Bus. Orgs. Code Ann; § 152.308 (general partnership); 153.256 (limited partnership); and § 101.112 (LLC).

Once a distribution has been paid to the defendant, it becomes the defendant's property, subject to turnover. *Stanley v. Reef Sec., Inc.*, 314 S.W.3d 659 (Tex.App.—Dallas 2010, no pet.); *Henderson v. Chrisman*, 05-14-01507-CV (Tex.App.--Dallas April 27, 2016, no pet.). These two opinions say that in these situations the charging order is not the exclusive remedy of a creditor, but I think that is an inaccurate description of the situation. Once the distribution money is in the possession of the debtor, it is simply property owned by the debtor. At that point, it isn't a charging order situation anymore.

The charging order itself does not have to be had in a separate proceeding against the LLC / partnership. The LLC / partnership doesn't have an interest-- the distribution isn't their money. So, you don't have to bring a new proceeding against the entity. You can do it as part of post-judgment proceedings in the trial court.

## IX. TURNOVER AGAINST A PROBATE ADMINISTRATOR

When a judgment debtor dies, the judgment ceases to have the force of a judgment and becomes merely another claim in the decedent's estate. A judgment against the decedent will not support turnover relief against the administrator because turnover will only issue against the judgment debtor. *First Financial Resolution Enterprises, Inc. v. Moore*, No. 05-04-01671-CV, 2006 WL 540326 (Tex. App—Dallas March 7, 2006, no. pet.) (mem. op.).

## X. CHALLENGING THE TURNOVER ORDER

A turnover order that is contrary to statute or contains errors is only voidable, not void. It must be attacked directly. *In re Wiese*, 1 S.W.3d 246 (Tex. App.--Corpus Christi 1999, orig. proceeding); *In re Great Northern Energy, Inc.*, 493 S.W.3d (Tex.App.--Texarkana 2016, orig. proceeding).

A turnover order is in the nature of a mandatory injunction. Therefore, it is a final, appealable judgment. *Schultz v. Fifth Judicial Dist. Court of Appeals*, 810 S.W.2d 738, 738-40 (Tex. 1991) (abrogated on other grounds, *In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004)); *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 909 S.W.2d 505, 506 (Tex. 1995).

Use the appellate timetable for final judgments. *Burns*, at 506.

As long as the judgment is alive, the court's jurisdiction to enforce its order lasts until the judgment is satisfied. It could sign multiple orders on various issues, over a period of years. Although these types of orders (and turnover orders in general) are interlocutory under *Schultz* in that they may not dispose of all of the issues, they are deemed to be final, appealable orders when they are in the nature of a mandatory injunction. The new parts of an amended turnover order that are in the nature of a mandatory injunction are appealable, even when the time to appeal the old portions of the order has expired. See, *Bahar v. Lyon Financial Services, Inc.*, 330 S.W.3d 379 (Tex. App.—Austin 2010, pet. denied).

If a portion of a turnover order does not impose a mandatory injunction on the debtor, that part of the order is interlocutory and the trial court maintains jurisdiction over the issue. For example, an order authorizing an officer to take possession of property does not compel the debtor to do anything, so it is not appealable. *Id.*

Portions of a post-judgment orders regarding discovery disputes are not appealable. They are only reviewable only through mandamus. *Id.* at 388.

A post-judgment award of monetary sanctions is an appealable, final judgment when the sanctions are reduced to a judgment and execution is authorized. *Id.* at 388.

If the trial court does not make findings of fact, all questions of fact are presumed found in support of the turnover order. *Schultz v. Cadle Co.*, 825 S.W.2d 151, at 153 (Tex. App—Dallas 1992, writ denied).

The burden is on the appellant to bring forth a sufficient record to demonstrate error. Without the record, the appellate court must assume that the omitted documents would have supported the trial court's decision. *Cortez v. Mann Bracken, LLP*, No. 03-09-00615-CV (Tex.App.-- Austin September 22, 2011 no pet.) (mem. op.). Yet, in case after case we see turnover orders reversed because the record did not show that the elements were proven. Many appellate opinions focus on the turnover hearing, and may not go back any further. If your order is appealed, be sure your evidence proving the elements, perhaps introduced at the trial rather than at a turnover hearing, is made part of the

record on appeal. One strategy is to simply hold another turnover hearing and introduce the evidence on the record. Get a fresh order.

Filing an appeal to the judgment does not keep it from being a final order. In *In Re Bradberry*, the debtor argued that turnover was premature because the judgment was on appeal. The debtor's application for a writ of mandamus vacating the turnover order was denied. *In re Bradberry*, No. 12-12-00162-CV (Tex.App.--Tyler, August 8, 2012, no pet.) (mem. op.).

## XI. INTERVENTION

Intervention is normally not allowed post-judgment. However, someone with an interest in property that is subject to turnover may intervene to protect his interest. *Breazeale v. Casteel*, 4 S.W.3d 434 (Tex. App.-- Austin 1999, pet. denied). Use caution, because intervening and participating in the hearing subjects the third party to the court's jurisdiction. *CRE8 International LLC v Elexis Rice*, 05-14-00377-CV (Tex.App--Dallas June 3, 2015, no pet.) *Cre8 International* is discussed at section VI K 14, above.

## XII. THE TURNOVER ORDER FAILS IF THE UNDERLYING JUDGMENT FAILS.

The default judgment against Ross, in *Ross v. National Center for Employment of the Disabled*, 170 S.W.3d 635, 639 (Tex. App.—El Paso 2005) was reversed due to bad service. 197 S.W.3d 795 (Tex. 2006). Therefore, the order compelling Ross to turn over the letter of credit was also reversed, in opinion no. 05-0534, 08/31/06 (citing *Matthiessen v. Schaefer*, 915, S.W.2d 479, 480 “If the underlying judgment is reversed on appeal, then the turnover order must be reversed also.” (Tex. 1995)); *Enis v. Smith* 883 S.W.2d 662 (Tex. 1994) (Nevada court vacated its judgment more than 30 days before the Texas trial court issued a turnover order on the domesticated judgment.)

## XIII. THE TURNOVER RECEIVERSHIP

### A. The Nature of the Turnover Receivership.

The turnover receiver is appointed “with the authority to *take possession of the non-exempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.*” § 31.002 (b) (3) (emphasis added). This is a liquidation receivership, so to speak, not a receivership to preserve property.

### B. The Receivership Order Can Last Indefinitely.

The court can exercise its inherent power to enforce its judgments for an indefinite period of time. *Bahar v. Lyon Financial Services, Inc.*, 330 S.W.3d 379, 387 (Tex. App.—Austin 2010, pet. denied). It follows that the receivership order does not “time out” as long as the judgment remains alive and unsatisfied.

### C. The Authority of the Receivership.

The defendant's non-exempt property comes into the constructive possession of the court in which the receivership is pending. *First Southern Properties. v. Vallone*, 533 S.W.2d 339 (Tex. 1976). The property comes into the receivership as of the signing of the receivership order. Any unauthorized transfers of property made after the order is signed are not merely voidable, they are *void*. Title does not transfer. *Id.* at 341.

In *First Southern Properties*, the court declared an ordinary foreclosure of real property void. The receivership order had been signed prior to the sale, but the receiver had not filed a lis pendens. “No one has the authority, even under a prior deed of trust or execution, to sell property held *in custodia legis* by a duly appointed receiver, unless the sale is authorized by the court in which the receivership is pending.” *Id.* In addressing the lis pendens issue, the court said,

We do not believe that Articles 6640-6642 [requiring lis pendens notice] had the intent or effect of ousting courts of their exclusive custody and jurisdiction of receivership property, or of creating innocent purchasers of such property without court approval, when the receiver does not file an Article 6640 lis pendens notice. A receiver has been said to be an arm or instrumentality of the court, holding possession of property for the court which appointed him.

*Id.* at 343.

Therefore, notwithstanding the lack of notice to third parties, under *First Southern Properties v. Vallone*, once the order is signed, the defendant's non-exempt property is *in custodia legis*. Any transfer without the approval of the court or the receiver is void.

*First Southern Properties, Inc.* pre-dates the Turnover Statute. In 2011, the case was followed within the context of a turnover receivership, in *Pratt v. Amrex, Inc.*, 354 S.W.3d 502 (Tex. App.-- San Antonio 2011, pet. denied). Like in *First Southern Properties*, there was a foreclosure sale and the buyer was a bona fide purchaser who did not have

notice of the receivership. The substitute trustee's deed was held to be void as a matter of law, because the receivership court had not given permission for the sale.

In *Huffmeyer v. Mann*, 49 S.W.3d 554 (Tex.App.—Corpus Christi, 2001, no pet.), the joint owner of an airplane sold it to his son after the court took whether to appoint a receiver under advisement, but before the receivership order was signed. The airplane was in the hands of the court as of the time the court took the matter under advisement, so the father did not have the power to sell it.

#### **D. Competing Claims**

A receivership does not destroy a third party's liens or other rights. But they do have to come before the court to enforce their lien. *First Southern Properties. v. Vallone*, 533 S.W.2d 339, 343 (Tex. 1976). And, a court may suspend enforcement of the lien. In *Texas American Bank/West Side v. G.O. Haven*, it was not an abuse of discretion for a divorce court to enjoin the bank from foreclosing. This gave the receiver time to sell the real property. However, the party who had obtained the injunction had to post a bond and make payments to the bank until the property was sold or the injunction had expired. 728 S.W. 2d 102 (Tex. App.—Fort Worth, 1987, writ dismissed).

If another creditor garnishes the defendant's bank account during the receivership, the receiver can direct the bank to pay the proceeds to the receiver, instead of to the garnishing creditor. As of the date of the order, all of the defendant's non-exempt property described in the order flowed into the receivership.

#### **E. Chapter 64 Does Not Apply To Turnover Receivership**

CPRC Chapter 64 does not apply to a turnover receivership. *Flooring Systems, Inc. v. Chow*, Civil Action 4:12-CV-475 No. 08-40182 (E.D. Texas 2013)(Affirmed 765 F.3d 518 (5<sup>th</sup> Cir. 2014)); *Unit 82 Joint Venture v. Mediacopy Tex., Inc.* 349 S.W.3d 42, 45 n.2 (Tex. App.—El Paso 2010)(rev'd on other grounds 377 S.W.3d 694 (Tex. 2012)); *Remote Control Hobbies, L.L.C. v. Airborne Freight Corp.* No. 14-12-01088-CV (Tex. App.—Houston [14<sup>th</sup> Dist.] March 27, 2014) no pet. (Venue sections of Ch. 64 did not apply for a turnover receivership.); *Schultz v. Cadle Co.*, 825 S.W.2d 151, 154–55 (Tex. App.—Dallas 1992, writ denied 852 S.W.2d 499 (Tex. 1993), per curiam, (The Ch. 64 requirements for the appointment of a receiver under Ch. 64 did not apply for a turnover receiver.); *Holland v. Alker*, No. 01-05-00666-CV, 2006 WL 1041785 (Tex. App.—Houston [1st Dist.] Apr. 20, 2006) pet. denied, mem. op.

Attorneys and the courts often confuse the two receiverships. There is not anything in Chapter 64 indicating that the legislature was thinking about §31.002 in 1985, when it codified the receivership articles into Chapter 64.

With only a few exceptions, the substance of Chapter 64 comes to us from the late 1880s and the early 1900s, well before the turnover statute was enacted in 1979. The drafters had not conceived of turnover relief, and could not have meant for these laws to apply in a turnover context.

