



TEXAS JUSTICE COURT TRAINING CENTER

Quarterly Report July 2015

GREETINGS FROM THE TRAINING CENTER

We hope everyone is having a fun-filled summer. July and August signify the end of our academic year, but at the Training Center, we aren't slowing down yet! We will see many of you during our eight legislative updates around the state as well as our final workshop in Austin.

One of the most exciting things for us this year was welcoming 173 newly elected and appointed Justices of the Peace. The New Judges attended three seminars for a total of 80 hours of education in San Marcos, TX. This was our largest class in over a decade!

We always appreciate your feedback and want to continually improve our customer service. In fact, we are currently working on a website redesign to make www.tjtc.org more user friendly. At our legislative updates, we will be holding website panels and would love for you to attend. Also, our Program Attorney Rob Daniel has created a website survey that we are using to gather information for our redesign. If you would like to receive the website survey or have any feedback for us, please email Jessica Foreman (jessforeman@txstate.edu). Your assistance will be greatly appreciated!

With this year drawing to a close, it's time to start looking forward to our next academic year which will start in September. We will be sending out brochures in mid-August with all of our seminar, workshop, and webinar dates and locations for next year. Registration will open in mid-September. We hope to see you at our events!

Until next time,

The Training Center Staff

INSIDE THIS ISSUE

Search Warrant Applications 2

Same-sex Marriage Statement 4

Ignition Interlock Devices 5

Bonds in Civil Lawsuits 6

Orders of Retrieval... 9

ITEMS OF INTEREST

- Academic year in review
- List of individuals who passed the Level I & Master Clerk exams
- List of individuals who passed the CPPE exam





“RING RING!” A SEARCH WARRANT APPLICATION IS CALLING

By Rob Daniel, Program Attorney

It’s 3:00 AM on September 1, and the buzzing telephone in your bedroom may very well be a peace officer calling to apply for a search warrant...over the telephone. New legislation which allows search warrant applicants to present facts to a magistrate “by telephone or other electronic means” will take effect on that date.

Swearing to facts over the phone? Authorized by the Code of Criminal Procedure? How did we get to this point? Texas arguably started moving in this direction after the Court of Criminal Appeals held in 2013 that telephonic search warrant applications were legal under some circumstances. *Clay v. State*, 391 S.W.3d 94 (Tex. Crim. App. 2013) (holding that when a peace officer and a magistrate recognized each other’s voices over the phone, and the peace officer later reduced his oral affidavit to writing, the basis for probable cause was properly memorialized).

Justice Kennedy’s concurring opinion in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), a search and seizure case, may have impacted the Texas Legislature as well. Justice Kennedy

“New legislation which allows search warrant applications to present facts to a magistrate “by telephone or other electronic means” will take effect [on September 1st].”

THE 2015 ACADEMIC YEAR IN REVIEW

873 Clerks attended TJCTC’s Court Personnel seminars

756 Judges attended TJCTC’s 20 hour and New Judges seminars

527 Constables and Deputy Constables attended TJCTC’s Civil Process seminars

952 people attended TJCTC’s 10-Hour Workshops

Over 1,000 people attended a TJCTC webinar!

pointed out that “the Federal Rules of Criminal Procedure were amended in 1977 to permit federal magistrate judges to issue a warrant based on sworn testimony communicated by telephone. As amended, the law now allows a federal magistrate judge to consider ‘information communicated by telephone or other reliable electronic means.’ States have also innovated. Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing.” This statement may have caused some Texas legislators to feel mild embarrassment, for as the Court of Criminal Appeals pointed out in *Clay*, “[w]hether an investigating officer may apply for a search warrant by swearing out a supporting affidavit over the telephone is not specifically addressed in Article 18.01(b), or in any other provision of the Code of Criminal Procedure.” Until now.

HB 326 (which takes effect on September 1, 2015) creates Section 18.01(b-1) of the Code of Criminal Procedure, which bears a strong resemblance to the federal rule cited by Justice Kennedy in *McNeely*. It allows search warrant applicants to transmit information to a magistrate by telephone or “other reliable electronic means.” (Whether a particular type of electronic transmission may be considered “reliable” is an interesting topic for discussion but goes beyond the scope of this article.) If an applicant submits information in this manner when requesting a search warrant, he or she must prepare a “proposed duplicate original” copy of the search warrant and submit it to the magistrate.

Article 18.01(b-1) also creates new rules and responsibilities for the magistrate who receives the search warrant. First, this legislation gives the magistrate the authority to examine the search warrant applicant or “any [other] person on whose testimony the application is based” after placing the examinee or examinees under oath. Second, if the magistrate considers “additional testimony or exhibits,” the magistrate shall document the testimony or exhibits. This may be done by preserving written exhibits or recording oral testimony and ordering the recording to be transcribed, certified, and preserved. The magistrate is required to sign, certify the accuracy of, and preserve any written records. As the language of the statute indicates, documentation of facts supporting a search warrant is more difficult in the digital age, but remains extremely important. Although not all search warrant

Search Warrant Application....Cont. from page 2

affidavits will have “four corners” in the future (at least in the physical sense), magistrates must continue to consider only sworn facts presented to them by peace officers and carefully document those facts.

