



TEXAS JUSTICE COURT TRAINING CENTER

QUARTERLY REPORT

June 2016

MESSAGE FROM THE NEW EXECUTIVE DIRECTOR THEA WHALEN

As many of you know, our former Executive Director, Roger Rountree, retired at the end of March. Roger was devoted to the mission of the Training Center and his efforts made it into the excellent center for justice court education that it is today. Right now, he is trying his hand at fly-fishing and we wish him the best.

We are completing our academic year with the last few training events scheduled through August. The education committees have already met to develop an outstanding curriculum and excellent faculty for next year.

Currently, we are in the process of hiring another staff attorney to replace my position. I still plan to teach and be available to assist the legal department and all of you, but we are excited to find another great member for the TJCTC team.

Most of you have already been using our automated phone system and we hope it is continuing to serve your needs by connecting you with our staff or providing access to our legal department to answer questions. Please let us know if you see any area for improvement with this new phone system.

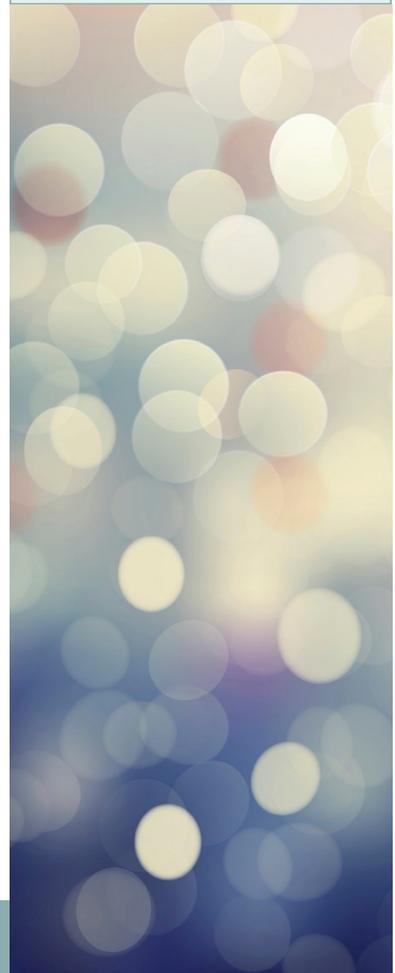
As always, contact us with any question you may have about our training.

Very truly yours,

Thea Whalen

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NEW TECHNIQUES CONSIDERED TO FIGHT DISTRACTED DRIVING

By Randall L. Sarosdy

32,675 people died in motor vehicle crashes in the United States in 2014. Although drunk driving continued to represent roughly one-third of those fatalities (resulting in 9,967 deaths that year), crashes due to distracted driving, including driving while texting, are rapidly increasing. In 2014 distracted driving accounted for 10 percent of all crash fatalities in the nation, or 3,179 deaths nationwide. See <http://www.nhtsa.gov/About+NHTSA/Press+Releases/2015/2014-traffic-deaths-drop-but-2015-trending-higher>.

According to TxDot, 483 or 15.1 percent of those distracted driving fatalities occurred in Texas (by contrast 10.4 percent of the drunk driving fatalities in the nation occurred in Texas in 2014), and more than

100,000 traffic accidents in Texas were linked to distracted driving with 3,214 serious injuries. See <http://ftp.dot.state.tx.us/pub/txdot/trf/crash-statistics/2014/31.pdf>. According to NHTSA, the fatalities in 2015 are expected to be up 8.1 percent over 2014.



Texting while driving is clearly an ever-increasing problem in Texas. Here's what happened when one bus driver in San Antonio was texting while driving: https://www.youtube.com/watch?v=dCHdZxO4_tQ. And this documentary film by Werner Herzog powerfully examines the potentially devastating – and deadly -- effects of texting while driving: <https://www.youtube.com/watch?v=Xk1vCqfYpos>.

The Texas Legislature did pass a statewide ban on texting while driving in 2011 in H.B. 242 but then Governor Rick Perry vetoed the bill. However, texting while driving is banned in school zones and for drivers under the age of 18, and according to TxDot 40 Texas cities have now enacted ordinances banning texting while driving, including Alice, Amarillo, Aransas Pass, Arlington, Austin, Brownsville, Corpus Christi, Denton, El Paso, Galveston, Harlingen, Missouri City, Nacogdoches, New Braunfels, Pampa, San Antonio, and Stephenville.

But how are such bans to be enforced given the inherent difficulty in observing a driver who is texting while driving? Two innovative approaches are discussed below.

