ENFORCING THE JUDGMENT, INCLUDING WHILE ON APPEAL

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University of Texas School of Law (J.D., 1975)

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U.S. District Court, Western District of Texas (1977-1992)
U.S. District Court, Southern District of Texas (1979)
U.S. Court of Appeals, Fifth Circuit (1979)
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Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas
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Tx. Bd. of Legal Specialization, Family Law Advisory Commission (1987-1993)
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Past-President, Texas Academy of Family Law Specialists (1990-91)
Past-President, San Antonio Family Lawyers Association (1989-90)
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Member, State Bar of Texas' Ad Hoc Committee to Study PDP Finances (1992-93)

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State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* 1996
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, & June 1997
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Editor - Texas Academy of Family Law Specialists' Family Law Forum (1988-89)
Associate Editor - State Bar Appellate Section's Appellate Advocate (1988-93)

Continuing Legal Education (Planning and Administration):

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Course Director, State Bar of Texas 1987 Advanced Family Law Course
Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

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Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (1125 pages)

Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994)

Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)

13 ST. MARY'S L.J. 477, *Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage that Crosses States Lines*-1982

39 BAY. L. REV. 909, *Characterization of Marital Property*-1988 (co-authored)

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State Bar's Advanced Family Law Course
Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998)

State Bar's Marriage Dissolution Course
Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998)

SMU's Specialists' Symposium on Family Law
Practitioner's Guide to Interstate Custody Disputes (1984); Dealing with the Family Home on Divorce (1986); Conflict of Law: Full Faith and Credit, Comity and Judgments (1988); Criminal Aspects of Family Law Cases (1991)

UT School of Law
Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998)

State Bar's Advanced Evidence & Discovery Course
Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998)

State Bar's Advanced Appellate Course
Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996)

South Texas College of Law
Interstate Jurisdictional Problems in Family Law Matters (1986-87); Drafting of Decrees and Agreements Incident to Divorce (1988); Election of Remedies, Domestic Torts Course (1989); The Scope and Method of Mandamus Problems (1989); The New Texas Pattern Jury Charges (Vol. 3) (Products, Premises, Professional Malpractice and Damages (1990); UCCJA, PKPA, Child Abduction: What Does It All Mean? (1990); Enforcing the Judgment, Including While on Appeal (1997); Panel Discussion: Oral and Written Advocacy in the Courts of Appeals (1997)

University of Houston Law Center
Valuation of Closely-Held Businesses and Professional Practices (1988-89); Experts, Opinion Evidence, and Privileges (1990)

State Bar's Annual Meeting
Objections (1991); Evidentiary Predicates and Objections (1992-93); Predicates for Documentary & Demonstrative Evidence (1994); "Don't Drink That! That's My Computer!", (1997); The Lawyer As Master of Technology: Communication With Automation (1997)

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ENFORCING THE JUDGMENT, INCLUDING WHILE ON APPEAL©

by

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I. OVERVIEW This Article deals with enforcing judgments, including while the judgment is on appeal. Topics covered include: post-judgment discovery; time limits on collecting judgments; the abstract of judgment; the constitutional bar against imprisonment for debt; execution; attachment; garnishment; "turnover" proceedings; property exempt from creditors' claims; and contempt enforcement of orders and decrees. A companion article by Professor Elaine Carlson, on suspending enforcement of a judgment being appealed, accompanies this article.

II. POST-JUDGMENT DISCOVERY Ordinarily a plaintiff is not entitled to do pre-judgment discovery regarding the collectibility of a judgment that may eventuate from the lawsuit. As a consequence, a party who recovers a money judgment against an adversary often does not know what assets the judgment debtor may have that can be taken in satisfaction of the judgment. The remedy to this problem is post-judgment discovery.

A. STATE COURT JUDGMENTS Rule 621a of the Texas Rules of Civil Procedure provides for post-judgment discovery "for the purpose of obtaining information to aid in the enforcement of such judgment." This discovery can be pursued at any time after rendition of judgment, so long as the judgment has not been suspended by supersedeas bond and has not become dormant. The Rule permits the successful party to initiate and maintain, in the trial court in the same suit in which judgment was rendered, any discovery proceeding authorized for pre-trial matters. The Rule also provides for the court to supervise such discovery in the same manner provided for pre-trial discovery. A post-judgment order against a judgment debtor for asset discovery is an appealable final judgment. *Schultz v. Fifth Court of Appeals*, 810 S.W.2d 738, 740 (Tex. 1991).