A magistrate who receives an electronic or telephonic search warrant application remains responsible for issuing the search warrant itself. The magistrate may utilize the proposed duplicate copy of the warrant submitted by the applicant, or the magistrate may modify this document. If the magistrate modifies the document, he or she may “transmit the modified version to the applicant by reliable electronic means or file the modified original and direct the applicant to modify the proposed duplicate original accordingly.” The magistrate must also sign all original documents and enter the date and time of issuance on the warrant. The magistrate may transmit the signed and dated warrant by reliable electronic means to the applicant or direct the applicant to sign the judge’s name and enter the date and time on the duplicate original copy of the search warrant.

Please keep in mind that HB 326 did not eliminate Article 18.01’s requirement that “a sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested.” Therefore, any peace officer who swears to facts to support a search warrant affidavit over the telephone must subsequently file a written document with the magistrate with whom he or she spoke. Article 18.01(b-1) requires the magistrate who receives the affidavit to “acknowledge the [applicant’s] attestation in writing on the affidavit.”

It’s important to note that Article 18.01(b-1) states that a magistrate “may” consider information submitted telephonically or electronically. Typically, the use of the term “may” within a Texas statute “creates discretionary authority or grants permission or a power.” (See Sec. 311.016, Government Code.) However, keep in mind that every magistrate also has a duty “to preserve the peace within his jurisdiction by the use of all lawful means; to issue all process intended to aid in preventing and suppressing crime; [and] to cause the arrest of offenders by the use of lawful means in order that they may be brought to punishment.” (See Art. 2.10, Code of Criminal Procedure.) Therefore, it’s TJCTC’s opinion that a justice of the peace may not refuse to accept telephonic or electronic search warrant applications. HB 326 opens the door for peace officers to submit search warrant applications to magistrates in the manner of their choosing.

Therefore, the time to speak to the law enforcement agencies in your county about this new law is now, before it goes into effect. If you do not wish to receive search warrant applications over the phone, it is better to communicate that information before your phone rings at 3:00 AM this fall.

If you are excited about this change to Texas law and wish to purchase a software system that would allow peace officers to submit search warrant applications, please keep in mind that your justice court technology fund may be used for that purpose. (See Art. 102.0173, Code of Criminal Procedure.)

We invite you to contact the Training Center if you encounter issues with the implementation of this new law. We may be reached at 512-347-9927, or you may post a question electronically via our website, www.tjctc.org.

Congratulations!

27 people passed the Civil Process Proficiency Certification Exam at a TJCTC event.

Deputy Constable Allen Bridges (Hays)	Deputy Constable William K. House (Denton)
Deputy Constable Billy Barnett (Denton)	Reserve Deputy Constable Orlando Lopez (Hidalgo)
Deputy Constable David Bennet (Denton)	Deputy Constable Raul Lozano (Hidalgo)
Deputy Constable Travis Brown (Hays)	Deputy Constable Saul Medrano (Travis)
Constable Norman Colyer (Hopkins)	Deputy Constable Joey Montgomery (Harris)
Deputy Constable Wade Fowler (Williamson)	Deputy Constable Sandy Riojas (Hays)
Deputy Constable Michael Gingrich (Brazoria)	Deputy Constable Raul Salinas (Hidalgo)
Deputy Constable Jose Gomez (McLennan)	Deputy Constable Paul Secrest (Travis)
Chief Deputy Constable Juan Gutierrez (El Paso)	Constable Jonathan Shoemaker (Falls)
Constable Randy Harris (Tom Green)	Chief Deputy Joshua Sipes (Ellis)
Deputy Constable Randy Hinson (Williamson)	Deputy Constable Reynaldo Trevino (Hidalgo)
Deputy Constable Pamela Holland (Johnson)	Deputy Constable Alyssa Wallace (Fort Bend)
Deputy Constable Samuel Holt (Williamson)	Deputy Sheriff George Young (Leon)
Deputy Constable William A. House (Denton)	

TEXAS JUSTICE COURT TRAINING CENTER STATEMENT REGARDING SAME-SEX MARRIAGES

In June, the Supreme Court of the United States issued its opinion in *Obergefell v. Hodges*. In a 5-4 decision, the court held that state laws which bar same-sex couples from entering into state-recognized marriages violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Accordingly, the court further held that “same-sex couples may exercise the fundamental right to marry in all States.”

The Supreme Court’s opinion is unambiguous, and it is therefore TJCTC’s position that Article 1, Section 32, of the Texas Constitution has been deemed unconstitutional, along with any other state laws which prohibit same-sex couples from entering into marriage relationships on the same terms and conditions as opposite-sex couples.

(Article 1, Section 32 of the Texas Constitution states that “marriage in this state shall consist only of the union of one man and one woman” and prohibits government recognition of any other type of marriage within the state.)

Furthermore, today the U.S. District Court for the Western District of Texas lifted the stay on its order in *De Leon v. Perry*, in which the court held that “Article I, Section 32 of the Texas Constitution and corresponding provisions of the Texas Family Code are unconstitutional.” The court’s order states that certain state officials are prohibited from “enforcing Article 1, Section 32 of the Texas Constitution, any related provisions in the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage.”