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ARTICLE 16.22 AND BEYOND

I recently had the opportunity to attend a Mental Health Summit put on by the Texas Municipal Court Education Center, and got some interesting information there about the current state of the Texas criminal justice system as it relates to individuals with mental health issues. I would like to express my appreciation to TMCEC for allowing us to attend the seminar, and the speakers there for addressing some issues that are very important, and which will likely be receiving increased attention in the upcoming legislative session.

Jails Full of the Mentally Ill

It probably comes as no surprise that much of our jail population is comprised of people suffering from mental illness. According to research by the Meadows Mental Health Policy Institute, Texas counties report that 20-25% of their daily jail population suffer from a recently-diagnosed mental illness. That means that on average, 12,000-16,000 mentally ill Texans are confined in jail, with an annual incarceration cost of \$450 million. Additionally, research indicates that 17% of the jail population is suffering from a “serious mental illness”, meaning an illness such as schizophrenia, bipolar disorder, post-traumatic stress disorder, psychotic disorder, major depressive disorder, etc. By comparison, 5% of the general population suffers from such a mental illness.

Why are so many mentally ill people in jail? The average person would likely say that the mentally ill are more likely to be violent, resulting in being locked up for their violent actions. However, studies from groups such as the Justice Center, Council of State Governments, and the American Psychiatric Association Foundation find that there is actually not a large correlation between serious mental illness and violence. Instead, many of the mentally ill find themselves in jail due to substance abuse issues. 72% of the individuals with a serious mental illness also are suffering from a substance abuse disorder, due to attempting to self-medicate their symptoms. Additionally, symptoms

such as delusions and lack of impulse control can result in criminal behavior and incarceration. Another major factor is failure to comply with court orders. One speaker at the conference related a story of his good friend and his friend’s schizophrenic adult son. The son usually appeared outwardly “normal”, but frequently was dissociated from reality in some ways. The friend would frequently come downstairs and see the son dressed up and saying he was ready for court, but court wasn’t until next week. Or the son would ask “Dad, why are you home?” when it was Sunday. An individual with these issues, especially without a live-in caretaker, will often find themselves incarcerated on Failure to Appear charges, or a revocation of probation warrant, or on an attachment for a contempt hearing.

National Focus on the Issue

National momentum is growing to address the problem of mentally ill inmates. The Stepping Up Initiative is a national coalition of entities working together to improve processes. Importantly, this improvement benefits both the mentally ill as well as the communities they reside in. The costs to incarcerate a mentally ill inmate are generally two to three times higher than an inmate not suffering from mental illness. Individuals suffering from mental illness are more likely to re-offend if they have been incarcerated and the recidivism rate increases as the time the person is incarcerated increases. The goals of the Stepping Up Initiative are to reduce the number of people with mental illness booked into jail, shorten the length of stay for people with mental illness in jail, increase the percentage of people with mental illnesses in jail connected to services and support upon release, and lower rates of recidivism. For more information on the initiative, including a sample county resolution adopted by over 100 counties, visit stepuptogether.org.

Momentum in this area is also specifically growing with Texas. Texas Sen. John Cornyn has spoken publicly on the issue, and introduced the

TURNOVER ORDERS AND THE REQUEST TO APPOINT A RECEIVER

By Thea Whalen

Over the past few months, hundreds of requests for the appointment of receivers have been filed in justice courts. The appointment of a receiver falls under the turnover order provision of the Civil Practice and Remedies Code – an order that we have instructed on for several years but until recently has garnered little interest. Now that there is an increase in their use we are reviewing this post-judgment remedy in detail.

Purpose

The purpose of a turnover order is to aid judgment creditors (plaintiffs) who cannot otherwise reach the property needed to satisfy their judgment. See Hittner, *Texas Post-Judgment Turnover and Receivership Statutes*, 45 Tex. B.J. 417 (1982). For example, a judgment creditor seeks a writ of execution. It is returned nulla bona because the judgment debtor (defendant) will not allow the constable onto their property to execute the writ. A turnover order would then require the judgment debtor themselves to “turn over” their property to the designated person.

It is important to note that the law surrounding this type of order only consists of one section of the Civil Practice and Remedies Code, Section 31.002. The code does not provide procedures, nor do the Texas Rules of Civil Procedure. What we discuss will be pieced together from case law and common practice.

Procedure

Section 31.002(a) of the Civil Practice and Remedies Code states: “A judgment creditor is entitled to aid from a court ... in order to reach property to obtain satisfaction on the judgment.” (Emphasis added.) But the property must not be exempt and “cannot readily be attached or levied on by ordinary legal process.” *Id.* The judgment creditor must present evidence of the exempt status and inability to reach the property to meet the statutory requirement. The Houston Court of Appeals held that “the turnover statute [requires] an evidentiary showing to support the entry of the court’s order.” *Tanner v. McCarthy*, 274 S.W.3d 311, 322 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

So we can glean from the code section that: (1) there should be some sort of application, and (2) it should allege the judgment debtor is seeking non-exempt property that the judgment creditor cannot otherwise reach. Case law tells us that evidence should be presented to prove the judgment creditor is entitled to this order. How the evidence is presented – in a hearing or by written submission – is not addressed.