The intent and functioning of the turnover receivership is not at all like that of a Chapter 64 receivership. The point of the turnover statute is to aid the diligent creditor in collecting its judgment by compelling the defendant to turn over its non-exempt property for liquidation. In contrast, the Chapter 64 receivership contemplates a receiver running a business or preserving property in a prejudgment context. (See, Appendix 7).

Although the receivership order will grant the receiver all of the defendant's contract rights, the turnover receiver will be using those rights to find and take property, not to run the business. Do not expect the receiver to pay the debtor's light bill from proceeds or to give the defendant an allowance.

Courts

#### **F. Turnover Receivership Does Not Prevent Dormancy**

Although the receiver is an officer of the court, the receiver is not a sheriff or constable. A sheriff or constable is specifically required for a writ of execution which prevents dormancy under TRCP 622 and 629. *Oukrop v. Tatsch*, No. 03-12-00721-CV, (Tex. App.—Austin, July 23, 2014, no pet.)

### **XIV. THE RECEIVER'S TOOLBOX: Things A Receiver Can Do That You May Not Have Thought About**

The receiver under a comprehensive receivership order may...

#### **A. Levy on Bank Accounts**

The receiver can levy on bank accounts and non-exempt investment accounts. The receiver can call the bank anytime, checking on the status of the accounts and levying when the balance is good. The receiver's levy on bank accounts does not time out. The receiver who is on good terms with the legal departments of the large banks can also often get useful information about the debtor's deposit history. If the balance is low, the receiver can easily find out whether the levy just hit on a bad day or if the defendant really isn't using the account much.

#### **B. Sell Assignable Permits and other Rights**

The receiver may sell any transferable property right of the debtor, for example, the defendant's city permit to

operate a taxi service.

**C. Use A Broker, Hold An Auction Or Have A Private Sale**

The receiver may sell the defendant's interest in non-exempt real property in the manner that makes the most sense for the situation. Options include doing the sale via a receiver's auction, at a private sale or through a broker.

**D. Lock Out The Debtor**

The receiver may change the locks, subject to the lease provisions.

**E. Obtain Information From Third Parties**

Anyone who has accepted a check from the defendant knows where he banks. Because the receiver has the defendant's contract rights, and the right to documents relating to the defendant's property, the receiver can demand copies of credit applications, contracts and leases from anyone who has accepted payments from the defendant, such as his mortgage company and the finance company on his car. The receiver can demand copies of recent payments—a direct lead to a good bank account.

The receiver can obtain information from landlords, business associates, and business references of the defendant. Landlords, business references, and associates of the defendant are usually hesitant to talk to the creditor's counsel, but they will often provide valuable information to the receiver, a court appointed official. Often, they have a copy of the defendant's check in their file.

**F. Get a Copy of the Lease From The Landlord**

The receiver can obtain the lease to the defendant's location. The receiver has the defendant's contract rights, including any rights to the defendant's lease. If the defendant is playing musical chairs with his assumed name, the lease shows who really is doing business there. In a case where the defendant claims to have changed hands, looking at the lease can be very helpful. Defendants often don't bother to change the lease.

**G. Levy on Proceeds From a Lawsuit**

The receiver can levy on the proceeds from the defendant's anticipated recovery in a lawsuit.

**H. Levy On Government Contracts**

Have you ever had a defendant tell you that they have a big contract with the government that is about to pay off, but they are cagey about disclosing the details? Sometimes a little hint like the general location of the project or the type of services provided is enough to allow the receiver to track down the contract and levy.

**I. Capture the Defendant's Mail**

The defendant's mail may contain a wealth of information. Customer payments come in the mail. Besides being able to cash the check, the receiver learns who some of the debtor's customers are. Some of these may be good targets for a levy capturing future payments owed by the customer.

The receiver can get bank statements and statements for investment accounts; get other leads to where the defendant banks; get the defendant's cell phone numbers from the phone bill; get the debtor's online user name from the internet provider's bill; or perhaps find out that the defendant is a valued customer of the Luxor in Las Vegas.

Even a collection notice can reveal valuable information. Once, we received a statement from a collection office confirming payment. A copy of the debtor's check was included.

Capturing the mail also will give the receiver a handle on how bad the defendant's financial situation really is. The mail may include NSF notices, past due invoices from trade creditors, late child support notices, bad check notices, and the like.

Caution: See *Congleton v. Shoemaker*, No. 09-11-00453 CV (Tex.App. Beaumont, April 12, 2012 pet denied) (mem. op.). This is the only case against capturing the mail. The Beaumont Appeals Court calls it an "impermissible mail obstruction", but the turnover statute was meant to be open ended. David Hittner, *Texas Post-Judgment Turnover & Receivership Statutes*, 45 Tex. Bar J. 417, 417-18 (1982) (citing House and Senate committee reports). The reality is that the post office allows it. The receiver could not intercept the defendant's mail without the post office's consent. I would argue to a court that being able to review the defendant's mail may be essential to finding assets, at least in some cases. Chapter 7 trustees capture the mail of a business debtor on a regular basis. If your judge is against the idea, you might be able to come back later with a request for additional relief based on good cause.

**J. Search Through The Defendant's Office**

The receiver can search through the defendant's office in search of that elusive checkbook. With a good support

staff and just a little bit of luck, the receiver can have the defendant's bank account frozen before he gets back to the office from the defendant's location. Searching through the defendant's office may also net cash and checks from customers that have not been deposited yet.

**K. Levy On Accounts Receivable**

The receiver can levy on the debtor's accounts receivable.

**L. Levy on Rents.**

A levy on rents works better for commercial tenants than for residential tenants. In my experience, residential tenants will not comply with a receiver's levy for rent and it is not worthwhile to force the issue.

**M. Bring A Lawsuit**

The receiver can bring a lawsuit to recover the debtor's property, and to bring a claim against a principal or a director on behalf of the corporation in receivership. The receiver can sue to collect accounts receivable or enforce other property rights.

**N. Reconstruct The Debtor's Customer List**

If you know where the defendant banks, the receiver can sometimes reconstruct the debtor's customer list for under \$100, without any cooperation from the debtor. The receiver orders copies of non-cash deposits from the bank. For the price of the bank's normal research fees, the bank will provide copies of the debtor's deposits-- his customer's checks. Those who show up more than once are probably regular customers, ripe for a levy on their current account payable to the debtor.

**O. Obtain Copies Of Tax Returns From Accountants.**

The receiver can obtain copies of tax returns from the debtor's CPA, along with the CPA's notes and working papers. The receiver has the debtor's right to obtain documents from their CPA.

**P. Take Possession Of Miscellaneous Property Rights**

The receiver can use the defendant's contract rights and property rights. For example, the receiver may get the defendant's season tickets directly from the sports club.

**Q. Reach Property Outside Of Texas**

The turnover statute enables you or the receiver to reach property outside of Texas by compelling the defendant to turn it over, along with any indicia of ownership. (See section VII, above.)

**R. Take Control of Refillable Debit Cards**

Some of the large chain check cashing stores have refillable debit cards. With the right information, the receiver may be able to take the funds from the account accessed by the card.

**S. Obtain Defendant's Credit Report**

If provided for in the order, the receiver may purchase the defendant's credit report from the credit bureaus.

**XV. SELLING REAL PROPERTY**

The receiver may sell real property that is worth more than the judgment debt. This is not unfair because the debtor would receive the surplus. *Salaymeh v. Plaza Centro LLC* 258 S.W.3d 236 (Tex. App.—Houston [1<sup>st</sup>. Dist.] 2008, no pet.). The Court may confirm the sale after the fact. *Id.*

Unless there is a showing of fraud or material irregularities, or that the sales price was so inadequate as to shock the conscience of the court, a sale should not be overturned because the price was low. *Salaymeh*, at 222, 223; *Scheel v. Alfaro*, 406 SW3d 216 (Tex. App.—San Antonio 2013, pet. denied). Adequate notice of the sale should be given so that the debtor has a chance to pay the judgment before the property is sold. *Scheel*, 223.

**XVI. GARNISHMENT v. RECEIVERSHIP**

Is it better to garnish the defendant's bank or appoint a receiver to levy on the defendant's bank accounts?

**A. Lawsuit v. Motion Practice**

Garnishment is a lawsuit, with all the costs of filing and serving a lawsuit. The defendant must be notified of the garnishment and of his right to regain possession of the property by filing a replevy bond. Obtaining a receivership order is motion practice against the defendant. Turnover motions may be brought *ex parte*.

#### **B. Garnishee's Attorney's Fee v. The Bank's Administrative Fee For Legal Processing**

A garnishee is required to answer the garnishment and is entitled to their attorney's fees. A receivership order gives the receiver the power to take possession of the defendant's bank accounts. The order will give the receiver the defendant's contract rights. The bank must recognize the receiver's right to possession and also that the receiver has the bank's customer's contract rights. Some of the smaller banks refer the levy to outside counsel, who may charge a small fee from the captured funds. However, the large banks handle a receiver's levy internally and deduct \$100 or less from the captured funds as an administrative fee. If the bank does refer the levy to counsel, the fees should be limited, considering the bank is entitled to rely on a certified copy of the receivership order. Tex. Civ. Prac. & Rem. Code Ann. § 31.010 (West 2015). The bank is entitled to a reasonable attorney fee "if there is a contest." *Id.*

#### **C. The Receiver's Levy Does Not Time Out Until The Judgment Is Paid**

A garnishment captures funds in the bank's possession from the time of service of the writ through the time of bank's answer due date. *Wrigley v. First Nat'l Sec. Corp.*, 104 S.W.3d 252, 256-57 (Tex. App.—Beaumont 2003, no pet.). The receiver's right to the debtor's accounts attaches when the bank has been served with a certified copy of the receivership order. Tex. Civ. Prac. & Rem. Code Ann. § 31.002 (g) (West 2015). The receiver's authority continues until the receivership is closed or the judgment is satisfied.

#### **D. One Receiver Replaces The Need For Multiple Garnishments**

In cases where the judgment debtor has accounts at several banks, a garnishment action would have to be filed and served on each bank. A receiver can levy on several banks much more efficiently. The receiver can also serve a levy on account receivables due to the defendant. Without a receiver, you would have to have a writ of garnishment issued for each company that owes the defendant money.

#### **E. Quick Response Time**

Some banks respond to the receiver's levy very quickly. It is not uncommon for our office to learn the status of the defendant's bank accounts within hours of serving the levy. The bank's check may arrive in our office within a week.

#### **F. The Bank Account Returned To The Debtor's Control Faster In Receivership.**

The receiver can negotiate a payout agreement with the debtor very quickly, and instruct the bank to return control of the account back to the debtor. With a garnishment, the bank may wait until the Monday next after 20 days of being served just to file its answer, and then the rest of the garnishment proceeding must be played out.

#### **G. When Garnishment May Be More Appropriate Than A Receivership**

##### **1. Timing**

A garnishment can be had more quickly than a receivership. Many courts will not grant a receivership *ex parte*, so you would have to wait for a hearing. If you know that the funds in the defendant's account are in immediate danger of being lost to the creditor, a garnishment may be your best option. However, for the most part, you are just as likely to capture the defendant's money this month as you are next month, so consider using a receiver.

##### **2. Proceeds of Exempt Property**

Under §31.002 (f), the proceeds of exempt property remain exempt and are not subject to turnover. But this is only a turnover rule. If you think you have a sub (f) issue, consider a garnishment. *Marrs v. Marrs*, 401 S.W.3d 122 (Civ. App.—Houston [14th Dist.] March 2011, no pet.).