Therefore, as of today, it is our opinion that justices of the peace may perform same-sex marriage ceremonies in accordance with the Texas Family Code.

The more difficult question is whether Texas judges may refuse to perform same-sex marriage ceremonies while continuing to perform opposite-sex marriage ceremonies. As of today, we are unable to identify any current legal authority which would permit a justice of the peace to take such action.

However, we feel compelled to note that Lt. Governor Patrick has requested an Attorney General opinion asking whether “a justice of the peace or a judge [could] refuse to conduct a same-sex wedding ceremony if doing so would violate their sincerely held religious beliefs on marriage.” It remains to be seen whether this development will have any impact on Texas justices of the peace. Previous attorney general opinions have stated that a justice of the peace may not refuse to perform marriage ceremonies which fall under the Fourteenth Amendment’s protection once he or she “undertakes to exercise the authority to marry people granted ... by the Family Code.” *Tex. Att’y Gen. Op. No. JM-1 (1983)*.

Under Texas law, individual justices of the peace are not required to exercise their authority to perform marriage ceremonies. *Tex. Att’y Gen. Op. JM-22 (1983)*, *Tex. Att’y Gen. Op. DM-397 (1996)*. Therefore, it is our opinion that justices of the peace who do not currently perform marriage ceremonies and do not plan to perform marriage ceremonies in the future are unaffected by today’s developments. Furthermore, it is our opinion that justices of the peace who decide to immediately stop performing all marriage ceremonies following today’s developments will not be affected by the Supreme Court’s opinion in *Obergefell*.

We hope that this statement answers the questions that many of you have asked regarding today’s opinion. If you have additional questions, please do not hesitate to contact TJCTC.



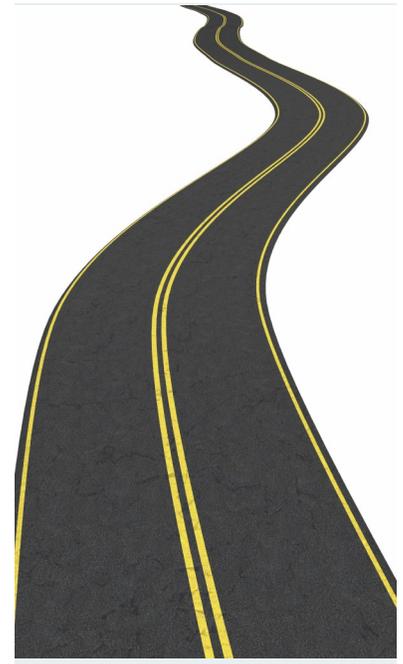
TEXAS LEGISLATURE INCENTIVIZES IGNITION INTERLOCK DEVICE INSTALLATION

By Rob Daniel, Program Attorney

Texas roadways will begin to become a safer place when HB 2246 takes effect on September 1, 2015. HB 2246 makes significant changes to the obtainment of an occupational license following a Driving While Intoxicated (DWI)-related license suspension.

In the 20th century, state legislators thought they had a solution to effectively punish DWI drivers and deter them from committing additional impaired driving offenses: driver's license suspension. This solution turned out not to be effective at all, for National Highway Traffic Safety Administration data shows that 3 out of 4 persons with an active driver's license suspension will continue to drive. In Texas, the attempt to improve public safety via license suspension has mostly led instead to a high number of DWLI offenses being filed in Texas trial courts.

License suspension is an inefficient means of preventing DWI offenders from committing additional DWI offenses because it cannot physically prevent an intoxicated person from operating a motor vehicle. However, devices which physically prevent an intoxicated person from driving his or her car down a public roadway do exist, and you should all be familiar with them: ignition interlock devices. HB 2246 effectively gives



“We predict that by encouraging the installation of ignition interlock devices in the vehicles of DWI offenders, HB 2246 will improve traffic safety in the state of Texas.”

DWI offenders the option to replace “hard” license suspension with the installation of an ignition interlock device on their vehicles.

Let’s say that Kermit, who was convicted of DWI last year, commits a new DWI offense in Winkler County. Following his arrest, Kermit provides a sample of his breath and the sample indicates that his blood alcohol concentration (BAC) at the time was 0.12. Two things should happen to Kermit following his arrest. First, Kermit’s license will be administratively suspended by the Texas Department of Public Safety under Chapter 524 of the Transportation Code. Second, the Winkler County magistrate who conducts Kermit’s post-arrest Article 15.17 hearing will order him to install an ignition interlock device as a condition of bond. (See Art. 17.441, Code of Criminal Procedure.)

During his license suspension period, Kermit may obtain an occupational license from a Winkler County justice court if he can demonstrate an essential need to operate a motor vehicle. However, under current law an order granting Kermit’s occupational license petition must include a delayed effective date. (See Sec. 521.251, Transportation Code.) More specifically, such an order should not take effect until 181 days after the effective date of Kermit’s suspension for providing a breath sample with a BAC greater than 0.08. *Id.* Additionally, current Texas law requires that an order granting Kermit’s occupational license petition must restrict his driving hours and the geographical areas in which he may travel. (See Sec. 521.248, Transportation Code.)