B. FEDERAL COURT JUDGMENTS Rule 69 of the Federal Rules of Civil Procedure provide that a judgment creditor under a federal court judgment may obtain discovery from any person, including the judgment debtor, either under the procedures of the Federal Rules of Civil Procedure or under the practice of the state in which the federal district court is held. FED. R. CIV. P. 69. While there appears to be some dispute as to just what discovery procedures are available, the Fifth Circuit Court of Appeals has held that interrogatories are available. *United States v. McWhirter*, 376 F.2d 102 (5th Cir. 1967). See *Supplementary Note of Advisory Committee Regarding . . . Rule [69]*.

III. TIME LIMITS ON COLLECTING JUDGMENT Section 34.001 of the Texas Civil Practice & Remedies Code says that a judgment becomes dormant if a writ of execution is not issued within 10 years after the rendition of judgment. A writ of execution cannot be issued on a dormant judgment, unless it is revived. TEX. CIV. PRAC. & REM. CODE ANN. § 34.001(a) (Vernon 1997). The same Section provides that a judgment becomes dormant 10 years after the issuance of the first writ of execution, unless a second writ of execution is issued within ten years of the issuance of the first writ. The second writ can be issued at any time within ten years of the first writ.

Section 31.006 of the Civil Practice & Remedies Code provides that a judgment may be revived by scire facias or by an action of debt brought not later than 2 years after the judgment becomes dormant. TEX. CIV. PRAC. & REM. CODE ANN. § 31.006 (Vernon 1997).

If a judgment has become dormant and is not revived before the time to revive it has passed, the judgment becomes "void of lawful effect by operation of law." *Huff v. Huff*, 648 S.W.2d 286, 288 (Tex. 1983). Interestingly, in that case the Supreme Court treated art. 5532 (now Section 31.006) as if it were a statute of limitations for the revival and enforcement of a judgment.

IV. ABSTRACT OF JUDGMENT The party who recovers a money judgment ordinarily will file an abstract of judgment in all Texas counties where the judgment debtor has or may acquire an interest in land. This is done to establish a lien in the debtor's real property. A properly-prepared abstract, when properly filed and indexed, puts potential buyers on notice that the property, if not exempt, is subject to execution to satisfy the judgment. The lien created by the filing of the abstract also establishes priority against subsequent liens placed against the property.

A. FILING ABSTRACT CREATES JUDGMENT LIEN Section 52.001 of the Texas Property Code provides that the filing of an abstract of judgment, when properly recorded and indexed, constitutes a lien on the real property of the defendant that is located in the county where the abstract is recorded and indexed. TEX. PROP. CODE ANN. § 52.001 (Vernon 1995).[1] This lien also applies to real property acquired by the judgment debtor after the abstract is filed. The procedures for abstracting a state judgment also apply to judgments rendered in Texas by a federal court. TEX. PROP. CODE ANN. § 52.007 (Vernon 1995). The effect of filing an abstract of a federal court judgment is the same as for a state court judgment. 28 U.S.C. § 1962 (West 1982). Federal law extends similar status to federal court judgments rendered elsewhere that are registered in a federal district of Texas. 28 U.S.C. § 1963 (West Supp. 1991).

Texas Property Code Section 52.006 provides that a judgment lien continues for 10 years following the date of recording and indexing of the abstract. The statute provides that if the judgment becomes dormant, the lien ceases to exist.

B. IF JUDGMENT IS SUSPENDED A lien does not arise, however, if the judgment has been superseded, *and* the court finds that the creation of the lien "would not substantially increase the degree to which a judgment creditor's recovery under the judgment would be secured when balanced against the cost to the defendant after the exhaustion of all appellate remedies." TEX. PROP. CODE ANN. § 52.0011 (Vernon 1995). This finding of the Court must be in writing, and a certified copy filed in the real property records in each county where the abstract or a certified copy of the judgment has been filed. This finding of the court can be withdrawn by the court at any time. A certified copy of the withdrawal of the finding can be filed in the deed records office, whereupon the judgment lien comes back into existence. TEX. PROP. CODE ANN. § 52.0011 (Vernon 1995).

C. WHO ISSUES THE ABSTRACT? In a justice court, the judge prepares the abstract. TEX. PROP. CODE ANN. § 52.002 (Vernon 1995). In county and district courts, the abstract can be prepared by the victor, or his/her attorney, or agent, or assignee, or by the clerk. There is a charge if the clerk prepares it. The abstract of judgment must be verified by the person preparing the abstract. TEX. PROP. CODE ANN. § 52.002(c) (Vernon 1995).

D. WHAT GOES INTO THE ABSTRACT? Section 52.003 of the Property Code specifies what must go into the abstract. The specified items are:

- names of plaintiff and defendant
- defendant's birthdate and driver's license number
- cause number of the suit in which judgment was rendered
- defendant's address, or if not known, the "nature of the citation and the date and place of service of citation
- date of rendition of judgment
- amount of the judgment, and the balance due
- amount of the balance due, if any, for child support arrearage
- the rate of interest specified in the judgment.