It is important to note that just because evidence is required does not mean a hearing is necessary. The statute does not specify that a hearing must take place. Section 31.002 Tex. Civ. Prac. & Rem. Also, it does not violate a judgment debtor’s due process rights to have a post-judgment order, like a turnover order, granted ex parte. *Endicott–Johnson Corporation v. Encyclopedia Press*, 45 S.Ct. 61 (1924). This leaves the need for a hearing within the judge’s discretion. A judgment creditor seeking approval of a turnover order on submission of evidence will need to make sure the proof is sufficient.

From what we have heard around the state, these orders are being requested when no other attempt to collect the judgment has been made. As stated above, the code requires that the property “cannot readily be attached or levied on by ordinary legal process.” If the judgment creditor has made no attempt to levy by ordinary legal process, it could be argued that they should first have attempted a writ of execution. “It is required in some Houston courts.” State Bar of Texas *Collections and Creditor’s Rights Manual* Chapter 17, “Turnover and Receiverships” page 5, by Michael Bernstein. And, “some judges will require that a writ of execution be returned nulla bona before they will entertain a turnover application.” *Id.* at Chapter 8, “Post Judgment Remedies, Judgment Liens, Garnishment, Execution, Turnover Proceedings, Receiverships Under the DPA, and ‘Other Stuff’” page 36, by Donna Brown. But one court has held that a prior writ of

Treat Texting While Driving Like Drunk Driving

Lawmakers in New York are considering giving law enforcement officers a new device, the Textalyzer, the digital equivalent of the Breathalyzer. An officer arriving at the scene of a crash could ask the drivers involved for their cell phones and use the device to tap into the phone's operating system to check for recent activity. The technology would enable the officer to determine whether the driver had been using the phone to text, email or engage in other prohibited use while driving just before the accident. If the driver refuses to hand over the phone his license would be suspended just as when a driver refuses to submit to a Breathalyzer test.

Supporters of the proposed legislation say that officers would not have access to the contents of the text messages or emails; they would only be able to see whether the device was being used just before the accident. But the ACLU opposes the bill due to privacy concerns. And in 2014 the United States Supreme Court held in *Riley v. California*, 134 S. Ct. 2473 (2014), that even after an arrest the police could not search a cell phone without a warrant. The bill's supporters say that when drivers obtain a license they give their implied consent to being subject to a search of their cell phone, just as they give implied consent to being subject to a breath or blood test. The driver may refuse but if he does so his license will be automatically suspended.

A former Chair of the National Transportation Safety Board, Deborah Hersman, now President of the nonprofit National Safety Council, supports the bill. She asks: "Why are we making a distinction between a substance you consume and one that consumes you?"

Police Officers Ride Buses to Catch Drivers Who Text

Another innovative approach by law enforcement has been tried recently in Austin. Officers rode buses to take advantage of the higher angle of view and freedom from having to drive themselves while looking

for people who were texting while driving. The officers then radioed in violations to nearby officers on patrol. They issued 71 citations in an hour and forty minutes.

The next day Austin police tweeted out the number of citations as well as information concerning how offenders could take advantage of deferral procedures in municipal court to have a potential \$500 fine reduced to \$50. They stated that they were attempting to gain wider compliance with the new law, which went into effect on January 1, 2015, rather than just to punish offenders. The new law does not prohibit the use of a device as long as it is hands-free so, for example, a driver may talk on a cell phone if he has a blue tooth or headphones.

The new law is not just directed to cell phones. Drivers have been using iPads, Kindles and other devices to distract themselves while driving. The Austin police intend to continue having officers ride buses on a weekly basis – they have even announce in advance the day of the week – in an attempt to continue the effort to change drivers' habits.

Will Texas Ban Texting While Driving?

Texas is one of only four states that does not prohibit texting while driving. Calls are already being made for a new statewide ban on texting while driving during the 85th Legislative Session in 2017. See <http://www.houstonchronicle.com/opinion/editorials/article/Distracted-driving-7101132.php>. However, Governor-nor Greg Abbott has stated that he will follow the example of his predecessor and also veto a statewide ban on texting while driving. Given that opposition it is not clear whether or not a new legislative effort will be made to ban texting while driving throughout the state. In the meantime more and more cities are opting to do so. And new techniques will no doubt continue to be introduced in an effort to cut down on distracted driving and thereby save lives. We will keep you informed of any further developments during the next Legislative Session.