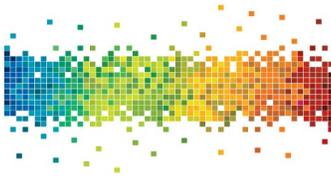
HB 2246 will eliminate the delayed effective date requirement for occupational license petitioners who “submit proof the person has an ignition interlock device installed on each motor vehicle owned or operated by the person.” Therefore, HB 2246 will give Kermit an incentive to comply with the bond condition set by the magistrate and obtain an ignition interlock device as soon as possible.

HB 2246 will give Kermit an additional incentive to comply with the magistrate’s order: an occupational license petitioner who has been “restricted to the operation of a motor vehicle equipped with an ignition interlock device may not be subject to any time of travel, reason for travel, or location of travel restrictions.” (TJCTC recommends ensuring that the petitioner has complied with the restriction prior to issuing an order granting an occupational license.)

So Kermit, and other DWI defendants with pre-conviction driver’s license suspensions, will have two options after September 1. Option 1: Kermit may install an ignition interlock device on each motor vehicle he owns or operates and immediately drive anywhere, anytime, throughout the state of Texas if he subsequently obtains an occupational license. Option 2: Kermit may decide not to install an ignition interlock device, but he will be subject to possible bond revocation. Additionally, he will

Congrats to everyone who passed the Clerk Level I Civil Exam!

Carol Capps (Tarrant)
Hailey Clark (Harris)
Linda Cuellar (Bexar)
Kristin Docken (Tarrant)
Laurie Field (Bexar)
Michele Garcia (Bexar)
Pat Garcia (Cameron)
Judith Hernandez (Denton)
Tonya Hoodenpyle (Tarrant)
Rhonda Kennedy (Tarrant)
Aubrie Linder (Harris)
Azia Mahood (Tarrant)
Christopher Nettles (Tarrant)
Christine Powell (Angelina)
Cindy Redmon (Rusk)
Susan Reynolds (Brazoria)
Melissa Ringo (Montgomery)
Alicia Rodriguez (Webb)
Maria Santos (Webb)
Devan Sturdivant (Harrison)
Tina Villa (Hood)
Heather Villarreal (Dallas)



DWI BOND CONDITION SCHEMATIC PROGRAM

TJCTC's bond schematic program assists Texas counties in creating consistent conditions of bond in all DWI cases. TJCTC works with all stakeholders (including all criminal magistrates, prosecutors, and probation departments) in participating counties to establish a system for setting, monitoring, and enforcing appropriate conditions of bond. If you are interested in having your county participate in this program, please contact Rob Daniel at 512-347-9927.

INTERLOCK....CONT. FROM PAGE 5

not be able to obtain an effective occupational license order for six months, and if he does obtain an occupational license order he will be subject to time of day and geographical location restrictions. Which option would you choose if you were Kermit?

Option 1 is probably the better option for Kermit, and it's also probably the better option for public safety on Texas roadways. Study after study has shown that ignition interlock devices reduce the rate of repeat DWI offenses by about 50% while they are installed. We therefore predict that by encouraging the installation of ignition interlock devices in the vehicles of DWI offenders, HB 2246 will improve traffic safety in the state of Texas. We encourage you to keep this in mind as you process what will likely be an increased number of occupational license petitions filed in your court.

We also encourage you to remember that TJCTC recommends noting whether the petitioner has been restricted to the operation of a motor vehicle equipped with an ignition interlock device in an order granting an occupational license. Documenting this restriction will cause the Department of Public Safety to note the restriction on the occupational license it issues to the petitioner. Sample orders may be found under the "New Forms" section at www.tjctc.org.

We invite you to contact the Training Center if you encounter issues with the implementation of this new law. We may be reached at 512-347-9927, or you may post a question electronically via our website, www.tjctc.org.

BONDS IN CIVIL LAWSUITS: HOW MUCH AND HOW PARTIES MAY RECOVER

By Thea Whalen, Program Attorney

Many of you have asked us what standard you should use when setting various civil bonds and how those bonds are ultimately disposed of. The first part of this question is stated in the particular Texas Rule of Civil Procedure for each specific civil remedy. The rules are less straightforward when it comes to the procedures that a recovering party must follow. In this article, we will review the standard for civil bonds and discuss how a party may try to recover against a bond.

Justice courts frequently encounter issues involving bonds in civil cases when a court receives an application for a pre-judgment writ or when a party wishes to appeal a judgment. We will start by reviewing the two types of pre-judgment bonds requested in justice courts: bonds for writs of sequestration and writs of attachment. As a reminder, these writs allow certain property to either be held by a third party or have a lien placed on it during the pendency of a law suit. *Tex. R. Civ. P. 696 and 592.*