Texas courts have been exacting about the requirement for accuracy in the abstract. For example, in *Bonner v. Grigsby*, 10 S.W. 511 (Tex. 1892), an abstract which omitted the cause number was declared to be invalid and to have created no lien. In *Texas American Bank v. Southern Union Exploration*, 714 S.W.2d 105 (Tex. App.--Eastland 1986, no writ), an abstract was held to be invalid and to create no lien when the abstract failed to state the defendant's address and failed to disclose, in the alternative, the nature of the citation and date and place of service of the citation. In *Reynolds v. Kessler*, 669 S.W.2d 801 (Tex. App.--El Paso 1984, no writ), an abstract was held to be defective and to create no lien, because it failed to state the date of the judgment, and because it failed to state the rate of interest specified in the judgment.

E. RECORDING AND INDEXING Under Section 52.004 of the Property Code, the county clerk is supposed to immediately record in the county's judgment records each properly authenticated abstract of judgment present to him or her. The clerk is to note the date and hour of receipt.

When recorded, the clerk is supposed to enter the abstract on the alphabetical index to the judgment records, indicating the name of each plaintiff and defendant, and the number of pages in the records where the abstract is recorded.

The clerk is supposed to leave room at the bottom of the abstract for the entry of credits or satisfaction of the judgment, and is supposed to make such entries reflecting credits. TEX. PROP. CODE ANN. § 52.004(c) (Vernon 1995).

COMMENT

Because it frequently happens that an abstract will not be indexed properly, which would destroy the efficacy of the abstract, it is wise to wait a few days after the abstract has been filed, and then obtain a copy of the index reflecting the filing of the abstract. If the abstract is not indexed properly, work with the county clerk's office until the index is correct.

Texas courts have been very strict about the exact method of indexing. For example, in *City State Bank v. Bailey*, 214 S.W.2d 901 (Tex. Civ. App.--Amarillo 1948, writ ref'd), an abstract was held to create no lien where the abstract was indexed under "B" for "Bank," rather than "C" for "City State Bank." An abstract was held to create no lien in *Reynolds v. Kessler*, 669 S.W.2d 801 (Tex. App.--El Paso 1984, no writ), because it was indexed showing a life insurance company as the plaintiff, when in actuality the judgment being abstracted was on a cross-claim between two co-defendants in a suit brought against both of them by the insurance company. Although the life insurance company was the plaintiff in the main case, and was reflected as plaintiff in the heading of the judgment, the court ruled that the abstract should have listed the name of the cross plaintiff in the plaintiff's index, and the name of the cross-defendant in the defendant's index. In *Caruso v. Shropshire*, 1997 WL 559658 (Tex. App.--San Antonio 1997, no pet.), where 54 plaintiffs had obtained a judgment but the abstract listed and was indexed under only one plaintiff's name, the abstract was a nullity. The appellate court said: "[S]ubstantial compliance with the statutory requirements is mandatory before a judgment creditor's lien will attach . . . . Substantial compliance allows only a minor deficiency in an element of the abstract as opposed to omitting a statutorily required element altogether."

F. DURATION OF LIEN Under Section 52.006 of the Property Code, a judgment lien exists for 10 years following the date the abstract was recorded and indexed. However, if the judgment becomes dormant during that period, the lien ceases to exist. The statute does not say that a revival of the judgment revives the lien, but that would logically follow.

G. DISCHARGE OF LIEN IN BANKRUPTCY Section 52.021 of the Texas Property Code provides that a discharge under federal bankruptcy law of the debt giving rise to the judgment will discharge the judgment and judgment lien. A debtor who has received a bankruptcy discharge can apply to the court which rendered the judgment, to secure an order discharging and canceling the judgment and judgment liens. TEX. PROP. CODE ANN. § 52.022 (Vernon 1995). Section 52.023 provides that notice of the application for such relief must be given to the judgment creditor or his attorney of record. A hearing is required. The resulting order, when filed in the county where the abstract has been filed, constitutes a release of the lien. Where the debt "evidenced by the judgment" is not discharged in the bankruptcy, or if the property is non-exempt and is abandoned in bankruptcy, then the judgment lien is not discharged. TEX. PROP. CODE ANN. § 52.025 (Vernon 1995).