IMPROVING BOND CONDITIONS IN DWI CASES THROUGH THE TEXAS BOND SCHEMATIC PROGRAM

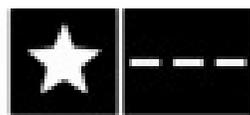
By Randall L. Sarosdy

The DWI Bond Schematic (or Uniform Bond Condition) Program is part of a statewide plan to reduce the incidence of DWI offenses in Texas by assisting Texas counties in adopting a comprehensive plan for setting bond conditions in DWI cases. The Texas Justice Court Training Center (TJCTC) views this program as an important step in reducing the number of DWI drivers on Texas roads and highways, thereby improving public safety throughout the state.

TJCTC will work with all criminal magistrates (including county judges and justices of the peace), local prosecutors, and potential monitoring agencies in each county that elects to participate in the program in order to create forms specific to that county to be used in administering the program. These forms may be based on TJCTC's Universal DWI Bond Schematic (available at www.tjctc.org) or forms that a county currently uses in setting bond conditions. Forms will be modified to meet the bond conditions that county officials agree are appropriate in DWI cases.

The program: provides county officials with an opportunity to develop a system for setting, monitoring, and enforcing DWI bond conditions to ensure community safety and protect victims; increases consistency in setting bond conditions by a magistrate and a trial court; promotes the use of bond conditions (such as ignition interlock devices) that reduce the incidence of DWI recidivism; and ensures that bond conditions required by law are set, monitored and enforced.

The program is administered by the Texas Justice Court Training Center Traffic Safety Initiative through funding provided by the Texas Department of Transportation. If you would like further information concerning the program, please feel free to contact Randall L. Sarosdy at rs52@txstate.edu.



Save a Life™

TEXAS DEPARTMENT OF TRANSPORTATION

REMAINING 2015-2016 TJCTC TRAINING SCHEDULE

COURT PERSONNEL PROGRAM

June 15-17: Austin

July 13-15: Rockwall

20 HOUR CIVIL PROCESS PROGRAM

July 26-29: Austin

8-HOUR WORKSHOP

August 22: San Antonio

10 HOUR WORKSHOPS

June 8-10: Irving

July 21-22: College Station

August 9-10: Tyler

IMPAIRED DRIVING SYMPOSIUM

August 4-5: Austin

DWI SUMMITT

June 16: Longview

WEBINARS

June 22: Enforcing Civil Judgements

July 6: Jury Trial Procedure

July 19: Mental Health Issues

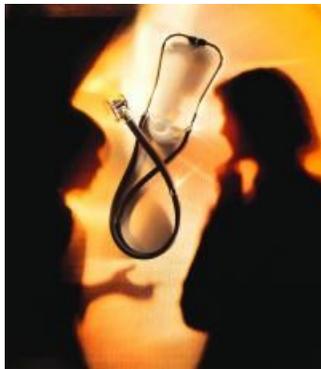
August 2: Advanced Civil Procedure

August 17: DWI Bond Conditions

August 25: Using TJCTC Resources

Mental Health and Safe Communities Act in the U.S. Senate. Lt. Gov. Dan Patrick made an interim assignment to the Texas Senate to evaluate jail safety standards in Texas, including those related to mental illness issues. Representative Joe Straus is leading a special Texas House Subcommittee that will “take a comprehensive look at mental health care.”

Focus on this issue, in Texas and nationally, was crystallized by the case of Sandra Bland, who was found dead in her Texas jail cell on July 13, 2015. Bland was arrested on July 10 of that year, following a traffic stop which escalated into an arrest. After her arrest, she attempted to secure bond, but was not immediately able to do so. On the morning of July 13, nearly 72 hours after her arrest, she was found asphyxiated by a plastic garbage bag in her jail cell, in an apparent suicide. Bland’s case raised several issues, but a huge one was the issue of mental illness in inmates, specifically how to identify, process, and protect defendants who exhibit signs and symptoms of mental illness.



The System in Texas

Texas began building its framework for screening inmates for mental health issues in 1993 when SB 1067 created Art. 16.22 of the Code of Criminal Procedure. This statute, which we will discuss in detail below, requires notification of the magistrate whenever the sheriff or jail staff has reason to believe the defendant is mentally ill. Additionally, 1993 saw the enactment of Art. 17.032 of the CCP, which allows a magistrate to release a defendant with mental illness on a personal bond and require treatment as a condition of release.