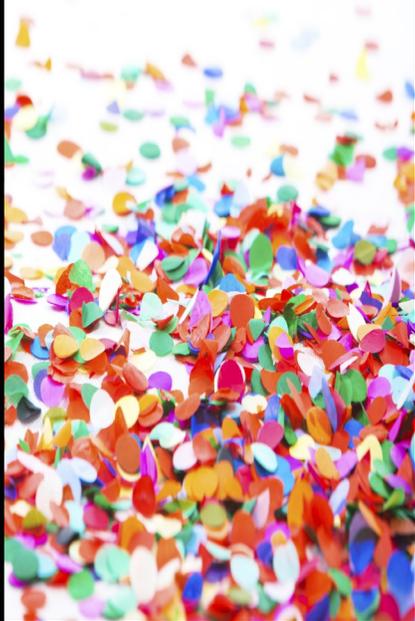
Bonds for Writs of Sequestration and Attachment

Because these are pre-judgment writs, issued while the lawsuit is ongoing, the writs affect the interests of the parties. The bond requirements for a writ of sequestration and an attachment are virtually identical: in both, the bond amount is determined by the court, the bond is to be payable to the defendant, the bond requires sufficient sureties (however, keep in mind that Texas Rule of Civil Procedure 14c, any time the word surety is used in the Rules, the party has the option to post a cash bond), and the bond is "conditioned that the plaintiff will prosecute his suit to effect and pay to the extent of the penal amount of the bond all damages and costs as may be adjudged against him for wrongfully suing out such writ of attachment [or sequestration]." *Tex. R. Civ. P. 698 and 592a.* It is this last section that gives the court some insight as to what the bond amount should be. The Rules expect the court to consider the financial harm that may come to a defendant while a suit is pending. For example, if a rent-a-center filed a

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Congratulations to everyone who passed the Master Clerk exam this year!

Charla Airheart (Brown)
Sue Baulos (Tom Green)
Irma Cantu (Fort Bend)
Misty Cass (Kerr)
Lillian Delgado-Sanchez (Harris)
Joann Dickey (Young)
Nancy Elliott (Bell)
Ashley Ferguson (Rusk)
Adelina Gallardo (El Paso)
Elsa Galvan (Kerr)
Arlynn Garcia (El Paso)
Veronica Grinnell (Hardin)
Shelley Hardy (Harris)
Jo Ann Harrison (Collin)
Janelle Harvison (Tarrant)
Michelle Juarez (Lubbock)
Donna Lowery (Liberty)
Heather MacGregor (Tarrant)
Christine Martinez (Kerr)
Jennifer Montgomery (Tarrant)
Christi Moss (Johnson)
Kathy Osier (Johnson)
Cynthia Pizana (Guadalupe)
Debbie Singleton (Tarrant)
Amy Tapia (Matagorda)
Carrie Thomas (Denton)



Civil Bonds....Cont. from page 6

lawsuit to recover personal property and then sought a writ of sequestration for a set of living room furniture, that furniture would be removed from the defendant's possession and be held by a third party, usually a Sheriff or Constable. Because of this, the defendant may need to buy other furniture so that they have somewhere to sit until the lawsuit is over. If the rent-a-center fails to prove their case at trial and the living room furniture is returned to the defendant, the defendant was still harmed. Only they were harmed *during* the lawsuit -- they had to pay for other furniture because theirs was sequestered. It is this loss on the defendant's part that the Rules anticipate the plaintiff's bond will protect.

Once the court sets a pre-suit bond, it is not necessarily a final amount. Rules 701 and 599 of the Texas Rules of Civil Procedure allow either party at any time before the judgment to ask for the bond to be increased, decreased or to question the sufficiency of the surety. To accomplish this, the party must file a motion, serving it informally (Tex. R. Civ. P. 21a – service via mail, fax, etc.) on the other party. The court must set a hearing and issue an order regarding any potential change in bond or finding with respect to sufficiency of the sureties. *See* Tex. R. Civ. P. 701 and 599.

Recovering Against a Surety on a Writ

Once the court has issued a final judgment, what happens to that bond? At this point, the court has determined who prevailed in the lawsuit and the property will either be awarded to a party or sold. If the plaintiff won the suit, this issue of what to do with the bond is simple -- return it to the plaintiff. However, if the defendant prevailed, they may wish to recover against the bond because, like the above example, they may take action which harmed them such as purchasing living room furniture while theirs was sequestered.

The answer is alluded to in case law and the rules, but not stated clearly: before a judgment is rendered, a defendant can sue a plaintiff in a counterclaim and if they are successful in the counterclaim, could recover against the bond. To do so, the defendant must allege that the writ was wrongfully issued and that they have damages from the lack of possession or control of their property. In justice court the counterclaim would have to be filed in accordance with Rule 502.6 Texas Rules of Civil Procedure. The counterclaim would cost the defendant a filing fee, but no citation would issue and there would be no formal service but rather informal service under Rule 501.4 Texas Rules of Civil Procedure.

It makes sense that a defendant can recover a bond through a judgment in their favor when we think back to the requisites of the bond that the "plaintiff will prosecute his suit to effect and pay to the extent of the penal amount of the bond all damages and costs *as may be adjudged against him for wrongfully suing out such writ of sequestration.*" Tex R. Civ. P. 698 and 529. The Supreme Court of Texas also restates this position in a case where the defendant has countersued the plaintiff for wrongfully issuing the writ. *Kelso v Hanson*, 388 S.W.2d 396 (Tex. 1965) ("The sequestration bond guarantees the payment of damages and costs in case it is decided that the sequestration was wrongfully issued.") From *Kelso*, it is explained that the determination of a wrongfully issued writ is a fact question to be answered by the judge or jury, not a finding that is automatic by virtue of the defendant winning the lawsuit. *Id.* In other words, just because the plaintiff applied for a prejudgment writ but then lost the case it does not mean that the writ was "wrongfully issued." The Supreme Court of Texas noted in another case that:

[t]he filing of a sequestration bond does not preclude actual damages. On the contrary it guarantees the payment of damages and costs in case it is decided that the sequestration was wrongfully issued.