##### **3. Determining Rights Of Third Parties.**

Turnover is a procedural device aimed at the judgment debtor's property. It cannot be used to adjudicate the rights of a third party who claims an interest in the property. However, garnishment is a lawsuit against the third party. You can use garnishment to determine the third party's rights to the property.

#### **H. Summation: Garnishment v. Receivership.**

After preparing & serving one garnishment, the creditor gets the funds captured at one bank from the day of the

writ through that one bank's answer. Requesting a receiver is motion practice. The creditor can have all of the power and flexibility of a receivership working for it.

## **XVII. THE RECEIVER'S LEVY AND THE BANK**

### **A. The Bank Is Not Liable To Its Customer For Compliance With A Receivership Order**

A financial institution that complies with an order to turn over assets to a receiver is not liable for such compliance to the judgment debtor, a party claiming through the judgment debtor, a co-depositor with the judgment debtor, or a co-borrower with a judgment debtor. The bank is entitled to rely on a certified copy of the receivership order. Tex. Civ. Prac. & Rem. Code Ann. § 31.010 (West 2015); *Yazdchi v. Bank One*, 177 S.W.3d 399 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2005, pet. denied).

In a separate, later *Yazdchi* opinion, the Fourteenth District followed *Yazdchi v. Bank One*, saying the First Court had found that the banks were “statutorily immune” from liability for transferring funds from the Yazdchis' accounts to the receiver. *Yazdchi v. Tradestar Inv. Inc.*, 217 S.W.3d 517 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

### **B. The Burden is on the Debtor To Contest The Receiver's Levy**

The Texas Finance Code puts the burden of contesting the levy on the debtor:

The customer bears the burden of preventing or limiting a financial institution's compliance with or response to a claim subject to this section by seeking an appropriate remedy, including a restraining order, injunction, protective order, or other remedy, to prevent or suspend the financial institution's response to a claim against the customer.

Tex. Fin. Code Ann. § 59.008 (c) (West 2013); *Yazdchi v. Bank One*, 177 S.W.3d 399 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2005, pet. denied)

*See, also, Davis v. West*, where a summary judgment in favor of the bank was sustained. 317 S.W.3d 301 (Tex.App.—Houston [1<sup>st</sup> Dist.] 2009, pet. denied). The bank honored a receiver's levy that had been only been served on the bank via fax. The opinion used § 59.008 and *Yazdchi* in its analysis.

### **C. The Bank Should Not Mention A Record Request by the Receiver To Its Customer**

Texas Finance Code Ann. §59.006 (West 2013 & Supp. 2015), Discovery of Customer Records, provides the *exclusive method* for compelled discovery of a record of a financial institution relating to its customer.

“This section provides the exclusive method for compelled discovery of a record of a financial institution relating to one or more customers but does not create a right of privacy in a record. This section does not apply to and does not require *or authorize* a financial institution to give a customer notice of: ... (5) a record request by a duly appointed receiver for the customer.” (emphasis added) § 59.006 (a) (5).

Of course, the bank will have to notify its customer of withdrawals from the account. So, if you don't want the defendant to know that you have also requested copies of bank statements and deposits, the receiver's record request should be served in a separate document from the receiver's levy on the bank account.

The bank cannot claim that the Gramm Leach Bliley Act prohibits the bank from giving up its documents with regard to the debtor. 15 USC 6802 (e) (8) specifically excludes properly authorized civil investigations and subpoenas from the prohibition against sharing private information.

## **XVIII. USING THE RECEIVER ON SMALL DOLLAR CASES**

The receiver's fee is taxed against the defendant as a cost, in the receivership order. The fee is added to the judgment amount and is paid from the recovery.

The creditor should expect to come out of pocket for putting up the receiver's bond (usually \$100 or \$200 in county court), if any, and some small amount to cover postage on certified mail and certified copies of the order. If the creditor is willing to fund a garnishment (filing fee, and cost of service of process, and possible bank's attorney fees), it is a better deal to risk the same amount, or less, to have a receiver appointed.

## **XIX. GETTING THE RECEIVER APPOINTED**

### **A. Same Elements as Turnover Relief in General**

The elements are the same for getting other turnover relief. See section IV.

**B. Who May Be A Receiver?**

The turnover statute is silent as to who may be a receiver. As stated above, Chapter 64 of the Texas Civil Practice & Remedies Code (receivership to preserve property) does not apply to turnover receiverships, however trial courts and counsel sometimes use the Chapter 64 requirement (*see, Moyer v. Moyer*, 183 S.W.3d 48 (Tex. App.-Austin 2005, no pet.): a receiver must be a citizen and qualified voter of this state at the time of appointment and not be a party, attorney or other person interested in the matter.

The mere fact that a receiver expects to get paid from receivership property does not make the receiver a person “interested” in the appointment of a receiver. *Swate v. Johnston*, 981 S.W.2d 923 (Tex.App.--Houston [1<sup>st</sup> Dist.] 1998, no pet. n 1).

The receiver must also maintain actual residence in Texas during the receivership, under Chapter 64. Tex. Civ. Prac. & Rem. Code Ann. § 64.021 (West 2008). Turnover receivers might as well live in Texas.

As a practical matter, it is helpful to find someone who is experienced with collection practice and is well versed in the exemptions. If you know who you would like to use as receiver, contact the receiver before the hearing to discuss fees and anything the receiver might want included in the order.

**C. The Receiver Qualifies**

The receiver should qualify to serve by filing an oath and the bond, if one was ordered, with the court. The turnover statute does not require a receiver’s oath, but most orders state that the receiver should file an oath, and judges expect to see one. No bond is required by the statute or the case law (see below), but if the judge sets a bond, the bond should be paid before the receiver begins work.

**XX. PROCEDURAL CONSIDERATIONS- RECEIVERSHIPS****A. No need to wait 30 days**

See, section V, above. However, if a motion for a new trial is granted, the turnover order evaporates. *Scheel v. Alfaro*, 406 SW3d 216 (Tex. App.--San Antonio 2013, pet. denied), citing *Baca v. Hoover, Bax & Shearer*, 823 S.W.2d 734, 738-39 (Tex.App.--Houston [14<sup>th</sup> Dist.] 1992, writ denied.)

**B. May be granted ex parte.**

See section V, above.

It is good practice to give the defendant notice of the hearing. If the defendant has notice, it will be much less likely to bring an application for a TRO once the receiver begins seizing assets. Also, the TRO would be much less likely to succeed if the matter has already been heard. Unless there is good reason to proceed *ex parte*, you might as well give notice. The defendants often do not appear.

**C. No Bond Is Required**

*Childre v. Great Sw. Life Ins. Co.*, 700 S.W. 2d 284 (Tex. App.—Dallas 1985, no writ). The decision whether to require a receiver’s bond lies within the court’s discretion. Texas Rule of Civil Procedure 695a, which requires a bond “...conditioned for the payment of all damages and costs in such suit...” does not apply. *In re Estate of Herring* 983 S.W.2d 61, 64 (Tex. App.—Corpus Christi 1998, no pet.).

The rule is clearly for a prejudgment / Ch 64 matter. It provides for a receiver’s bond to protect the defendant in the case of a wrongfully appointed receiver. The idea of a wrongfully appointed turnover receiver is out of context, because creditor has already won its judgment and the elements will have been proved up at the hearing.

“There is a strong view that since the underlying obligation has been determined by final judgment, the judgment debtor will not be harmed if no bond, or merely a nominal bond, is required. Any bond which may be required should be carefully framed so as not to indemnify the judgment debtor in the traditional sense, as the righteousness of the appointment should have been fully litigated in any hearing pursuant to the new statutes.”

*Childre*, 700 S.W.2d at 289. The only possible purpose for a receiver’s bond would be one paid by the creditor to indemnify the receiver for out of pocket costs.

Unless the judgment debtor shows extraordinary circumstances,

any bond required should not be in an amount that would act as a prohibitive cost or make it economically

impossible for the judgment creditor to use the remedies provided in [the turnover statute] for even the smallest of judgments.

*Id.* at 289 (quoting Hittner, *supra*, at 420); *Shultz v. Cadle Co.*, 825 S.W.2d 151, 154-155 (Tex.App.—Dallas 1992, writ denied); *Estate of Herring*, 983 S.W.2d 61 (Tex. App.—Corpus Christi, 1999, no pet.)

#### **D. The Traditional Requirements For Appointment Of A Receiver Do Not Apply**

In *Childre*, the judgment creditor sought an injunction, as well as the appointment of a receiver. Childre, the judgment debtor, argued that the creditor had not exhausted its remedies, because the injunction had not yet been denied. 700 S.W. 2d at 288. Also, the creditor had not shown imminent harm would occur unless an injunction was granted. *Id.* However, the court ruled that the traditional requirements for the appointment of a receiver do not have to be met. The creditor need not exhaust its remedies and did not have to show imminent harm. *Id.*; *Hennigan v. Hennigan*, 666 S.W.2d 322, 323 (Tex.App.—Houston [14<sup>th</sup> Dist.] 1984, writ ref'd n.r.e.)

Receiverships for preserving property, found at Chapter 64 of the Civil Practice and Remedies Code, requires a showing that the property subject to the receivership is in danger of being lost, removed or materially injured. Tex. Civ. Prac. & Rem. Code Ann. § 64.001 (b) (West 2008). However, the turnover statute does not refer to the requirements of Chapter 64:

Indeed, if the Texas legislature had intended for the appointment of receivers in turnover proceedings to meet the requirements of the receivership statutes, it would have provided for or at least referred to these requirements in the turnover statute. Since the turnover statute does not provide specific requirements for the appointment of a receiver, this decision falls within the trial court's discretion.

*Schultz v. Cadle Co.*, 825 S.W.2d 151, 155-55 (Tex. App.—Dallas 1992, writ denied) (internal citations omitted).

### **XXI. DRAFTING CONSIDERATIONS**

#### **A. § 31.002 (h): Specificity In Turnover Orders**

§ 31.002 (h) supersedes a troublesome line of cases requiring property to be specifically identified in the turnover order. *See, Bergman v. Bergman*, 828 S.W.2d 555, 557 (Tex. App.—El Paso 1992, no writ); *Roebuck v. Horn*, 74 S.W.3d 160 (Tex. App.—Beaumont 2002, no pet.); *Moyer v. Moyer*, 183 S.W.3d 48 (Tex. App.—Austin 2005, no pet.). The legislature has made it clear that: “A court may enter or enforce an order under this section that requires the turnover of non-exempt property *without* identifying in the order the specific property subject to turnover.” § 31.002 (h) (emphasis added).

These cases required the creditor to put the debtor on notice, via the turnover application, of what properties to transfer or hide. Also, if undisclosed leviable property was found after the order was signed, under this line of cases, the newfound property would not be subject to turnover, not having been identified in the order. These cases go against the intent of the turnover statute—to put the burden of disclosure on the defendant and to give the creditor an affordable, effective remedy. § 31.002 (h) provides that the order does not have to specifically identify the property.

David Hittner, in his article introducing the turnover statute, recommends that “The proposed order shall state with *reasonable particularity* the items to be turned over.” David Hittner, *Texas Post-Judgment Turnover & Receivership Statutes*, 45 Tex. Bar J. 417, 419 (1982) (emphasis added). My view is that a laundry list type order satisfies this requirement and § 31.002 (h).