Since the introduction of these laws, Texas has continued to try to improve the system. A barrier to sharing information was removed in 1995 when Health & Safety Code Sec. 614.017 was enacted, allowing communication between human services agencies and law enforcement. In 2000, the Texas Commission on Jail Standards added suicide screening to the jail intake review process. In 2005, TLETS added the capability for jail staff to identify individuals who have previously received publicly-funded mental health services. Also in 2005, the Continuity of Care Query (CCQ) was created to help identify mentally ill individuals who have become involved in the criminal justice system. A new intake screening form was promulgated by the Texas Commission on Jail Standards in October 2015 and can be found under the TCJS Resources tab www.tcjs.state.tx.us.

Lt. Gov. Dan Patrick made an interim assignment to the Texas Senate to evaluate jail safety standards in Texas, including those related to mental illness issues.

However, the system is only effective if it is properly implemented. In Bland’s case, she answered yes to the following questions on her intake form: “Have you ever been very depressed?”, “Do you feel depressed now?”, “Have you ever thought of killing yourself last year?”. She also indicated that she had attempted suicide in 2014 due to losing a baby, and that she had suffered a recent loss, the death of her godmother. This information was not considered in placing Bland and there was no timely clinical follow-up. Her depression was apparently exacerbated by the fact that her family and another individual she counted on for help were unable to come up with the \$500 necessary to bond her out of jail.

So how should the system work? Intake screening information should immediately be evaluated by jail staff. If this information indicates mental illness, Art. 16.22 requires that this information be communicated

MENTAL ILLNESS (CONTINUED)

as soon as possible, but no later than 72 hours after determining that a mental illness exists, to the magistrate either electronically or in writing. What does the magistrate do with this information? Unless the defendant has been determined to have a mental illness within the previous year, the magistrate shall order a local mental health authority or another qualified mental health expert to collect information regarding the defendant's mental illness and give the magistrate a written assessment. If the defendant refuses to give information, the magistrate may order them to be evaluated at a mental health facility for up to 21 days. The written assessment ordered by the magistrate must be given to the magistrate within 30 days of the order in a felony case and within 10 days of the order in a misdemeanor case. This assessment must be given to the prosecutor, the defense attorney, and the trial court.

What else can you do as a magistrate? As discussed above, Art. 17.032 allows you to release certain mentally ill defendants on a personal bond and require treatment as a condition of release. Treatment for the mental illness is much more likely to have desirable outcomes for the defendant,



MENTAL ILLNESS ISSUES...

as well as the community. If a defendant is ordered to be assessed under Art. 16.22, you must order them released on personal bond and to participate in treatment as a condition of release, unless good cause is shown. It is important to note that this article does not apply to defendants charged with a

violent offense, as defined in the statute. By educating yourself on mental illness issues, as well as familiarizing yourself with what resources are available in your area for ordering treatment, you can become a great asset to your community.

Moving Forward

Certainly, magistrates alone cannot make a perfect system for dealing with mentally ill criminal defendants. The Texas Legislature will be examining these issues, and hopefully will assist all of us in improving the process. Resources need to be allocated to treatment, which over the long-term, is less expensive than incarceration. We hear frequently from magistrates who are frustrated about the lack of mental health facilities and treatment options in their region. That said, well-educated magistrates who are working in conjunction with properly trained law enforcement officers and jail staff are a huge component in ensuring that this process works as well as it currently can for mentally ill Texans. We at TJCTC will attempt to do our part in keeping you abreast of developments in the area and examining potential solutions.

COURT COSTS IN MINOR IN POSSESSION OF TOBACCO CASES

By Randall L. Sarosdy

An interesting question came up during the ten hour workshop on Truancy Cases and Juvenile Law held in Galveston on April 4-5: how do you handle court costs when you dismiss a minor in possession of tobacco case after the defendant completes a tobacco awareness course? The judges and clerks in attendance were evenly divided with respect to whether the court should assess court costs even when it dismisses the case or whether court costs are discharged along with the fine. We thought we should explain the issue and let you know where we come out on it.

To set the stage keep in mind that under Section 161.252(a), Health and Safety Code, an individual who is younger than 18 years of age commits an offense if he possesses, purchases, consumes or accepts a cigarette, e-cigarette or tobacco product, or falsely represents himself to be 18 years of age or older in order to purchase or obtain possession of a cigarette, e-cigarette or tobacco product. The offense is punishable by a fine not to exceed \$250.

On conviction of an offense under Section 161.252, the court must suspend execution of the sentence and require the defendant to attend an e-cigarette and tobacco awareness program. See Section 161.253(a). Not later than the 90th day after the date of a conviction the defendant must present to the court evidence of satisfactory completion of the e-cigarette and tobacco awareness program. See Section 161.253(e).