Barfield v. Brogdon, 560 S.W.2d 787 (Tex. Civ. App. 1978).

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Appeal Bonds

Once a case has come to a final judgment, it may be appealed. In justice court, there is a rule which addresses appeal bonds in debt claim and small claims cases and a separate rule which addresses appeal bonds in eviction cases (there is no appeal bond in a repair and remedy case). Tex. R. Civ. P. 509.8 (b) Debt claims and small claims cases have a simple appeal bond rule. If the defendant is the appellant, the bond is double the amount of judgment and if the plaintiff is appealing, the appeal bond is \$500. Tex. R. Civ. P. 506.1. Either type of bond must be supported by a surety approved by the judge and conditioned that the party prosecute its appeal and pay any judgments rendered against it on appeal. *Id.* In other words, once a county court accepts an appeal from justice court, the appellant needs to see the case through and is responsible for any judgment against them in the judgment following trail de novo in the county court. *Id.*

The standard for setting the amount of the appeal bond in eviction cases is created by Rule 510.11, and differs from the standard in small claims and debt claim cases. Rule 510.9. (b) states the bond, like those in other civil cases, is conditioned on the appellant seeing the case through appeal at county court and is to ensure payment of any judgment that comes from the de novo appeal. However, when it comes to the amount of the bond, the court is directed to take into consideration another rule, Rule 510.11. *Id.* Rule 510.11 identifies potential damage that may occur during an eviction appeal, including loss of rental income and attorney fees. *Id.* Therefore, the court should take this potential damage into consideration when determining a bond amount. Some courts have a policy of setting the bond at twice the rental amount. While there is nothing inherently wrong with this practice, you still need to consider the potential damages listed in 510.11 when applicable. Remember, this is a discussion about the bond amount on appeal. The amount of rent paid during the appeal for an eviction is separate and can often not even apply, such as in the case of foreclosure because no rent was paid.

Recovering Against a Surety on Appeal

Once an appeal bond in justice court case is posted, the original documents, certified copy of the bill of costs, and bond are forwarded to county court. Tex. R. Civ. P 506.2. Justice court appeal bonds are conditioned on the party's "prosecution of its appeal to effect and payment of any judgment and all costs rendered against it on appeal." Tex. R. Civ. P. 506.1(c) and 510.9(b). The appeal bond is sent to county court and is to ensure the judgment on appeal is paid. *Id.* If the case is perfected and heard de novo in county court, the defendant would recover against the bond if county court issued a judgment in their favor. If county court rejects the case, it did not actually become an appeal and remains a justice court judgment. The appeal bond is no longer necessary and would return to the posting party.

We hope this explains some of your questions as how to set and process various bonds in civil lawsuits. As always, if further information or guidance is needed, please contact the Training Center at 512-347-9927.

Camesha Collin (Collin)	Doy Jeter (Haskell)	Ellenor Reyes (Galveston)
Genesis Barrera (Harris)	Martha Jimenez (Webb)	Jessica Rojo (Howard)
Misty Beaty (Collin)	Dana King (Menard)	Janet Rosenboom (Calhoun)
Katy Benavides (Brazoria)	Kelly Kinsinger (Travis)	Jennifer Salaiz (Duval)
Karla Benitez (Harris)	Debbie Leavey (Fort Bend)	Shannon Skilling (Hill)
Amanda Carlton (Denton)	Sabrina Lilly (Hunt)	Laura Tillery (Ellis)
Demetrich Carrington (Montgomery)	Olivia Lopez (Bexar)	Candice Tower (Hays)
Reesa Cerdas (Galveston)	Cynthia Maddox (Nacogdoches)	Elizabeth Trevino (McCulloch)
Armando Cruz Jr. (Bexar)	Veronica Martinez (Rockwall)	Rosie Trusty (Deaf Smith)
Maria DeLeon (Bexar)	Ashley McIntyre (Bexar)	Monika Turner (Harris)
Michelle Farmer (Brazos)	Pam Minchew (Montgomery)	Connie Vasquez (Reeves)
Patricia Faz (Val Verde)	Brigitte Nelson (Brazoria)	Jennifer Villanueva (Travis)
Michelle Fontenot (Liberty)	Lydia Palos (Webb)	Jamie Warren (Upshur)
Misty Foster (Tarrant)	Roxana Pantoja (Collin)	Brandi Watkins (Harris)
Adriana Franco (Dewitt)	Patricia Pitrucha (Bell)	Brook White (Brazoria)
Leticia Garcia (Bexar)	Jaqueline Ponce (Deaf Smith)	Lisa Wimberly (Brazos)
Ann Gaytan (Gonzales)	Shonda Powell (Collin)	Veronica Wright (Parker)
Carmelita Gomez (Collin)	Marisella Ramirez (Gonzales)	Maria Yoo (Harris)
Missey Graham (Irion)	Lyndsey Ramirez (Brazos)	Pat Zahrt (Hood)
Jacque Haith (Victoria)	Maria Raya Rojas (Montgomery)	



Congratulations to everyone who passed the Level I Criminal Exam this year!