V. NO IMPRISONMENT FOR DEBT IN TEXAS The Texas Constitution provides that a person cannot be incarcerated for failing to pay a debt. TEX. CONST. art. I § 18. The judiciary has respected this stricture. *See e.g., Ex parte Yates*, 387 S.W.2d 377 (Tex. 1965). Child support is not deemed to be a "debt" within the scope of this constitutional bar, so that delinquent obligors are jailed all the time for failing to pay child support. A federal statute also bars imprisonment for debt on process issued out of a federal court located in any state where imprisonment for debt has been abolished. 28 U.S.C § 2007 (West 1982).

VI. EXECUTION In both state and federal courts, execution is the primary method for collecting a money judgment.

A. PURSUANT TO STATE COURT JUDGMENT TEX. R. CIV. P. 621 provides that state court judgments can be enforced "by execution or other appropriate process." A writ of execution or other process must be returnable in thirty, sixty, or ninety days, whatever is requested by the plaintiff or his representative.

1. Time for Issuance Under Rule 627 of the Texas Rules of Civil Procedure, the clerk of the court in which a judgment has been rendered can issue a writ of execution thirty days after a final judgment is signed. If a motion for new trial or "to arrest the judgment" is timely filed, then the writ of execution cannot issue until thirty days from the time the order overruling the motion is signed by the Court, or until thirty days after the motion is overruled by operation of law. TEX. R. CIV. P. 627. Rule 628 creates an exception to the general rule, under which execution can issue within thirty days if the plaintiff files an affidavit that the defendant is about to remove from the county his personalty that is subject to execution, or is about to transfer or secrete such personalty for the purpose of defrauding his creditors.

2. Suspended Judgment If the losing party posts a supersedeas bond (or if the loser is a government organization and gives notice of appeal), writ of execution may not issue. TEX. R. CIV. P. 627. If a writ of execution has already been issued when the judgment is suspended, the clerk is to immediately issue a writ of supersedeas suspending all further proceedings under execution. TEX. R. CIV. P. 634.

3. Formalities of the Writ of Execution Rule 629 of the Texas Rules of Civil Procedure gives the requisites for a writ of execution. The writ is directed to a sheriff or constable of Texas. It must be signed by the clerk of the court, and bear the seal. It must describe the judgment, giving the court and time when rendered, and names of the parties for and against whom the judgment was rendered. A true copy of the bill of costs is supposed to be attached to the writ of execution. The writ must be returnable within 30, 60, or 90 days, at the plaintiff's election.

When execution is issued for a sum of money, under Rule 630 the writ of execution must specify the sum recovered or directed to be paid, and the sum actually due when issued and the rate of interest. The writ should direct the officer to satisfy the judgment and costs out of the judgment debtor's property that is subject to execution. TEX. R. CIV. P. 630.

When execution is issued for the sale of particular personalty or real estate, the writ must particularly describe the property, and must direct the officer to sell the property upon prior public notice as required by law. TEX. R. CIV. P. 631.

When execution is issued for the delivery of particular personalty, the writ must particularly describe the property and designate who is to receive the property. The writ must direct the officer to deliver possession of the property to the appropriate person. TEX. R. CIV. P. 632. The writ should also state that if the officer cannot make delivery of the personalty, he should levy on the judgment debtor's other personalty and collect the value of the personalty out of the debtor's non-exempt property. TEX. R. CIV. P. 633.

4. The Levy Upon Non-Exempt Property When the sheriff or constable receives the writ of execution, the officer is to levy the writ upon the non-exempt property of the judgment debtor located within the county. The officer should first "call upon the defendant," asking him to point out property to be levied upon, and the levy should first be made on the assets pointed out by the debtor. TEX. R. CIV. P. 637. The debtor is not supposed to direct levy upon assets he has sold, mortgaged, or conveyed into trust, of property which is exempt from execution. TEX. R. CIV. P. 638. If the officer thinks the selected assets will not sell for enough to pay the judgment and costs of sale, he may direct the debtor to designate more property. If the judgment debtor fails to designate, the officer is to levy upon any non-exempt property of the debtor.

In order to levy upon real estate, the officer can merely endorse the levy on the writ. It is not necessary for him to go to the property location. In levying on personalty, the officer is to take possession of the personalty, except where the debtor has an interest in the personalty but not the right to present possession. If someone else has the right to present possession, the officer is to give notice of the levy to the party with right to possess. TEX. R. CIV. P. 639. Special considerations apply in a levy on livestock. A levy upon shares of stock may be effected by taking possession of the share certificates.

A judgment debtor may "replevy" personalty levied upon, by delivering to the officer a bond payable to the plaintiff, with two or more "good and sufficient sureties," which bond is subject to approval by the officer. TEX. R. CIV. P. 644.