Upon receipt of that evidence, if the defendant has not been previously convicted of an offense under Section 161.252, then the court “shall . . . discharge the defendant and dismiss the complaint or information against the defendant.” See Section 161.253(f)(2). (On the other hand, if the defendant has been previously convicted of an offense under Section 161.252, then the court shall execute the sentence but may reduce the fine imposed to not less than half the fine previously imposed by the court. See Section 161.253(f)(1).)

The statute then states: “If the court discharges the defendant under Subsection (f)(2), the defendant is released from **all penalties and disabilities** resulting from the offense except that the defendant is considered to have been convicted of the offense if the defendant is subsequently convicted of an offense under Section 161.252 committed after the dismissal under Subsection (f)(2).” Therefore, the question is whether court costs are included in “all penalties and disabilities” or whether a defendant is required to pay court costs even if he completes the tobacco awareness course and the complaint is dismissed.

To answer this question we first need to look at the statutes that require the collection of court costs. Section 133.102, Local Government Code, states:

(a) A person **convicted of an offense** shall pay as a court cost, in addition to all other costs:

...

CONTINUED ON PAGE 10

(3) \$40 on conviction of a nonjailable misdemeanor offense

(b) The court costs under Subsection (a) shall be collected and remitted to the comptroller in the manner provided by Subchapter B.

This requirement is re-stated in Section 102.0212, Government Code. And Section 102.101, Government Code, requires a clerk of a justice court to collect additional fees and costs under the Code of Criminal Procedure upon conviction of a defendant. The Justice Court Convictions Court Cost chart maybe found at this link: [http:// www. txcourts.gov/media/1223920/j-ct-ct-cst-010116-.pdf](http://www.txcourts.gov/media/1223920/j-ct-ct-cst-010116-.pdf).

As noted above, it is only upon a **conviction** under Section 161.252, Health and Safety Code, that the court must suspend the sentence and order the defendant to take the tobacco awareness course. Does that conviction trigger the requirement in Local Government Code § 133.102 and Government Code §§ 102.0212 and 102.101 that the court collect costs from the defendant or is the collection of the costs suspended along with the sentence?

The Court of Criminal Appeals has held that court costs are not part of a defendant's sentence:

The State argues that an order to pay court costs is a nonpunitive “matter of recoupment of the costs of judicial resources expended in connection with the trial of the case” and that the legislative requirement that only convicted defendants pay court costs “does not, in and of itself, make such payment a sentencing issue.” We agree with the State that the legislative requirement that only convicted defendants pay court costs does not by itself indicate that these costs were intended by the Legislature to be punitive and part of the sentence. We also agree with the State that Section 102.021(1) of the Texas Government Code, authorizing an assessment of court costs against convicted defendants, was intended by the Legislature as a nonpunitive “recoupment of the costs of judicial resources expended in connection with the trial of the case.” *See also People v. Jones*, 223 Ill.2d 569, 308 Ill.Dec. 402, 861 N.E.2d 967, 975 (2006) (unlike a punitive “fine” imposed as part of a convicted defendant's sentence, a “cost” does not punish a defendant, but instead is a collateral consequence of the defendant's conviction that is compensatory in nature); *State v. Kula*, 262 Neb. 787, 635 N.W.2d 252 (2001) (“costs” are purely compensatory and not punitive).

Weir v. State, 278 S.W.3d 364, 365-66 (Tex. Crim. App. 2009).

In *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011), the Court again noted that court costs do not alter the range of punishment to which a defendant is sentenced and are not part of the sentence but instead are compensatory in nature; “that is, they are ‘a nonpunitive recoupment of the costs of judicial resources expended in connection with the trial of the case.’”

Quoting *Weir v. State*, 278 S.W.3d at 367. See also *Hurst v. State*, 2014 WL 2447333 at *4 (Tex. App.—San Antonio May 28, 2014, writ ref'd) (not for pub.); *Cantrell v. State*, 2014 WL 2069279 at *5 (Tex. App.—Waco May 15, 2014, no writ) (not for pub.); *Auchincloss v. State*, 2012 WL 1249412 at *2 (Tex. App.—Beaumont Apr. 11, 2012, no writ) (not for pub.).

Therefore, it is clear that court costs are not part of the sentence that is suspended upon a conviction under Health and Safety Code § 161.253. Nor does the Health and Safety Code itself authorize the court to suspend or waive the collection of court costs (although, as noted below, the court may waive the payment of court costs for a person who defaults in payment and is indigent or was a child (less than 17) at the time of the offense under Art. 45.0491 of the Code of Criminal Procedure). Local Government Code § 133.102 and Government Code §§ 102.0212 and 102.101 require the collection of court costs **upon conviction**. The Court of Criminal Appeals has held that court costs are not punitive but are compensatory in nature. The fact that the defendant is discharged from all “penalties and disabilities” would therefore not appear to excuse the defendant from the collection of court costs upon conviction.