ORDERS OF RETRIEVAL— WHAT, WHEN, HOW, AND WHY

By Bronson Tucker, Program Attorney

In 2013, the Justices of the Peace and Constables Association (JPCA) assisted with a bill in the 83rd Texas Legislature that would have authorized a special order allowing a person who has been excluded from their current or former residence to go with a peace officer to retrieve personal items that they need immediately. Unfortunately, that bill died without reaching the floor for a vote. In 2015, JPCA tried again, and it looked like the bill would meet a similar fate, but at the end of the session, HB 2486 (with some last minute changes from the floor of the Legislature!) passed and was signed into law by Governor Abbott.

This bill adds Chapter 24A to the Texas Property Code, effective September 1, 2015. For full text of this chapter, you can go to the Texas Legislature Online webpage (capitol.state.tx.us), or consult the TJCTC Legislative Update guidebook, beginning on page 273, available now at Legislative Update seminars and around September 1st on our website (www.tjctc.org).

Filing the Application for an Order of Retrieval

Section 24A.002 describes how the order of retrieval process is initiated: “If a person is unable to enter the person's residence or former residence to retrieve personal property belonging to the person or the person's dependent because the current occupant is denying the person entry, the person may apply to the justice court for an order authorizing the person to enter the residence accompanied by a peace officer to retrieve specific items of personal property.” The first thing to take away from this section is that, unlike applications for writs of re-entry or restoration, an application for an order of retrieval does not have to be filed in the precinct where the property is located. In fact, there isn't even a requirement that the application be filed in the same county where the property is located.

HB 2486 was signed into law at the 84th Regular Legislative Session.

A question that is not addressed by the law is: “Does the applicant have to pay a filing fee?” The Training Center performed some legal analysis and also consulted with the Office of Court Administration in an effort to answer that question. Ultimately, based on other appellate court rulings and AG opinions that generally hold that if a proceeding isn't criminal in nature, it is civil in nature, we are of the opinion that an order of retrieval is civil in nature. Therefore, it would require the payment of a filing fee (or a statement of inability to pay costs). For an examination of this issue in a similar context, see Tex. Att'y Gen. Op. No. GA-1044, opining that justice courts are authorized to charge the standard civil filing fee for petitions for occupational driver licenses.

So what needs to be contained in the application? Sec. 24A.002 goes on to tell us: An application must:

- (1) certify that the applicant is unable to enter the residence because the current occupant of the residence has denied the applicant access to the residence;
- (2) certify that, to the best of the applicant's knowledge, the applicant is not:
 - (A) the subject of an active protective order under Title 4, Family Code, a magistrate's order for emergency protection under Article 17.292, Code of Criminal Procedure, or another court order prohibiting entry to the residence; or
 - (B) otherwise prohibited by law from entering the residence;

We have already fielded questions on what ‘certify’ means, and whether or not the application must be sworn. We see no requirement that it is to be sworn, although if it is, that would certainly satisfy the requirement that the application is ‘certified.’ Note that a justice court can only issue the order if the current occupant is denying access (a verbal threat would be sufficient to deny access, it is not necessary that the applicant was physically barred). Also, with regard to protective orders, what that section means is that if the person is barred from that residence, they can't use the order of retrieval to find a way to thwart that order and enter the premises. It does **not** mean that if the applicant is the protected party in a court order, that they are ineligible for an order of retrieval. We were also asked if the person has been criminally trespassed from the residence if that would ‘otherwise prohibit them by law from entering the residence’ for purposes of this subsection, and we think that would depend on the specific circumstances.

Cont. on page 10

What Items Can the Applicant Retrieve?

The applicant must additionally allege that the applicant or the applicant's minor dependent requires personal items located in the residence that are only of the following types:

- (A) medical records;
- (B) medicine and medical supplies;
- (C) clothing;
- (D) child-care items;
- (E) legal or financial documents;
- (F) checks or bank or credit cards in the name of the applicant;
- (G) employment records; or
- (H) personal identification documents.

Further, the applicant must describe with specificity the items that they intend to retrieve. These orders are not designed to allow someone to get their baseball card collection or their favorite concert T-shirt back, they are only for emergency circumstances. The applicant must allege that they or their dependent will suffer personal harm if the items listed in the application are not retrieved promptly.

What Protection Does the Current Occupant Have?

With the application, the applicant must include a lease or other documentary evidence that shows the applicant is currently or was formerly authorized to occupy the residence. What 'other documentary evidence' is acceptable is a matter of judicial discretion, but we would recommend accepting a sworn statement that the applicant is currently or was formerly authorized to occupy the residence. Many of the people whom this bill was designed to protect will not have had a written lease or bills arriving in their name at that address.