There are cases after § 31.002 (h) was enacted where it was found to be an abuse of discretion to order turnover of property when there was no evidence that the defendant owns any of that kind of property. *See, for example, Stanley v. Reef Sec., Inc.*, 314 S.W.3d 659 (Tex.App.—Dallas 2010, no pet.). If you find yourself in that situation, consider submitting an order that does not compel the debtor to turn over the property, but empowers the receiver to seize it. For future rights to property, consider language compelling the defendant to turn it over within a set time period once the defendant obtains possession or control over that type of property. *See, the subsection (h) discussion above, in the general turnover section at IV.B and IV.C.*

The order must identify the property coming into the receivership well enough to give the receiver notice of what property is in his charge. *See, Connellee v. Witty*, 246 S.W. 715 (Tex. Civ. App.—Fort Worth 1922, no writ). “To be valid, a turnover order must be definite, clear and concise in order to give the person to whom it is directed sufficient information as to his duties and should not be such as would call on him for interpretations, inferences, or conclusions.” *Thomas v. Thomas*, 917 S.W.2d 425, 434 (Tex. App.—Waco 1996, no writ). The order should be specific enough to support an eventual contempt action against the debtor for failure to turn over property as ordered. The order should spell out the details of compliance “in clear, specific and unambiguous terms” so the debtor will know exactly the

duties or obligations imposed on it. *Ex parte Hodges*, 625 S.W.2d 304, 306 (Tex. 1981) (following *Ex parte Slavin*, 412 S.W.2d 43 (Tex. 1967)).

### 1. Examples

- a) An order directing the turnover simply of “all non-exempt assets” was reversed in *Bergman v. Bergman*, 828 S.W.2d 555 (Tex. App.—El Paso 1992, no writ). While such an order may no longer be reversible in light of subsection (h), it would still be hard to enforce. It would not be specific enough to support a contempt against the defendant for failure to make the turnover, and it may not even be specific enough to let the receiver know what assets are in his charge.
- b) “Income derived from the law practice” is specific enough. *Thomas*, 917 S.W.2d at 434.

### B. Should Your Order Include Master of Chancery Powers?

Some attorneys include master in chancery powers in their receiver orders. Some orders in circulation include master of chancery powers without using the term “master” or “Master in Chancery”. The idea is that the receiver, having the powers of a master, could command the judgment debtor and non-party witnesses to appear at a hearing to testify about the debtor’s assets. Also, a master will file a report with his or her findings. It is important to note that the master’s report becomes conclusive if there is no timely objection.

However, the case law has come down against the use of a master in a turnover context. Rule 171, Master In Chancery, states, “The court may, *in exceptional cases*, for *good cause* appoint a master in chancery...” (emphasis added). In *Suttles v. Vestin Realty Mortgage I, Inc.*, the First District did not find good cause or that the case was exceptional. 317 S.W.3d 412 (Civ. App.—Houston [1st Dist.] 2010, no pet.). The First District compared post judgment collection to a complex toxic tort case with 19 parties. The order appointing a master in the toxic tort case was vacated. See, *Simpson v. Canales*, 806 S.W.2d 802 (Tex. 1991). It follows that post judgment discovery does not merit the appointment of a master.

Does a conflict of interest arise when the receiver is also a master, having the power to rule upon his own right to obtain information? This question was raised in the appeal in *Roebuck v. Horn*, 74 S.W.3d 160, 163-64 (Tex. App.—Beaumont 2002, no pet.) and remanded back to the trial court for consideration. (See, also, *Sheikh v. Sheikh*, 248 S.W.3d 381 (Tex. App.—Houston [1st Dist.] 2007, no pet.)). In a later Ninth District case, they find a conflict because the receiver’s fee comes out of what the receiver is able to collect, and that same person could be ruling upon objections as a Master. *Congleton v. Shoemaker*, 09-11-00453-CV (Tex.App.—Beaumont April 12, 2012, pet. denied) (mem. op.).

Although having the receiver appointed as master could greatly facilitate the search for the judgment debtor’s assets in some cases, the post judgment discovery of assets is not the exceptional circumstance required by Rule 171. An order granting a receiver the powers of a master raises a conflict of interest issue that might not survive a challenge.

Appellate review of an order appointing a master in chancery is done through a petition for writ of mandamus. *Moyer v. Moyer*, 183 S.W.3d 48, 58 (Tex. App.—Austin 2005, no pet.); *Tanner v. McCarthy*, 274 S.W.3d 311, (Tex.App.—Houston [1<sup>st</sup> Dist.], 2008, no pet.)

### C. Handling The Receiver’s Fee In The Order.

Include language taxing the receiver’s fee and expenses against the defendant as a cost of court. It is important to put the receiver’s rate into the order because the receiver needs to know how much money to ask the bank and accounts receivable for. In most cases, we only get one bite at the apple. We can’t ask the bank for X dollars, wait for a hearing to determine receiver’s fees, and then go back to the bank for more money. My view is that a receiver’s levy should state a specific dollar amount to be seized. If the receiver’s levy simply locks down the entire balance in the account, there is a risk that more money will be seized than is required to satisfy the judgment. So, the order should state how the fee is calculated. The sample order in the appendix shows how I handle it.

Say in the receivership order that the fee calculation is usual and customary. Do not include a finding that the receiver’s fee is reasonable. A finding that the receiver’s fee is reasonable, before the receiver has done any work, is premature and an abuse of discretion. *Moyer v. Moyer*, 183 S.W.3d 48 (Tex. App.—Austin 2005, no pet.). In *Moyer*, the order awarded the receiver 25% of all proceeds coming into his possession, found that it was a reasonable fee, and authorized the receiver to pay himself.

State in the order that the fee calculation (25%) is the usual and customary fee for a turnover receiver. Later in the case, when there are funds to distribute, get a new order on the reasonableness of the fee. The 5th District upheld

the receiver's contingent fee in *Evans v. The Frost National Bank*. *Evans* was distinguished from *Moyer* because in *Evans* the receiver came back later and got a new order on reasonableness. *Evans v. The Frost National Bank*, No. 05-12-01491-CV (Tex.App.--Dallas August 11, 2015, no pet.)(mem. op.).

The courts need to recognize that post judgment collection is mostly a contingent fee arena. There continues to be litigation based on *Moyer* and cases that follow it, which are based on rules for determining the reasonableness of an hourly fee. *Moyer* misguidedly applied an hourly fee rationale derived from old cases to a turnover post judgment collection situation.

#### **D. Miscellaneous**

1. The order should state that it is based upon the evidence (as well as arguments of counsel and perhaps the papers on file). See the discussion in section IV.
2. The receiver's authority comes from the order appointing the receiver. The order must comply with the statute authorizing the appointment. *Ex parte Hodges*, 625 S.W.2d 304, 306 (Tex. 1981). If you have a particular asset in mind to be turned over, or a particular type of asset, put it in the order.
3. No bond is required. However, it is within the court's discretion. Some attorneys draft the order with a blank for the court to fill in, and the court can fill in a zero: "The receiver is / is not required to post a bond of \$\_\_\_\_\_."
4. The judgment creditor is entitled to recover reasonable costs, including attorney's fees. Include a provision for your post judgment attorneys fees and costs. § 31.002 (e). Consider adding a sentence allowing the creditor to seek additional fees later.
5. Do not have the property turned directly over to the creditor. "The potential for error or abuse where turnover is ordered directly to judgment creditors is obvious, considering that the statute allows ex parte entry of the order without notice and hearing." *Ex parte Johnson*, 654 S.W.2d 415, 419 Tex. 1983); *Lozano v. Lozano*, 975 S.W.2d 63 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, pet. denied).
6. If the judge in your case is hesitant to appoint receivers, or if you are not sure, consider including language in the order to the effect that the receiver shall hold any property seized until directed by further orders of the court or until there is a written agreement with the defendant. This assures the judge that the court maintains control over the seized assets, notwithstanding the broad powers granted to the receiver.  
Language stating that the receiver will not distribute without an agreement or the court's approval could be the key to getting a reluctant judge to sign your order.
7. The most useful receivership order both compels turnover of the debtor's property and empowers the receiver to take possession of it. For each piece of property or type of property that the debtor is to turn over, give your receiver the power to take possession. If you are ordering the turnover of a type of property in a laundry list, condition it so that the turnover is required within a set number of days after receipt by the defendant. This is to avoid an order that compels turnover of something the creditor never proved that the defendant owns.
8. Review the form you are using carefully and re-work language that is not appropriate to a turnover receivership. The turnover order should not have empowering language about running the debtor's business. The receiver is appointed to seize and sell the defendant's assets. § 31.002 (b) (3).
9. Include a clause that the receiver may take control of the defendant's mail and the mail of any business owned by the defendant by redirecting it to the receiver's address. But, see the discussion on capturing mail in section XIV, above.  
Some judges will only approve language that captures business mail. However, if the debtor's address is a business address, the distinction is meaningless. All mail sent to a business address is presumed to be business mail. Domestic Mail Manual Publication 508, 1.6, March 3, 2009) (Appendix 4).
10. If the business is not wholly owned by the judgment debtor, draft the order to only bring the debtor's interest into the receivership. *Roebuck v. Horn*, 74 S.W.3d 160, 163-64 (Tex. App.—Beaumont 2002, no pet.).
11. If you want the order to require the debtor pay a certain sum of money every month, the order must specify what non-exempt property is owned by the debtor and direct that the payments will come from that property. An order

compelling payments that does not identify any non-exempt assets sufficient to cover the payments or says what the non-exempt source of the payments is will be overturned as an abuse of discretion. *See, Ex parte Prado*, 911 S.W.2d 849, 850 (Tex. App.—Austin 1995, no writ); *W.T.J. v. S.L.S.*, No. 03-10-00335-CV (Tex.App.-- Austin August 2012, no pet.) (mem. op.).

12. Be aware of the line of cases holding that the order should specify which assets are to be turned over by debtor. *Moyer v. Moyer*, 183 S.W.3d 48 (Tex. App.-Austin 2005, no pet.); *Bergman v. Bergman*, 828 S.W.2d 555, 557 (Tex. App.—El Paso 1992, no writ); *Roebuck v. Horn*, 74 S.W.3d at 163-64. These cases have been superseded by statute. Tex. Civ. Prac. & Rem. Code Ann. § 31.002 (h), There is a small handful of opinions issued after sub (h) was enacted that ignore the statute, so watch out for those.

13. A post judgment order cannot be inconsistent with the original judgment. It cannot require performance of obligations in addition to the obligations imposed by the final judgment. “This is particularly true when such orders purport to adjudicate the rights of non-parties.” *In Re Old American County Mutual Fire Insurance Company*, No. 13-14-00231-CV (Tex. App.-- Corpus Christi Sept 25, 2014, orig. proceeding).

## **XXII. BANKRUPTCY ISSUES**

### **A. General Discussion**

Once the defendant files its bankruptcy petition, all collection actions, including the receivership, must cease, per the automatic stay. 11 U.S.C.S. § 362 (LEXIS L. Publg. 1995 & Supp. 2008).

11 U.S.C.S. § 543 (LEXIS L. Publg. 2007), Turnover of Property by a Custodian, prohibits the receiver from administering or making any distributions from the debtor’s property, except as may be necessary to preserve the property. The receiver is to deliver the property to the trustee and file an accounting. § 543 (b). The receiver is entitled to its fee for preserving the debtor’s property, after notice and a hearing. § 543 (c). The receiver’s fee is a priority administrative claim under § 503 (b) (3) (E) (A custodian superseded under § 543) and under § 507 (a) (1).