What then does all “penalties and disabilities” mean? It means the fine and any consequences to the defendant from failure to pay the fine, such as being placed in OMNI and not being able to renew a driver’s license or not being eligible to obtain a driver’s license, or having to perform community service to discharge the fine if the defendant cannot afford to pay it. Those are all matters that result directly from the sentence that was suspended upon conviction of the offense. Cf. *Yazdchi v. State*, 428 S.W.3d 831, 839 (Tex. Crim. App. 2014) (where judge exercises judicial clemency provision, the conviction is wiped away, the indictment is dismissed and the person is free to walk away from the courtroom “released from all penalties and disabilities” resulting from the conviction); *Cuellar v. State*, 70 S.W.3d 815, 819 (Tex. Crim. App. 2002) (same); *Texas Dept. of Public Safety v. J.H.J.*, 274 S.W.3d 803, 809 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (a person's release from the “penalties and disabilities” of a criminal offense does not entitle that person to expunction, which is a civil privilege granted to eligible citizens).

One other issue is worth noting. Govt. Code § 102.001 (a) states: “To the extent of any conflict between the provisions of this chapter and another state statute, the other statute prevails.” Therefore, if there were a conflict between the cost collection provisions of Chapter 102 of the Government Code and Section 161.252 of the Health and Safety Code, the provisions of the Health and Safety Code would prevail. However, under the construction discussed above, there is not a direct conflict between the two statutes.

Of course, the court may allow the defendant in a minor in possession of tobacco case to discharge the court costs by performing community service under Art. 45.049 of the Code of Criminal Procedure if the defendant has insufficient income or resources to pay the court costs. Under Art. 45.0491 of the Code of Criminal Procedure, the court may also waive the payment of court costs imposed on a defendant who defaults in payment if the court determines that the defendant is indigent or was a child (over the age of 10 and younger than 17) at the time of the offense and that discharging the court costs through community service would impose an undue hardship on the defendant. These are matters for the court to decide on a case by case basis.

TURNOVER ORDERS... (CONTINUED)

execution is not *necessary*. *Childre v Great Sw. Life Ins., Co.*, 700 S.W.2d 284 (Tex. App-Dallas 1985, no writ) (emphasis added). This practice experience lets us know that it is within the court's discretion to require a writ of execution attempt prior to considering a turnover order.

Basis for Court's Ruling

What should you look for at a hearing to determine if property "cannot readily" be attached or levied? Many cases on appeal have dealt with multiple prior attempts at execution and a judgment debtor who refused to appear at post-judgment discovery depositions. See *Hennigan v. Hennigan*, 666 S.W.2d 322 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e. (per curiam), 677 S.W.2d 495

and Senate Subcommittee Report. This again speaks to the expectation that the type of property at issue may be difficult to discover. It is also important to note that wages cannot be turned over, regardless of form (paycheck, cash, or property). Section 31.025 (b) Tex. Civ. Prac. & Rem. Code. This means the turnover order cannot require the employer to provide unpaid wages to the designated party. Once cash or paychecks are deposited in a bank they lose their exempt status. *Schultz v. Cadle Co.*, 825 S.W.2d 151, 153-54 (Tex. App—Dallas 1992, writ denied).

Again, the final determination is within the court's discretion, but either a degree of difficulty in finding the property or previous failed attempts to execute would be justified reasons to grant a turnover order.

.....
"This practice experience lets us know that it is within the court's discretion to require a writ of execution attempt prior to considering a turnover order."
.....

(Tex. 1984), and *Arndt v. National Supply Co.*, 650 S.W.2d 547, 549 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.). Failed efforts to collect or property that is difficult to locate seem to be appropriate facts to consider.

The legislative history of Section 31.002 lists several types of property the legislature considered when drafting the code: "...judgment debtor owns property interest in such items as contract rights receivable, accounts receivable, commissions receivable, and similar acts to property or rights to receive money at a future date ..." or, "... where negotiable instruments, corporate stocks, corporate securities and the like are owned by the judgment debtor, but secreted by the judgment debtor in such a fashion that they cannot be found for execution..." See Toben, *Article 3827A and the Maturation of the Creditor's Bill Remedy in Texas*, 37 Baylor L.Rev. 587 (1985) citing the Texas House

Who is Provided the Property?

Once the court determines that the turnover request is well-founded, there are three choices as to how the property is to be handled: "(1) turn over nonexempt 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 nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment." See Section 31.002(b). The court cannot order the property turned over directly to the judgment creditor because, as stated by the Texas Supreme Court, "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 at 418 (Tex. 1983).