Real property to be sold after execution must be sold at public auction, at the courthouse door, on the first Tuesday of the month, between 10:00 a.m. and 4:00 p.m. TEX. R. CIV. P. 646a. "Courthouse door" is defined in Rule 648. The court has the power to order that the sale be conducted at the site of the real property. TEX. R. CIV. P. 646a. The time and place of the sale must be advertised by the officer in English once a week for three consecutive weeks, in a local newspaper. The first notice must appear not less than 20 days prior to the day of the sale. Further specifics are detailed in TEX. R. CIV. P. 647.

Personal property to be sold after execution can be offered for sale either where the property was levied upon or at the courthouse door. Ordinarily, previewing of the personalty by prospective buyers should be allowed. The notice of the time and place of sale of the personalty must be posted for ten successive days immediately prior to the sale. The notice should be posted at the courthouse door and at the place where the sale is to be made.

5. The Sale If the property does not sell for enough to satisfy the execution, the officer must "proceed anew" to levy upon other assets. TEX. R. CIV. P. 651. Where a buyer fails to comply with the terms of sale, he is liable for 20% of the value of the property. TEX. R. CIV. P. 652 In such an instance, the property should be resold. TEX. R. CIV. P. 653.

6. Return of the Writ of Execution The levying officer is supposed to return the writ, stating concisely in writing his efforts to execute the writ. TEX. R. CIV. P. 654.

B. PURSUANT TO FEDERAL COURT JUDGMENT Rule 69 of the Federal Rules of Civil Procedure provides that a writ of execution is the process to enforce a federal money judgment. The procedures for execution are to be "in accordance with the practice and procedure of the state in which the district court is held," except to the extent that a federal law is applicable. A federal statute provides for the federal court issuing the judgment to dictate the terms and conditions for the sale of real property to satisfy a federal court judgment. 28 U.S.C. § 2001 (West 1982). The court may also appoint a receiver. Federal law requires that notice of the sale of realty be published in a newspaper of general circulation, once a week for four weeks. 28 U.S.C. § 2002 (West 1982). The same rules apply to the sale of personalty. 28 U.S.C. § 2004 (West 1982).

C. SECONDARY MATERIALS There is a 500+ page article in 30 AM. JUR.2d *Executions* (1967), on the subject of executions. Execution in Texas is discussed in 34 TEX.JUR.3d *Enforcement of Judgments* §§ 4-190 (1984).

VII. ATTACHMENT Attachment is a pre-judgment remedy designed to assist a claimant in preserving his right to collect a judgment by limiting the debtor's freedom to dispose of non-exempt property.

A. STATE STATUTES AND RULES OF PROCEDURE Attachments in Texas are governed by Chapter 61 of the Texas Civil Practice and Remedies Code and Rules 592-609 of the Texas Rules of Civil Procedure.

1. Civil Practice & Remedies Code Provisions The following discussion examines the rules pertaining to writs of attachment contained in the Texas Civil Practice & Remedies Code.

a. The Four Principal Conditions Under Section 61.001 of the Texas Civil Practice and Remedies Code, a writ of attachment is available to a plaintiff if four conditions are met:

1. the defendant is justly indebted to the plaintiff;

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

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

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

TEX. CIV. PRAC. & REM. CODE ANN. § 61.001 (Vernon 1997).

b. The Nine Specific Grounds There are nine specific grounds set out in Section 61.002 for the issuance of a writ of attachment. They vary from the fact that the defendant is not a resident of Texas, to the fact that the defendant is about to leave the state permanently, or that the defendant is ducking service, to the fact that the defendant is about to hide his property for the purpose of defrauding his creditors, or that the defendant owes the plaintiff for property obtained under false pretenses. TEX. CIV. PRAC. & REM. CODE ANN. § 61.002 (Vernon 1997). These grounds involve transience of the defendant or efforts by the defendant to dispose of property to put it out of the reach of creditors.

c. Incident to Other Litigation; Before Debt is Due A writ of attachment must be issued incident to a pending suit. TEX. CIV. PRAC. & REM. CODE ANN. § 61.003 (Vernon 1997). A writ of attachment can issue even if the debt owed

by the defendant is not due. TEX. CIV. PRAC. & REM. CODE ANN. § 61.004 (Vernon 1997).

d. Affidavit Required The writ of attachment can be issued by the judge or the clerk of the court. In order to secure a writ of attachment, the plaintiff or his agent must file with the court an *affidavit* stating: the general grounds for issuance of the writ under Sections 61.001(1), (2), and (3); the amount of the demand; and specific grounds for issuance under Section 61.002. The affidavit must be filed among the papers of the case. TEX. CIV. PRAC. & REM. CODE ANN. § 61.022 (Vernon 1997). The applicant must execute a *bond*, with two or more good and sufficient sureties, payable to the defendant, in an amount fixed by the judge issuing the writ; and conditioned on the plaintiff prosecuting his suit to effect and paying all damages and costs adjudged against him for wrongful attachment. The officer issuing the writ must approve the bond, which should be filed among the papers of the case. TEX. CIV. PRAC. & REM. CODE ANN. § 61.023 (Vernon 1997).