The receiver must turnover any property of the defendant in its possession *to the trustee*. Debtors who think that filing a bankruptcy will result in the return of their property may be surprised when they don’t get it back, after all.

### **B. The Receivership Does Not Preclude a Bankruptcy.**

*In Re Gaston Premier Homes, Ltd.*, No. 09-11903-cag, Nov. 18, 2009, U.S. Bankr. Ct, W.D. Tex. The defendant, a limited partnership, filed a Chapter 7 after a receiver was appointed. The receiver argued that the bankruptcy should be dismissed because the debtor did not have authority to file, without the receiver’s consent. Under the turnover order, the receiver controlled the defendant’s assets, including its contract rights and choses of actions. There are cases supporting the receiver’s position that only the receiver can authorize a bankruptcy, but they are cases about Chapter 64 receiverships. *See, Chitex Communication, Inc. v. Cathleen Kramer, Et al.*, 168 B.R. 587 (S.D. Tex. 1994). The court drew a distinction between a Chapter 64 receivership and a turnover receivership. The Court recognized that a turnover receivership is, after all, a collection device. §31.002 does not preclude the debtor from using its remedies under federal law. On the bright side, the Court dismissed the bankruptcy on other grounds. *In Re Gaston Premier Homes, Ltd.* is important because it recognizes the difference between a Chapter 64 receivership and a Turnover receivership.

### **C. When the 90 Day Preference Period Starts**

For property in receivership, the look back time on the preference may depend on what kind of property is seized.

*In In Re Poston*, the property was money in the bank that had been seized by the receiver. A turnover order places the defendant’s property into receivership as of the date the order is signed. *First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339 (Tex. 1976). The creditor argued that the transfer of the property occurred when the receiver was appointed, which was outside the preference period. However, §31.002 (g) states that the receiver’s rights to money in a bank do not attach until the bank is properly served with the turnover order. The preference period began when the receiver served his Receiver’s Levy on the bank. 08-40182; Adv. Proc. No. 100-4030, Bankr. E.D. Texas, May 24, 2012 (Affirmed at 765 F.3d 518 (5<sup>th</sup> Cir. 2014) (affirming the district court’s opinion which affirmed the bankruptcy court’s opinion.). (*Poston* did not discuss the fact that the order compelled the debtor to turn over cash within a few days of receipt. The Court focused only on when the receiver seized the money.)

§31.002 (g) only applies to property held by a financial institution. This raises the question of when the preference period would begin for other kinds of property. Many turnover orders compel the defendant to turn over property when they obtain possession of it. Also, the statute and most orders cover future rights to property. So, outside of 31.002 (g), the transfer should be effective when the order is signed. *First Southern Props.* I would argue that property not

already owned by the debtor when the order was signed comes *in custodia legis* when the debtor receives it. However, *Poston* is the authoritative case.

### XXIII. SERIAL RECEIVERSHIPS

What happens when the defendant is put into receivership in two different proceedings? The defendant's non-exempt assets are *in custodia legis* as of the signing of the receivership order. *First Southern Properties. v. Vallone*, 533 S.W.2d 339 (Tex. 1976). The first receivership order signed controls. The assets are in the control of the court for the first receivership. This, they are not available to the court ordering a later receivership. The receiver in the first receivership can elect to accept payments from the debtor over time, forcing other creditors and subsequent receivers to wait their turn.

A plaintiff may obtain turnover to satisfy several judgments against the same debtor. *Barrera v. State*, 130 S.W.3d. 253 (Tex.App.--Houston [14<sup>th</sup> Dist.] 2004, no pet.)

### XXIV. ENFORCING THE TURNOVER ORDER

Some attorneys and receivers file a contempt motion when the judgment debtor fails to do the discovery as instructed by the turnover order. Some attorneys file a Motion For Sanctions, which does not carry the threat of jail time, but it can be compelling enough. The order usually states that if the debtor does not comply by a certain date, he or she can be held in contempt. The sanctions order typically awards plaintiff's counsel fees for bringing the motion.

When drafting a contempt motion, be sure to state specifically what the defendant failed to do. A general allegation in the motion or an affidavit that the defendant failed or refused to cooperate with the receiver's request for documents is insufficient. *In Re Capoche* No. 01-12-01063-CV (Tex.App.--Houston [1st. Dist.] November 29, 2012, orig. proceeding) (mem. op.).

### XXV. WHAT YOUR RECEIVER NEEDS TO GET STARTED.

Creditor's counsel brings the application for turnover relief. Once the order is signed, the creditor's counsel forwards the order to the receiver.

The receiver needs more from you than a bare copy of the order and a cover letter saying, "Sic 'em!" Send your receiver an information packet containing the following:

#### A. A Good Copy of the Order.

The receiver will be presenting the order to several people during the course of the receivership. A crisp, clean copy carries more weight than a faxed copy that has been reduced and muddled by scanners and fax machines.

#### B. A Certified Copy of the Order.

If you know where the defendant banks, or you expect to find out, go ahead and buy a certified copy of the order while you are at the courthouse. The receiver's rights to the defendant's bank accounts *do not attach* until the bank is served with a certified order. Tex. Civ. Prac. Rem. Code § 31.002 (g) (West 2015). As a practical matter, many banks, especially the large banks who are familiar with receiver levies, do not require a certified copy. However, there is no reason to take a chance, especially if the amount sought is large or the defendant can be expected to pull some weight at their bank. If the bank is not served with a certified order, it can absolutely ignore the receiver while its customer empties his account.

Practice Tip: Take a stamped return envelope addressed to the receiver and your checkbook with you to the hearing so you can purchase certified copies while you are there. If the clerk cannot process the certified copy for you while you wait, they will mail it to the receiver in the envelope.

#### C. The Bond Check.

If a bond has been ordered, provide your receiver with a check in the amount of the bond. Make your draft *payable to the clerk* of the court, and send it to the receiver with your information packet. The receiver will submit the check to the court, along with the oath of office. Or, you can deposit the bond funds after the hearing while you are still at the courthouse and provide the receiver with a copy of the receipt.

In the District Courts in Dallas County and Travis County, the clerk requires a separate check for a "bond approval" fee, even on cash bonds.

#### D. Contact Information on the Debtor.

Your receiver needs address and contact information for the defendant, its principals, its places of business, and its counsel.

**E. The Defendant's Tax ID Number.**

Provide the defendant's Tax ID number or Social Security number, if you have it.

**F. The Credit Application.**

The credit application may indicate banks and business references that the receiver can follow up with.

**G. Relevant Discovery.**

Provide any pages of discovery responses that indicate leviable assets.

**H. The Judgment or Abstract.**

The receiver needs a copy of the judgment or the abstract of judgment, along with a brief statement of any post-judgment credits and charges, so he can keep track of the current amount due. The receiver needs this in order to calculate the payoff amount for a bank levy. The judgment or abstract helps the receiver when discussing the charges and the payoff amount in conversations with the debtor.

**I. Information On Any Leviable Assets.**

A description of the assets that you are aware of, including who might be holding them. If you have already obtained copies of asset search reports and the tax records on real property from the appraisal district's web site, forward it to the receiver.

**J. Banking Information.**

Provide any leads to the defendant's bank. You do not need to have the account number, but provide it if you have it.

**K. Background Information.**

A few sentences describing the debtor and its business is helpful. Bring the receiver up to speed on the post-judgment history of the case. Help your receiver to be authoritative and knowledgeable in discussions with the defendant by arming him with the recent history, up front. The receiver can counter the defendant's excuses, and probe for information better, when he knows the background.

**XXVI. CONCLUSION**

Turnover receivership has been available to creditors since 1979. You can have it with a simple motion and a hearing.

It is a powerful, wonderfully flexible collection tool that should be a regular part of your arsenal. It is not difficult to integrate the procedure of getting a receiver appointed into your regular post judgment collection practice. For about the same amount of work as it would take to get a garnishment, you could be using a receiver!

**Appendix 1**

SAMPLE RECEIVERSHIP ORDER - INDIVIDUAL

**No. XX-XX-XXXX-X**

<b>Plaintiff</b>  <b>v.</b>  <b>Defendant</b>
---

**In The [ \_\_\_\_\_ ] Court**

**At Law Number [    ] Of**

**Dallas County, Texas**

**ORDER APPOINTING RECEIVER AND TO COMPEL DISCOVERY - INDIVIDUAL**

CAME ON to be heard the Application for Turnover After Judgment of **[Plaintiff]** (herein “Applicant”); whereupon, the Court, after review of the papers on file in this cause, became of the opinion that a Receiver should be appointed to take possession of and sell the leviabale assets of **[Defendant]** (herein “Defendant”). Based on the pleadings, the evidence and the papers on file in this cause, the Court finds that the defendant owns non-exempt property. Notwithstanding any contrary language herein, this order does not compel turn over of Defendant’s homestead, or checks for current wages or other exempt property.

**IT IS THEREFORE ORDERED** that **Michael S. Bernstein, whose address is 325 Gold Street, Suite 104, Garland Texas 75042- 1805 ((972) 271-2700 (office); (972) 271-1818 (fax))** be, and he is hereby appointed **Receiver** in this case pursuant to the Texas Turnover Statute with the power and authority to take possession of and sell all leviabale property of Defendant through a private or public sale, including, but not limited to the following non-exempt property: (1) all documents or records, including financial records, related to such property that is in the actual or constructive possession or control of the Defendant; (2) all financial accounts (bank account), certificates of deposit, money-market accounts, accounts held by any third party; (3) all securities; (4) all real property, equipment, vehicles, boats, and planes; (5) all safety deposit boxes or vaults; (6) all cash; (7) all negotiable instruments, including promissory notes, drafts, and checks; (8) causes of action, choses of action and judgments; (9) contract rights, whether present or future; (10) accounts receivable and (11) intangible property and property rights, including but not limited to intellectual property rights such as internet domains, patents, copyrights and trademarks; and that all such property shall be held in custodia legis of said Receiver as of the date of this Order.

Defendant is **ORDERED** to turnover to the Receiver within five (5) days from Defendant's receipt of a copy of this Order: 1) the documents contained on **Exhibit "A"** attached hereto, together with all documents and financial records which may be requested by the Receiver; 2) all checks, cash, securities (stocks and bonds), promissory notes, documents of title, and contracts owned by or in the name of Defendant;

Defendant is **ORDERED** to identify and turn over to the receiver all interests of the defendant in any business or venture and all agreements, stock certificates and other documents pertaining to the defendant's ownership in the business or venture within five (5) days from defendant's receipt of a copy of this order.

This ORDER constitutes a Charging Order under the Texas Business Organizations Code. This order constitutes a lien upon the judgment debtor's partnership interest in any partnership and the judgment debtor's membership interest in any limited liability company. The receiver has the right to receive any distribution to which the judgment debtor would be entitled from the debtor's partnership or membership interest.