Next, before the justice of the peace may issue an order under this section, the applicant must execute a bond that:

- (1) has two or more good and sufficient non-corporate sureties or one corporate surety authorized to issue bonds in this state;
- (2) is payable to the occupant of the residence;
- (3) is in an amount required by the justice; and
- (4) is conditioned on the applicant paying all damages and costs adjudged against the applicant for wrongful property retrieval.

The applicant shall deliver the bond to the justice of the peace issuing the order for the justice's approval. The bond shall be filed with the justice court. Keep in mind that the applicant could also post cash instead of a surety bond (For further discussion on bonds, see Thea Whalen's article on page 6.)

Another added protection for the current occupant is that a hearing must occur **before** the court issues the order. This is in contrast to the procedure in writs of re-entry or restoration, where the court issues the writ immediately following the ex parte hearing. The law is silent on how much notice must be given to the current occupant and how the notice must be delivered. TJCTC's position is that 24 hours is sufficient notice, given the emergency nature of the situation, and personal delivery or posting of the notice on the main entry to the premises is sufficient to satisfy this requirement.

Issuance and Execution of the Order

After holding the hearing, the judge may issue an order authorizing the applicant to enter the residence accompanied by a peace officer and retrieve the property listed in the application if the justice of the peace finds that the facts and statements set out in the application are true and correct, and that the current occupant received notice and had an opportunity to be heard. If the justice of the peace grants an application under Section 24A.002, a peace officer shall accompany and assist the applicant in making the authorized entry and retrieving the items of personal property listed in the application. One very important definition for this section, found in Section 24A.001: a 'peace officer', for purposes of this chapter, **only** includes sheriffs and constables, their deputies,

and their reserve deputies who hold a permanent peace officer license.

Section 24A.003 outlines the procedure for when the officer accompanies the applicant to the premises. If the current occupant of the residence is present at the time of the entry, the peace officer shall provide the occupant with a copy of the court order authorizing the entry and property retrieval. A peace officer may use reasonable force in providing assistance under this section. Before the applicant may remove the property listed in the application from the residence, they must submit all property retrieved to the peace officer to be inventoried. The peace officer then creates an inventory listing the items taken from the residence, provides a copy of the inventory to the applicant, provides a copy of the inventory to the current occupant or, if the current occupant is not present, leaves the copy in a conspicuous place in the residence, and returns the property to be removed from the residence to the applicant. The officer shall file the original inventory with the court that issued the order authorizing the entry and property retrieval. A peace officer who provides assistance in good faith and with reasonable diligence is not civilly liable for an act or omission of the officer that arises in connection with providing the assistance, nor are they civilly or criminally liable for the wrongful appropriation of any personal property by the person the officer is assisting.

Additionally, a landlord or a landlord's agent who permits or facilitates entry into a residence in accordance with a court order issued under this chapter is not civilly or criminally liable for an act or omission that arises in connection with permitting or facilitating the entry. This means that if an apartment complex, for example, lets someone into a unit based on a court order issued under this section, they will not face any legal consequences for that action.

Problems During Execution of the Order

Of course, situations where orders of retrieval become necessary are often difficult and heated, and there may be times when one or both of the parties does something they are not legally allowed to do. Firstly, Section 24A.005 makes it a Class B misdemeanor offense if any person interferes with a person or peace officer entering a residence and retrieving personal property under the authority of a court order issued under Section 24A.002. It is a defense to prosecution that the actor did not receive a copy of the court order or other notice that the entry or property retrieval was authorized. Theoretically, this could even end up in some situations with the applicant arrested if they are interfering with the lawful execution of the order, for example, taking unauthorized property or refusing to allow the officer to inventory the property.

Section 24A.006 lays out what should happen in the event that the applicant takes property that does not belong to the applicant. If the occupant wishes to contest the property retrieval, not later than the 10th day after the date of the authorized entry, they may file a complaint in the court that issued the order alleging that the applicant has appropriated property belonging to the occupant or the occupant's dependent. If that occurs, the court shall promptly hold a hearing and rule on the disposition of the disputed property. As always, the occupant could elect to file a small claims lawsuit for the return of the property that is theirs as well.

Why Orders of Retrieval?

Some have asked what the purpose of these orders is, when remedies such as civil standbys and writs of re-entry exist. The problem is that neither of those orders really met the needs of people who were in desperate need to recover personal items immediately. Our courts generally have no authority to order a civil standby, instead that is a service that law enforcement can voluntarily decide to provide for citizens. Many agencies have indicated they are unwilling or unable to provide this service without a court order and/or reassurances that they won't face liability for anything that occurs, which an order of retrieval provides. For writs of re-entry, many times there is either not a landlord-tenant relationship in these situations, or that relationship has been terminated, making a writ of re-entry inapplicable. Thus, often a person's only remedy for being excluded and not having access to bank records, baby formula, checkbooks, etc., would be to file a small claims case and wait through the process. However, these items are of a nature which makes them needed immediately, not months down the road.

Hopefully, this discussion has been helpful in clarifying the concept behind and procedure for issuing writs of retrieval. We will have additional information on this topic at Legislative Updates as well as in our seminars during the 2015-16 academic year.

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