e. Only on Non-Exempt Property The writ of attachment can be levied only upon property subject to execution. TEX. CIV. PRAC. & REM. CODE ANN. § 61.041 (Vernon 1997). If the officer attached personalty, he must retain possession until final judgment, unless the property is replevied, sold as provided by law, or claimed by a third party who posts bond and tries his right to the property. The officer attaches realty by filing a copy of the writ and part of the return with the county clerk of the county where the realty is located. If the writ of attachment is set aside, the court that issued the writ must send a certified copy of the order to the county clerk of each county where the realty is located. TEX. CIV. PRAC. & REM. CODE ANN. § 61.043 (Vernon 1997).

f. Creates Attachment Lien An executed writ of attachment creates a lien from the date of levy on the real property attached, on the personalty held by the attaching officer, and on the proceeds of any attached personal property that may have been sold. TEX. CIV. PRAC. & REM. CODE ANN. § 61.061 (Vernon 1997).

g. When Lien Foreclosed If the plaintiff is successful in the underlying suit, the attachment lien is foreclosed as are other liens. The court can direct the proceeds from prior sale of personalty to be applied to the judgment, and can direct the sale of personalty still in the hands of the officer or realty levied upon by the officer. TEX. CIV. PRAC. & REM. CODE ANN. § 61.062 (Vernon 1997). If personalty has been replevied, the plaintiff takes judgment against the defendant and the sureties on his replevy bond. TEX. CIV. PRAC. & REM. CODE ANN. § 61.063 (Vernon 1997).

2. Applicable Rules of Civil Procedure The following discussion examines Texas Rules of Civil Procedure pertaining to writs of attachment.

a. The Application for Writ of Attachment Rule 592 of the Texas Rules of Civil Procedure governs the application for writ of attachment and order. Under Rule 592, the plaintiff can file an application for writ of attachment at the commencement of a suit or during its progress. The application must be supported by affidavits of a person with knowledge of relevant facts, and the affidavits must be based upon personal knowledge. The information in the affidavits must set forth facts that would be admissible in evidence, except that facts may be stated on information and belief if the grounds for such belief are specifically stated. The application must meet statutory requirements, and must state the grounds for issuing the writ of attachment, and specific facts relied upon by the plaintiff to support the required findings by the trial court. The grounds may be stated conjunctively or disjunctively. TEX. R. CIV. P. 592.

b. Written Order of the Court Under Rule 592, writ of attachment cannot issue except upon written order of the court after a hearing, which may be ex parte. If a writ of attachment is to be issued, the court must make specific findings of fact in the order directing issuance of the writ, to support the statutory grounds found to exist. The order must specify the maximum value of property that may be attached, and the amount of the bond required of plaintiff. The order must also direct that the property attached be kept safe and preserved. The bond is to be set in an amount to adequately compensate the defendant in the event the plaintiff fails to prosecute his suit "to effect," and to pay all damages and costs that may be adjudged against the plaintiff for wrongfully suing out the writ of attachment. The order must also find the amount of bond which the defendant can post to replevy the property attached. This bond is to be in the amount of the plaintiff's claim, plus one year's interest if allowed by law, and the estimated costs of court. The order may direct one or more writs to issue simultaneously, or in succession. TEX. R. CIV. P. 592.

c. Bond Must be Posted A writ of attachment cannot be issued until the applicant has filed a bond payable to the defendant in the amount fixed by the court's order. Either the plaintiff or the defendant can file a motion to increase or reduce the bond, or challenge the sufficiency of the sureties. After a hearing, the court can change the amount of the bond, or enter appropriate orders regarding the sureties. TEX. R. CIV. P. 592a. A form of attachment bond is provided in Rule 592b.

d. Mechanics of Filing, Issuance The form of the writ of attachment is prescribed in Rule 594. The Writ of Attachment directs the Sheriff or Constable to "keep and secure in your hands the property so attached, unless replevied . . ." The sheriff or constable is required to execute the writ of attachment, by levying on the property of the defendant. TEX. R. CIV. P. 597. The defendant must be served with a copy of the writ of attachment, application, and accompanying affidavits and order, as soon as practicable after the levy of the writ. Service is to be effected as for citations. Pursuant to TEX. R. CIV. P. 598a, the copy of the writ of attachment served on the defendant must state in ten point type:

To _____, Defendant:

> You are hereby notified that certain properties alleged to be owned by you have been attached. If you claim any rights in such property, you are advised:
>
> > YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

e. Defendant's Right to Replevy Under Rule 599, the defendant has the right to replevy at any time prior to judgment, by giving bond with sufficient sureties, to be approved by the officer who levied the writ of attachment, payable to the plaintiff, in an amount fixed by the court's order, or instead at the defendant's election for the value of the property attached, plus one year's interest thereon, at the legal rate. Either party can secure prompt judicial review of the amount of the bond, denial of bond, sufficiency of the sureties, or value of the property in question. The court can decide based upon uncontroverted affidavits, of if controverted then based upon evidence presented. The defendant also can move the court for a right to substitute property of equal value to that attached. TEX. R. CIV. P. 599.

f. Perishable Items Rules 600-605 contain specific provision relative to perishable items.

g. Dissolution of the Writ The defendant or any intervenor claiming an interest in the attached property can file a sworn motion to vacate, dissolve, or modify the writ of attachment. Such a motion should either admit or deny each finding in the underlying court order directing issuance of the writ, or set out the reasons why that is not possible. Except by agreement of the parties to the contrary, the matter is to be determined within ten days. The filing of such a motion stays all further action on the writ except for orders directed to preserving the property in question. At the hearing, the plaintiff has the burden to prove the grounds for the attachment, failing which the writ should be dissolved. If the issue is that the value of the property attached exceeds the amount necessary to secure the debt, plus one year's interest, plus costs, then the movant has the burden on that point. The movant also has the burden if the issue is substituting property. The court may rule on the basis of uncontroverted affidavits, or if controverted then on the basis of evidence presented. TEX. R. CIV. P. 608.

VIII. GARNISHMENT Garnishment is a court proceeding designed to recover the judgment debtor's claim to money or property in the hands of a third person. As a practical matter, most garnishments are issued against financial institutions, to retrieve funds placed "on deposit" with the institution by the judgment debtor. However, the contents of a safety deposit box can be garnished. *See Blanks v. Radford*, 188 S.W.2d 879 (Tex. Civ. App.--Eastland 1985, writ ref'd w.o.m.).

A. STATE STATUTES AND RULES OF PROCEDURE The regulations surrounding garnishment in Texas are contained both in the Texas Civil Practice and Remedies Code, Chapter 63, and in the Texas Rules of Civil Procedure, Rules 657-679. In common parlance, the judgment creditor or plaintiff initiating the garnishment proceeding is called the "plaintiff," the third party holding the debtor's property or owing a debt to the debtor is called the "garnishee," and the debtor is called the "defendant."

1. Civil Practice & Remedies Code Provisions Garnishment is available when an original attachment has been issued. TEX. CIV. PRAC. & REM. CODE ANN. § 63.001(1) (Vernon 1997). Pre-judgment garnishment is available when the plaintiff is suing for a debt, and makes an affidavit stating that the debt is "just, due, and unpaid," and that within the plaintiff's knowledge the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt, and the garnishment is not sought to injure the debtor or the garnishee. TEX. CIV. PRAC. & REM. CODE ANN. § 63.001(2) (Vernon 1997). Post-judgment garnishment is available when the plaintiff has a valid, subsisting judgment,[2] and makes an affidavit stating that, within plaintiff's knowledge, the defendant does not possess property in Texas that is subject to execution sufficient to satisfy the judgment.

The clerk of the court issues the writ of garnishment. TEX. CIV. PRAC. & REM. CODE ANN. § 63.002 (Vernon 1997). Once the writ is served on the garnishee, the garnishee may not deliver any personalty or pay any debt to the defendant. TEX. CIV. PRAC. & REM. CODE ANN. § 63.003 (Vernon 1997). If the garnishee is a corporation, the garnishee may not permit or recognize a sale or transfer of shares or an interest in the business alleged to be owned by the defendant. If such a payment or transfer nonetheless occurs, the payment or transfer is void as against the garnishor, to the extent necessary to pay the debt, deliver the personalty, of deliver the shares.

Both the Texas Constitution and the Civil Practice and Remedies Code prohibit the garnishment of current wages for personal service. TEX. CONST. art. XVI, sec. 28; TEX. CIV. PRAC. & REM. CODE ANN. § 63.004 (Vernon 1997). This issue is discussed more fully at p. S-16 below. Venue of a contested garnishment action ordinarily is in the county where the garnishee is located. However, if the garnishee is a foreign corporation, the garnishment is to be tried in the court in which the suit giving rise to the garnishment is pending or was tried. TEX. CIV. PRAC. & REM. CODE ANN. § 63.005 (Vernon 1997).