Receiver

We know many of you are seeing requests to appoint a receiver. Based on the law, it is clear that they are only to take the property and sell it under Chapter 31 of the Civil Practice and Remedies Code. Another chapter of that code, Chapter 64, addresses receivers. However, Chapter 64 does not apply to turnover proceedings:

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.

See *Schultz* at 155.

Because the appointment of a receiver is a matter within the court's discretion, Chapter 64 can offer guidance. Specifically, to be appointed a receiver the court could require the person be a resident of Texas and take an oath to faithfully execute their duties *Id.* at §§ 64.021 and 64.022. The court could require the receiver to post a bond. *Id.* at §64.023. If the court does decide to set a bond, it "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 for in these statutes for even the smallest of judgments." Hittner, *Texas Post-Judgment Turnover and Receivership Statutes*, 45 *Tex.B.J.* 417, 419 (1982).

Chapter 64 also indicates that the court has

complete discretion as to the duties of the receiver. §64.031 *Tex. Civ. Prac. & Rem.* The court can limit or expand the enumerated duties as the court sees fit. So, if a judgment creditor is asking that the receiver take "all cash on hand," the court can limit the receiver's authority to what the court is comfortable with. Again, the court does not have to follow Chapter 64, but may wish to. The court could also require the receiver to provide an inventory of all property taken as soon as possible. *Id.* at §64.032.

Order

If you do decide to grant a turnover order, what should it contain? "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). However, the order does not have to identify "specific property." Section 31.002(h), *Tex. Civ. Prac. & Rem. Code*.

Costs may also be included. The judgment creditor is "entitled to recover reasonable costs, including attorney's fees." *Id.* at §31.002(e). If a receiver is appointed, any finding of reasonable fees should not be made until **after** the work is completed. *Moyer v. Moyer*, 183 S.W.3d 48 (Tex. App.—Austin 2005, no pet.). In the *Moyer* case, the order sought fees of 25% of the proceeds. The court found that, "no evidence was presented of what would constitute a fair, reasonable, or necessary fee." *Id.* The *Moyer* court found this problematic because, "[t]he receiver's fee should be measured by the value of the services rendered; the results which are accomplished by the receiver must be considered in determining a reasonable fee." *Id.* citing *B.B.M.M., Ltd. v. Texas Commerce Bank—Chemical*, 777 S.W.2d 193, 198 (Tex.App.—Houston [14th Dist.] 1989, no pet.).



TURNOVER ORDERS... (CONTINUED)

Contempt

Turnover orders are enforceable by contempt. Section 31.002(c), Tex. Civ. Prac. & Rem. Code. As with any situation when contempt is an option, we caution you to use it sparingly and carefully. Although the order does not have to list specific property, an order that is too broad cannot be used to support a finding of contempt. In *Ex Parte Hodges*, the Texas Supreme Court held, “[i]f the court order itself fails to spell out the details of compliance in clear, specific and unambiguous terms as to the acts to be performed and the party to perform them, then the order, or any actions taken by a receiver acting under authority of that order, will not support a contempt.” 625 S.W. 2d 304 (Tex. 1981). A general claim that the judgment debtor “failed or refused to cooperate,” is insufficient for a finding of contempt. *In re Capoche*, 2012 WL 5989629.

Summary

When a request for turnover is filed in your court, you should expect an application that includes evidence that the property requested is nonexempt and not readily attached or levied through ordinary legal means. You may require the judgment creditor to attempt to collect the judgment first by means of a writ of execution. It is within the court’s discretion to hold a hearing or to provide notice to the judgment debtor. If the court finds that the property “cannot readily” be obtained, then the court’s order needs to provide some guidance as to the property to be turned over and indicate that the property is nonexempt. A receiver may be appointed, but this is within the court’s discretion.

TOBACCO CASES... (CONTINUED)

Conclusion

We believe this is a close question that reasonably could be construed either way. But given the recent decisions of the Court of Criminal Appeals concerning the meaning of court costs, we think the better construction is that court costs should be imposed upon conviction of a defendant of a minor in possession of tobacco offense and that those costs are not “penalties and disabilities” that are discharged if the defendant completes the tobacco awareness course and the court dismisses the complaint. But the court may allow the minor to discharge the court costs by performing community service under Art. 45.049, Code of Criminal Procedure, and the court may waive the court costs under Art. 45.0491, Code of Criminal Procedure, for a defendant who defaults in payment and is indigent or was under the age of 17 at the time of the offense if the court finds that performing community service would impose an undue hardship on the defendant.

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