Defendant is **ORDERED** to continue, until the Judgment in this cause is fully paid, to turnover to the Receiver at the Receiver's address all checks, cash, securities, promissory notes, documents of title, and contracts within three (3) days from the Defendant's receipt of such property. Paychecks for current wages are exempt from this order.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, authority and powers with respect to the Defendant's property, to: 1) collect all accounts receivable of Defendant and all rents due to the Defendant from any tenant; 2) change locks to all premises except the defendant's homestead, at which any property is situated; 3) direct the delivery of Defendant's mail and the mail of any business of the defendant to the Receiver's address and open all mail directed to Defendant and any business of the defendant; 4) endorse and cash all checks and negotiable instruments payable to Defendant, except paychecks for current wages; 5) hire a real estate broker to sell any real property and mineral interest belonging to the Defendant; 6) hire any person or company to move and store the property of Defendant; 7) (the right but not the obligation) to insure any property belonging to the Defendant; 8) obtain from any financial institution, bank, credit union, credit bureau, savings and loan, title company, or any other third party, any financial records, including credit reports belonging to or pertaining to the Defendant; 9) obtain from any landlord, building owner or building manager where the Defendant or the Defendant's business is a tenant copies of the Defendant's lease, lease application, credit application, payment history and copies of Defendant's checks for rent or other payments; 10) hire any person or company necessary to accomplish any right or power under this Order; and 11) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property,

and leased premises wherein any property of Defendant may be situated, and to review and obtain copies of all documents related to same.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the right, authority and power to request and obtain from providers of utilities, telecommunications, telephone, cell phone, cable, internet, data services, internet website hosts, satellite television services, and all similar services, (including Time Warner, AT&T, Verizon, Sprint, Satellite TV, Direct TV, EV1, Google, Yahoo, and internet blogs and chat rooms) the production of any information regarding the defendant's payments, payment history and financial information, including account information, telephone numbers, names, service addresses, telephone numbers, IP addresses, call detail records, payment records, and bank and credit card information. This Order serves as the court order required by 47 USC § 551, and satisfies all obligations of the responding party to obtain or receive a court order prior to disclosing material containing personally identifiable information of the subscriber and/or customer.

All Sheriffs or Constables, and their deputies, and all other peace officers, are hereby ordered to assist the Receiver in carrying out his duties and exercising his powers hereunder and prevent any person from interfering with the Receiver in taking control and possession of the property of Defendant, without the necessity of a Writ of Execution. The Receiver is authorized to have a writ of execution issued and to direct any Constable or Sheriff to seize and sell property under the writ.

[ IF DISCOVERY WAS SERVED AND UNANSWERED ] It is further, **ORDERED** that Defendant shall fully answer and serve on both Receiver and Applicant, within 30 days, post judgment interrogatories previously served by applicant on defendant.

It is further ORDERED that Applicant have and recover of and against Defendant, Judgment in the additional sum of \$\_\_\_\_\_ as additional attorney fees for the presentation of this motion.

The Receiver has the authority to issue subpoenas for the production of documents to the defendant and to third parties.

The Receiver **is / is not** ordered to post bond in the amount of \$\_\_\_\_\_ payable to this Court and conditioned upon his faithful discharge of his duties in accordance with this Order. The Clerk may accept a check from the receiver or the applicant's attorney's firm for the bond. The receiver's fee is 25% of all proceeds coming into his possession, which the Court finds to be the customary and usual fee for a turnover receiver. The receiver's fee is taxed as a cost against the defendant. The Receiver is further ordered to take the oath of his office.

**SIGNED** this \_\_\_\_\_ day of \_\_\_\_\_, [YEAR].

\_\_\_\_\_  
[name], JUDGE PRESIDING

**APPROVED AS TO FORM:**  
[FORWARDING ATTORNEY]

BY: \_\_\_\_\_  
[ATTORNEY]  
[State Bar No. ]  
PLAINTIFF’S ATTORNEY

**EXHIBIT A TO RECEIVERSHIP ORDER  
DOCUMENTS TO BE TURNED OVER TO RECEIVER**

All records, as hereinafter described, concerning affairs of Defendant; unless otherwise noted, for the preceding 36 months:

1. bank statements; pass books and other bank or financial institution records;
2. federal income and state franchise tax returns;
3. all motor vehicle Certificates of Title (preceding 72 months);
4. real property deeds and deeds of trust (preceding 10 years);
5. business journals, ledgers, accounts payable and receivable files;
6. state sales tax reports;
7. credit applications and other documents stating debtor’s financial condition (preceding 72 months).

**Appendix 2****ORDER APPOINTING RECEIVER AND TO COMPEL DISCOVERY-CORPORATE****XXVII. ORDER APPOINTING RECEIVER AND TO COMPEL DISCOVERY-CORPORATE**

CAME ON to be heard the Application for Turnover After Judgment of [Plaintiff] (herein “Applicant”); whereupon, the Court, after review of the papers herein on file, became of the opinion that a Receiver should be appointed to take possession of and sell the leviable assets of [Defendant]. Respondent refers to [officer of defendant], an officer of the Defendant. Based on the pleadings, the evidence and the papers on file in this cause, the Court finds that the defendant owns non-exempt property.

**IT IS THEREFORE ORDERED** that **Michael S. Bernstein, whose address is 325 Gold Street, Ste 104, Garland, Texas 75042-6658 (telephone number 972 / 271-2700, fax number 972 / 271-1818) be, and he is hereby appointed Receiver** in this case pursuant to the Texas Turnover Statute with the power and authority to take possession of and sell all leviable property of Defendant through a private or public sale, including, but not limited to the following non-exempt property: (1) all documents or records, including financial records, related to such property that is in the actual or constructive possession or control of the Defendant; (2) all financial accounts (bank accounts), certificates of deposit, money-market accounts, accounts held by any third party; (3) all securities; (4) all real property, equipment, vehicles, boats, and planes; (5) all safety deposit boxes or vaults; (6) all cash; (7) all negotiable instruments, including promissory notes, drafts, and checks; (8) causes of action, choses of action, and judgments; (9) contract rights, whether present or future; (10) accounts receivable and (11) intangible property and property rights, including but not limited to intellectual property rights such as internet domains, patents, copyrights and trademarks; and that all such property shall be held in custodia legis of said Receiver as of the date of this Order.

Respondent is **ORDERED** to turnover to the Receiver within five (5) days from Respondent’s receipt of a copy of this Order: 1) the documents contained on **Exhibit “A”** attached hereto, together with all documents and financial records which may be requested by the Receiver; 2) all checks, cash securities (stocks and bonds), promissory notes, documents of title, and contracts owned by or in the name of Defendant.

Respondent is **ORDERED** to continue, until the Judgment in this cause is fully paid, to turnover to the Receiver at the Receiver’s address all checks, cash, securities, promissory notes, documents of title, and contracts within three (3) days from Defendant’s receipt of such property.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, authority and powers with respect to the Defendant's property, to: 1) collect all accounts receivable of Defendant and all rents due to the Defendant from any tenant; 2) change locks to all premises at which any property is situated; 3) open any mail addressed to the defendant and addressed to any business owned by the defendant; redirect the delivery of any mail addressed to the defendant or any business of the defendant, so that the mail may come directly to the receiver; 4) endorse and cash all checks and negotiable instruments payable to Defendant, except paychecks for current wages; 5) hire a real estate broker to sell any real property and mineral interest belonging to the Defendant; 6) hire any person or company to move and store the property of Defendant; 7) insure any property belonging to the Defendant (but not the obligation); 8) obtain from any financial institution, bank, credit union, savings and loan or title company, credit bureau or any other third party, any financial records belonging to or pertaining to the Defendant; 9) obtain from any landlord, building owner or building manager where the Defendant or the Defendant's business is a tenant, copies of the Defendant's lease, lease application, credit application, payment history and copies of Defendant's checks for rent or other payments; 10) hire any person or company necessary to accomplish any right or power under this Order; and 11) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of Defendant may be situated, and to review and obtain copies of all documents related to same.

All Sheriffs or Constables, and their deputies, and all other peace officers are hereby directed and ordered to assist the Receiver in carrying out his duties and exercising his powers hereunder, without the necessity of a writ of execution, and prevent any person from interfering with the Receiver in taking control and possession of the property of Defendant. The Receiver is authorized to have a Writ of Execution issued and to direct any Constable or Sheriff to seize and sell property under the writ.

[[ If discovery was served and not answered ]]It is further **ORDERED** that Respondent shall fully answer and serve upon the receiver and the applicant, within 30 days, post judgment interrogatories previously served by the applicant on the defendant.

The Receiver has the authority to issue subpoenas for the production of documents to the defendant and to third parties.

It is further ORDERED that Applicant have and recover of and against Defendant, Judgment in the additional sum of \$\_\_\_\_\_ as additional fees for the presentation of this motion.

The Receiver **is / is not** ordered to post bond in the amount of \$\_\_\_\_\_ payable to this Court and conditioned upon his faithful discharge of his duties in accordance with this Order. The Clerk may accept a check from the receiver

or the applicant’s attorney’s firm for the bond. The receiver’s fee is 25% of all proceeds coming into his possession, which the Court finds to be the customary and usual fee for a turnover receiver. The receiver’s fees and expenses are taxed as costs against the Defendant. The Receiver is further ordered to take the oath of his office.

**SIGNED** this \_\_\_\_\_ day of \_\_\_\_\_, [YEAR].

\_\_\_\_\_  
[Name], JUDGE PRESIDING

**APPROVED AS TO FORM:**  
[FORWARDING ATTORNEY]

BY: \_\_\_\_\_  
[ATTORNEY]  
[State Bar No. ]  
PLAINTIFF’S ATTORNEY

**EXHIBIT A TO RECEIVERSHIP ORDER  
DOCUMENTS TO BE TURNED OVER TO RECEIVER**

All records, as hereinafter described, concerning affairs of Defendant; unless otherwise noted, for the preceding 36 months:

1. bank statements; pass books and other bank or financial institution records;
2. federal income and state franchise tax returns;
3. all motor vehicle Certificates of Title (preceding 72 months);
4. real property deeds and deeds of trust (preceding 10 years);
5. business journals, ledgers, accounts payable and receivable files;
6. state sales tax reports;
7. credit applications and other documents stating debtor’s financial condition (preceding 72 months).

## Appendix 3

[ COURT HEADING ]

## ORDER APPOINTING RECEIVER AND TO COMPEL DISCOVERY -- INDIVIDUAL AND CORPORATE DEFENDANTS

CAME ON to be heard the [[ Title of the application for receivership ]] of [[ **Plaintiff** ]] (herein “Applicant”); whereupon, the Court, after review of the papers on file in this cause, became of the opinion that a Receiver should be appointed to take possession of and sell the leviable assets of [[ **name each defendant** ]] (herein “Defendant or Defendants”). Respondent refers to [[ name an officer of the corporate defendant ]], an officer of the defendant [[ name of the corporate defendant ]]. Based on the pleadings, the evidence and the papers on file in this cause, the Court finds that the defendants each own non-exempt property. Notwithstanding any contrary language herein, this order does not compel turnover of a natural person’s homestead, or checks for current wages or other exempt property.

**IT IS THEREFORE ORDERED** that **Michael S. Bernstein, whose address is 325 Gold Street, Suite 104, Garland, Texas 75042-6658 (telephone number (972) 271-2700; fax (972) 271-1818) be, and he is hereby appointed Receiver** in this case pursuant to the Texas Turnover Statute with the power and authority to take possession of and sell all non-exempt property of the Defendants through a private or public sale, including, but not limited to the following non-exempt property: (1) all documents or records, including financial records, related to such property that is in the actual or constructive possession or control of the Defendant; (2) all financial accounts (bank account), certificates of deposit, money-market accounts, accounts held by any third party; (3) all securities; (4) all real property, equipment, vehicles, boats, and planes; (5) all safety deposit boxes or vaults; (6) all cash; (7) all negotiable instruments, including promissory notes, drafts, and checks; (8) causes of action, choses of action, and judgments; (9) contract rights, whether present or future; (10) accounts receivable and (11) intangible property and property rights, including but not limited to intellectual property rights such as internet domains, patents, copyrights and trademarks; and that all such property shall be held in custodia legis of said Receiver as of the date of this Order.

Each Defendant and Respondent for a Defendant is **ORDERED** to turnover to the Receiver within five (5) days from receipt of a copy of this Order: 1) the documents contained on **Exhibit “A”** attached hereto, together with all documents and financial records which may be requested by the Receiver; 2) all checks, cash, securities (stocks and bonds), promissory notes, documents of title, and contracts owned by or in the name of Defendant;

Each Defendant and Respondent is **ORDERED** to identify and turn over to the receiver all interests of the defendant in any business or venture and all agreements, stock certificates and other documents pertaining to the defendant's ownership in the business or venture within five (5) days from defendant's receipt of a copy of this order.

This ORDER constitutes a Charging Order under the Texas Business Organizations Code. This order constitutes a lien upon the judgment debtor's partnership interest in any partnership and the judgment debtor's membership interest in any limited liability company. The receiver has the right to receive any distribution to which the judgment debtor would be entitled from the debtor's partnership or membership interest.

Each Defendant is **ORDERED** to continue, until the Judgment in this cause is fully paid, to turnover to the Receiver at the Receiver's address all checks, cash, securities, promissory notes, documents of title, and contracts within three (3) days from the Defendant's receipt of such property. Paychecks for current wages are exempt from this order.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, authority and powers with respect to each of the Defendants' property, to: 1) collect all accounts receivable of Defendant and all rents due to the Defendant from any tenant; 2) change locks to all premises, except the homestead, at which any property is situated; 3) direct the delivery of Defendant's mail and the mail of any business of the defendant to the Receiver's address and open all mail directed to Defendant and any business of the defendant; 4) endorse and cash all checks and negotiable instruments payable to Defendant, except paychecks for current wages; 5) hire a real estate broker to sell any real property and mineral interest belonging to the Defendant; 6) hire any person or company to move and store the property of Defendant; 7) (but not the obligation) to insure any property belonging to the Defendant; 8) obtain from any financial institution, bank, credit union, credit bureau, savings and loan, title company, or any other third party, any financial records, including credit reports belonging to or pertaining to the Defendant; 9) obtain from any landlord, building owner or building manager where the Defendant or the Defendant's business is a tenant copies of the Defendant's lease, lease application, credit application, payment history and copies of Defendant's checks for rent or other payments; 10) hire any person or company necessary to accomplish any right or power under this Order; and 11) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of Defendant may be situated, and to review and obtain copies of all documents related to same.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the right, authority and power to request and obtain from providers of utilities, telecommunications, telephone, cell phone, cable, internet, data

services, internet website hosts, satellite television services, and all similar services, (including Time Warner, AT&T, Verizon, Sprint, Satellite TV, Direct TV, EV1, Google, Yahoo, and internet blogs and chat rooms) the production of any information regarding the defendant’s payments, payment history and financial information, including account information, telephone numbers, names, service addresses, telephone numbers, IP addresses, call detail records, payment records, and bank and credit card information. This Order serves as the court order required by 47 USC § 551, and satisfies all obligations of the responding party to obtain or receive a court order prior to disclosing material containing personally identifiable information of the subscriber and/or customer.

All Sheriffs or Constables, and their deputies, and all other peace officers, are hereby ordered to assist the Receiver in carrying out his duties and exercising his powers hereunder and prevent any person from interfering with the Receiver in taking control and possession of the property of Defendant, without the necessity of a Writ of Execution. The Receiver is authorized to have a writ of execution issued and to direct any Constable or Sheriff to seize and sell property under the writ.

[[ IF DISCOVERY WAS SERVED AND UNANSWERED ]] Discovery: It is further, **ORDERED** that Defendant shall fully answer and serve upon the receiver and the applicant, within 30 days, post judgment interrogatories previously served by the applicant on the defendant.

The Receiver has the authority to issue subpoenas for the production of documents to the defendants and to third parties.

Attorney Fees: It is further ORDERED that Applicant have and recover of and against Defendant, Judgment in the additional sum of \$\_\_\_\_\_ as additional attorney fees for the presentation of this motion.

Bond; Receiver’s Fee: The Receiver **is / is not** ordered to post bond in the amount of \$\_\_\_\_\_ payable to this Court and conditioned upon his faithful discharge of his duties in accordance with this Order. The Clerk may accept a check from the receiver or the applicant’s attorney’s firm for the bond. The receiver’s fee is 25% of all proceeds coming into his possession, which the Court finds to be the customary and usual fee for a turnover receiver. The receiver’s fee is taxed as a cost against the defendant. The Receiver is further ordered to take the oath of his office.

**SIGNED** this \_\_\_\_\_ day of \_\_\_\_\_, [YEAR].

\_\_\_\_\_  
[[ name ]], JUDGE PRESIDING

**APPROVED AS TO FORM:**  
[FORWARDING ATTORNEY]

BY: \_\_\_\_\_  
[[ ATTORNEY ]]  
[[ State Bar No. ]]  
PLAINTIFF'S ATTORNEY

**EXHIBIT A TO RECEIVERSHIP ORDER  
DOCUMENTS TO BE TURNED OVER TO RECEIVER**

All records, as hereinafter described, concerning affairs of Defendant; unless otherwise noted, for the preceding 36 months:

8. bank statements; pass books and other bank or financial institution records;
9. federal income and state franchise tax returns;
10. all motor vehicle Certificates of Title (preceding 72 months);
11. real property deeds and deeds of trust (preceding 10 years);
12. business journals, ledgers, accounts payable and receivable files;
13. state sales tax reports;
14. credit applications and other documents stating debtor's financial condition (preceding 72 months).

## Appendix 4

### U.S. Postal Service Manual Excerpt

The United States Postal Service's Domestic Mail Manual 508, Recipient Services, provides:

#### 1.5 Delivery to Individual At Organization

##### 1.5.1 To Address

All mail addressed to a governmental or nongovernmental organization or to an individual by name or title at the address of the organization is delivered to the organization, as is similarly addressed mail for former officials, employees, contractors, agents, etc. *If disagreement arises where any such mail should be delivered, it must be delivered under the order of the organization's president or equivalent official.* (Italics added).

Domestic Mail Manual, as published on line as of March 11, 2015 at <http://pe.usps.com/>

## Appendix 5

### Bonus Feature: Taking Possession of Domain Names

When you register a domain name, the contact information for your domain name registration is included in a public database known as WHOIS. You can look up who owns the domain name at any whois utility. Any Registrar will have a whois look up utility. One is <http://www.networksolutions.com/whois/>.

Enter the domain name (anyname.com, anyname.net, etc) and it will show you who owns the domain name and who the REGISTRAR is. The Registrar is the provider of the domain name. Some services block the domain owner's identifying information, so you would have to get it from the registrar directly.

The Registrar will be able to provide the login credentials (username and password) for accessing the Domain Name. Once you have the login credentials you can upload a new web page for the debtor. You can access email going to anyone @ the\_Domain\_Name . You can forward the Email to any address you like. There may be extra charges for the Email forwarding, but the cost is nominal.

Every computer on the internet has its own unique IP (Internet Protocol) .address, so it can be found. The IP address looks like 192.0.34.65 . The Domain Name System (DNS) links domain names to the IP addresses, so you can use the name instead of the address. It is much easier to use ICANN.ORG than 192.0.34.65. When you type in [www.icann.org](http://www.icann.org), the DNS looks up the address and routes you to 192.0.34.65. Once you have control over the domain name, you can assign the name to an IP address of your choosing. For example, you could route internet traffic intended for [www.your-defendant.com](http://www.your-defendant.com) over to [www.receivers-website.com](http://www.receivers-website.com) . You change the address that the name is linked to. In one case, I hired a company in the business of managing internet companies to manage a company that had a large presence on the web. The managing company re-routed traffic for the defendant's website to its own website, where it could handle the tech support issues and service the defendant's customers.

Depending on the domain name, there may be some value to selling it. A name like Lawyer.com is going to be more sought after than SamSmith.com. However, you might be able to find another SamSmith company and see if they want to buy the domain name.

Domain names are not really bought and sold. They are leased. The lease expires if not timely renewed. The whois lookup will tell you when the domain name is set to expire. If you or the owner let the name expire, it goes up for grabs at an auction. If you think you might want to get turnover of someone's domain and the domain name expires soon, consider paying the Registrar for another year. The cost will only be around \$20.00 or \$30.00.

## Appendix 6

### How To Find The Bank Account (Besides through discovery to the debtor)

Some of these will work without a receiver, some won't. Each of these has worked for me at least once.

- ❖ Check their website. Debtors who do a lot of internet business may have their wiring instructions posted.
- ❖ Try a subpoena against some of these non-parties who have recently received a check from the debtor (Tex. R. Civ. Proc. 205 & 621a):

The auto finance company

The landlord

The mortgage lender

If the mortgage is serviced through MERS, surf to [www.mers-servicerid.org](http://www.mers-servicerid.org) to find out who the lender is!

Better yet, have a receiver do it. The receiver is proceeding "in the shoes" of the defendant, not under 205 & 621a. The receiver doesn't have to put the defendant on notice!

- ❖ Make a purchase and pay with a check. This no longer works as well as it used to, because in many stores the check is presented electronically through a processing company.
- ❖ Ask them! While you are at the store, anonymously making your purchase, ask the clerk where the store does its banking. It doesn't hurt to ask.
- ❖ If the defendant has disclosed a loan, the receiver can talk to the lender. If the defendant does not bank there, sometimes the receiver can find out what bank the debtor's checks are drawn on.
- ❖ Some asset reports have a section called "business associations". This section contains a list of lenders, probably taken from UCC filings against the debtor. If the listing shows a bank, the defendant may have an account there. This is a long shot-- the information is often stale, but sometimes it is worth a try.
- ❖ The receiver goes to the defendant's location with a constable. The receiver looks through the desk for the check book while the constable keeps the peace. The cost is the constable's standard writ fee.
- ❖ Seize and look through the defendant's mail. (Receivership order required.)
- ❖ If the defendant is getting interest from an investment account, the brokerage house will be listed on the defendant's federal tax return.

Appendix 7

Chapter 64 Does Not Apply

COMMENTS

CPRC CHAPTER 64: RECEIVERSHIP (WEST 2008)

<p>The substance dates from 1887 &amp; 1889; Art. 2293. Re-formatted &amp; reworded in 1985,</p> <p>Sub (a)(2) is from Art. 2293, and could not be referring to a post judgment proceeding.</p> <p>“... in an action...” – this is pre judgment language.</p> <p>The applicant must have a probable interest in the property – these are not post judgment issues.</p> <p>❖</p> <p>§64.001 is the gateway into Ch. 64. None of the other provisions should be applied to turnover, because you can’t get past this section</p> <p>❖</p>	<p style="text-align: center;">SUBCHAPTER A. GENERAL PROVISIONS</p> <p><b>§ 64.001. AVAILABILITY OF REMEDY.</b></p> <p>(a) A court of competent jurisdiction may appoint a receiver:</p> <p>(1) in an action by a vendor to vacate a fraudulent purchase of property;</p> <p>(2) in an action by a creditor to subject any property or fund to his claim;</p> <p>(3) in an action between partners or others jointly owning or interested in any property or fund;</p> <p>(4) in an action by a mortgagee for the foreclosure of the mortgage and sale of the mortgaged property;</p> <p>(5) for a corporation that is insolvent, is in imminent danger of insolvency, has been dissolved, or has forfeited its corporate rights; or</p> <p>(6) in any other case in which a receiver may be appointed under the rules of equity.</p> <p>(b) Under Subsection (a)(1), (2), or (3), the receiver may be appointed on the application of the plaintiff in the action or another party. The party must have a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured.</p> <p>(c) Under Subsection (a)(4), the court may appoint a receiver only if:</p> <p>(1) it appears that the mortgaged property is in danger of being lost, removed, or materially injured; or</p> <p>(2) the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt.</p>
<p>Sub (d) has to do with missing persons, not applicable to our discussion, except to underscore that Ch. 64 does not have anything to do with §31.002.</p>	<p>d) A court having family law jurisdiction or a probate court located in the county in which a missing person. . . .</p> <p>Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1997, 75th Leg., ch. 1376, § 4, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 1081, § 1, 3, eff. Sept. 1, 1999.</p>

Note: This analysis has been done for the rest of Chapter 64. Email me if you’d like a copy of the whole analysis.

Appendix 8

Sample Bond

No.

IN THE COUNTY

COURT AT LAW NUMBER 000

DALLAS COUNTY, TEXAS

Plaintiff

vs.

Defendant

BOND OF RECEIVER

1. \_\_\_\_\_ has been appointed receiver in the above styled and numbered cause. The order appointing him requires that he execute a bond in the amount of \$xx.yy.
2. Therefore, I, \_\_\_\_\_, Receiver, as principal, hereby acknowledge myself bound to pay to the judge of the court the sum of \_\_\_\_\_ which amount has been tendered in cash, conditioned that said Receiver will faithfully discharge his duty as receiver in the above styled and numbered cause and obey the orders of the court therein.

SIGNED, this \_\_\_\_ day of \_\_\_\_\_, 2017.

\_\_\_\_\_  
[name], Receiver

Filed and Approved this \_\_\_\_\_ day of \_\_\_\_\_, 2009

\_\_\_\_\_  
Clerk

[ Note: It is silly to have space on the form for the clerk to “approve” a cash bond, but if this isn’t on the form some clerks will reject it. ]

[ Note: The Dallas District Clerk requires a \$4.00 “bond approval fee”-- even on cash bonds. The bond approval fee must be paid with a separate check. ]

Appendix 9

Sample Oath

No.

In The County Court

At Law Number ?? Of

Dallas County, Texas

Plaintiff

vs.

Defendant

OATH OF RECEIVER

I solemnly swear that I will faithfully perform and discharge the duties of receiver in this cause and will obey the orders of the Court. I further swear that I am a qualified voter of the State of Texas and am in fact registered to vote. My actual residence is within the State of Texas. I further swear that I am not a party, attorney or other person interested in the action giving rise to the judgment that is the basis for the appointment of a receiver.

Michael S. Bernstein
Receiver

STATE OF TEXAS )
COUNTY OF DALLAS )

I certify under my seal of office this \_\_\_ day of \_\_\_\_, 2013, that Michael S. Bernstein personally appeared before me, the undersigned Notary Public and signed the foregoing statement in writing before me and swore before me that the facts therein stated are true and correct.

Notary Public in and for
The State of Texas

Filed with the Court on \_\_\_\_\_, 2017.

John F. Warren, Clerk

Deputy Clerk

Appendix 10

(With thanks to Blenden Roth Law Firm for allowing me to use their form.)

PLAINTIFF'S POST-JUDGMENT REQUESTS FOR ADMISSION

Answer:

- \_\_\_\_\_ 1. No reason exists why the judgment in this cause should not be paid by defendant.
- \_\_\_\_\_ 2. The facts support the judgment which was rendered in this cause.
- \_\_\_\_\_ 3. Defendant is indebted to plaintiff in the amount stated in the judgment.
- \_\_\_\_\_ 4. Plaintiff properly filed and served post-judgment interrogatories on defendant.
- \_\_\_\_\_ 5. Defendant received the post-judgment interrogatories from plaintiff more than 31 days ago.
- \_\_\_\_\_ 6. Defendant failed to answer post-judgment interrogatories within 31 days of service of same.
- \_\_\_\_\_ 7. Defendant has no valid reason or excuse for failing to answer the post-judgment interrogatories.
- \_\_\_\_\_ 8. Defendant refuses to answer the post-judgment interrogatories in order to conceal assets from levy.
- \_\_\_\_\_ 9. Defendant consents to the appointment of Michael Bernstein as receiver in this case.
- \_\_\_\_\_ 10. The facts support placing defendant in receivership until the judgment has been paid.
- \_\_\_\_\_ 11. No bond, or a minimal bond, should be required for the receiver.
- \_\_\_\_\_ 12. All property owned by defendant is subject to levy or turnover to satisfy the judgment.
- \_\_\_\_\_ 13. Defendant owns collectable accounts receivable.
- \_\_\_\_\_ 14. Defendant continues to generate business revenue.
- \_\_\_\_\_ 15. Defendant owns stock.
- \_\_\_\_\_ 16. The stock referred to in the preceding request is not exempt from attachment, execution, or seizure.
- \_\_\_\_\_ 17. Defendant has an active bank account.
- \_\_\_\_\_ 18. The bank account referred to in the preceding is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.
- \_\_\_\_\_ 19. Defendant has sufficient net worth to pay the judgment.
- \_\_\_\_\_ 20. Defendant has the ability to pay the judgment, but has chosen not to pay.
- \_\_\_\_\_ 21. Defendant owns real property, other than a homestead, which is sufficient to satisfy the judgment.
- \_\_\_\_\_ 22. The real property referred to in the preceding request is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.
- \_\_\_\_\_ 22. Defendant owns personal property.

- \_\_\_\_\_ 23. The personal property referred to in the preceding request is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.
- \_\_\_\_\_ 24. Though plaintiff has attempted to amicably obtain payment of the judgment, Defendant has refused to discuss payment either by lump-sum payment or by installment payments.

Appendix 11

Courtesy of Blenden Roth Law Firm

MOTION FOR POST-JUDGMENT RECEIVERSHIP PURSUANT TO SECTION 31.002, CIVIL PRACTICE AND REMEDIES CODE

1. Plaintiff has obtained a judgment against Defendant in this cause. The judgment is dated [date], and is in the amount of approximately \$\_\_\_\_\_. The judgment is final, has not been superseded, and remains fully payable. A copy of the judgment is attached as Exhibit A. Attached as Exhibit B is a copy of Section 31.002, Civil Practice and Remedies Code (herein §31.002) upon which this motion is based.

2. §31.002 (a) specifically provides that, “A judgment creditor is entitled to aid from a court of appropriate jurisdiction...” and §31.002 (a) (3) provides for the appointment of a receiver to collect the debt. The defendant has not paid the judgment; the defendant owns property, including present or future rights to property that is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.

3. Accordingly, Plaintiff requests the Court order Defendant to turn over all non-exempt property that is in the defendant’s possession or subject to the defendant’s control, together with all documents related to the property, to a receiver with the authority to take possession of the non-exempt property, sell it and pay the proceeds to the plaintiff to the extent required to satisfy the judgment, including the fees and costs of the receiver.

4. Plaintiff further moves the Court to appoint a receiver pursuant to §31.002 (b) (3), to take possession of the non-exempt assets and documents related to the assets, sell the assets and apply the proceeds from the sale to satisfy the judgment, including the receiver’s fee and costs. Plaintiff requests this court to appoint Mike Bernstein, whose address is 325 Gold Street, Suite 104, Garland Texas 75042-6658, (telephone number (972) 271-2700; fax (972) 271-1818)) as Receiver. Mr. Bernstein has extensive experience as a receiver in turnover matters.

5. Plaintiff requests that the Court award its attorney’s fees, expenses and costs in the amount of \$500.00 for preparing, filing and arguing the motion and obtaining an order. Under §31.002 (e), the judgment creditor is entitled to recover reasonable costs, including attorney’s fees.

Wherefore, Plaintiff respectfully requests that the court appoint a receiver to collect the judgment in this case, award attorney’s fees, and provide for the payment of fees and costs to the receiver.

CERTIFICATE OF SERVICE

I certify that a true copy of this Motion with all attachments were forwarded to the Defendant through its attorney, Mr. / Ms. \_\_\_\_\_, by facsimile transmission at 214 -555-1515 before 5:00 p.m. as provided by the Rules on [date].

Respectfully Submitted,

[ signature block ]

**Appendix 12**

**Legislative Intent  
Texas Civil Practice & Remedies Code §31.002 Subsection (h)**

**BILL ANALYSIS**

Senate Research Center  
79R3276 MFC-D

H.B. 729  
By: Nixon (Janek)  
Jurisprudence  
4/2/2005  
Engrossed

**AUTHOR'S/SPONSOR'S STATEMENT OF INTENT**

Currently there is a loophole in the law that allows debtors to hide some of their assets within the turnover statute. The turnover statute is a post-judgment remedy enacted to shift the burden of disclosure of assets from the judgment-creditor to the judgment-debtor. The turnover goal is to force the debtor to disclose the assets he or she owns, that are not exempt by law, to be used towards payment.

However, at least two lower court decisions appear to require property subject to turnover to a court-appointed receiver to be specifically identified by the creditor in the application for a turnover order. The rulings make the turnover procedure ineffective in that the debtor is advised in the turnover application what property the receiver intends to take possession of and gives the debtor an opportunity to dispose of the property even before a receiver can be appointed. Furthermore, in the event specific assets are unknown at the time of the application to the court, a creditor would be precluded from utilizing the statute.

As proposed, H.B. 729 clarifies that a court may enter or enforce an order that requires the turnover of non-exempt property without identifying the specific property subject to turnover.

**RULEMAKING AUTHORITY**

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

**SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Section 31.002, Civil Practice and Remedies Code, by adding Subsection (h) to authorize a court to enter or enforce an order under this section that requires the turnover of non-exempt property without identifying in the order the specific property subject to turnover.

SECTION 2. Makes application of this Act prospective.

SECTION 3. Effective date: upon passage or September 1, 2005.

**BILL ANALYSIS**

H.B. 729  
By: Nixon  
Civil Practices  
Committee Report (Unamended)

**BACKGROUND AND PURPOSE**

The turnover statute is a postjudgment remedy enacted to shift the burden of disclosure of assets from the judgment-creditor to the judgment-debtor. At least two lower court decisions appear to require property subject to turnover to a Court Appointed Receiver to be specifically identified by the creditor in the application for a turnover order. The rulings make the turnover procedure ineffective in that the debtor is advised in the turnover application what property the Receiver intends to take possession of and gives the debtor an opportunity to dispose of the property even before a Receiver can be appointed. Further, in the event specific assets are unknown at the time of the application to the court, a creditor would be precluded from utilizing the statute.

HB 729 clarifies that a court may enter or enforce an order that requires the turnover of non-exempt property without identifying the specific property subject to turnover.

**RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

**ANALYSIS**

HB 729 amends Section 31.002, Civil Practice and Remedies Code, by adding Subsection (h) to state that a court may enter or enforce an order under this section that requires the turnover of non-exempt property without identifying in the order the specific property subject to turnover.

**EFFECTIVE DATE**

Upon passage, or, if the Act does not receive the necessary vote, the Act takes effect September 1, 2005.