2. Applicable Rules of Civil Procedure Rule 658 of the Texas Rules of Civil Procedure governs the application for writ of garnishment and order. Under Rule 658, the plaintiff can file an application for writ of garnishment at the commencement of a suit or during its progress. The application must be supported by affidavits of a person with knowledge of relevant facts, and the affidavits must be based upon personal knowledge. The information in the affidavits must set forth facts that would be admissible in

evidence, except that facts may be stated on information and belief if the grounds for such belief are specifically stated. The application must meet statutory requirements, and must state the grounds for issuing the writ of garnishment, and specific facts relied upon by the plaintiff to support the required findings by the trial court. The grounds may be stated conjunctively or disjunctively.

a. Pre-Judgment Garnishment

(1) Written Order of the Court. Under Rule 658, writ of garnishment cannot issue before final judgment except upon written order of the court after a hearing, which may be ex parte. If a pre-judgment writ is to be issued, the court must make specific findings of facts, in the order directing issuance of the writ, to support the statutory grounds found to exist. The order must specify the maximum value of property or indebtedness that may be garnished, and the amount of the bond required of plaintiff. The bond is to be set in an amount to adequately compensate the defendant in the event the plaintiff fails to prosecute his suit "to effect," and to pay all damages and costs that may be adjudged against the plaintiff for wrongfully suing out the writ of garnishment. The order must also find the amount of bond which the defendant can post to replevy the property or debt garnished. This bond is to be in the amount of the plaintiff's claim, plus one year's interest if allowed by law, and the estimated costs of court. The order may direct one or more writs to issue simultaneously, or in succession.

(2) Bond Must be Posted. A pre-judgment writ of garnishment cannot be issued until the applicant has filed a bond payable to the defendant in the amount fixed by the court's order. Either the plaintiff or the defendant can file a motion to increase or reduce the bond, or challenge the sufficiency of the sureties. After a hearing, the court can change the amount of the bond, or enter appropriate orders regarding the sureties. If the garnishee files an answer that the garnishee is indebted to the defendant, or has personal effects of the defendant, in an amount less that the debt claimed by the plaintiff, then upon notice and hearing the court can reduce the bond to twice the sum of the garnishee's indebtedness to the defendant, plus the value of the effects in the garnishee's hands belonging to the defendant. TEX. R. CIV. P. 658a.

b. Mechanics of Filing, Issuance The clerk should docket the case and, if all prerequisites have been met, issue a writ of garnishment to the garnishee, commanding him to appear by answer day. The writ instructs the garnishee to answer under oath what, if anything, he is indebted to the defendant, etc. The writ also instructs the garnishee to state under oath any other persons he knows to be indebted to the plaintiff, or to have personalty belonging to the defendant. TEX. R. CIV. P. 659. The form of the writ of garnishment is prescribed in Rule 661. The sheriff or constable is required to served the writ of garnishment upon the garnishee, and to make return of the writ. TEX. R. CIV. P. 663. The defendant must be served with a copy of the writ of garnishment, application, and accompanying affidavits and order, as soon as practicable after service of the writ. Service is to be effected as for citations. The notice is to prominently state:

> To _____, Defendant:
>
> You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:
>
> > YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.

TEX. R. CIV. P. 663a.

c. Defendant's Right to Replevy Under Rule 664, the defendant has the right to replevy at any time prior to judgment, by giving bond with sufficient sureties, to be approved by the officer who levied the writ of garnishment, payable to the plaintiff, in an amount fixed by the court's order, or instead at the defendant's election for the value of the property garnished or indebtedness claimed, plus one year's interest thereon, at the legal rate. Either party can secure prompt judicial review of the amount of the bond, denial of bond, sufficiency of the sureties, or value of the property in question. The court can decide based upon uncontroverted affidavits, of if controverted then based upon evidence presented. The defendant also can move the court for a right to substitute property of equal value to that garnished. TEX. R. CIV. P. 664.

d. Dissolution of the Writ The defendant or any intervenor claiming an interest in the garnished property can file a sworn motion to vacate, dissolve, or modify the writ of garnishment. Such a motion should either admit or deny each finding in the underlying court order directing issuance of the writ, or set out the reasons why that is not possible. The matter is to be determined within ten days. The filing of such a motion stays all further action on the writ except for orders directed to preserving the property in question. At the hearing, the plaintiff has the burden to prove the grounds for the garnishment, failing which the writ should be dissolved. If the issue is that the value of the property garnished exceeds the amount necessary to secure the debt, plus one year's interest, plus costs, then the movant has the burden on that point. The movant also has the burden if the issue is substituting property. The court may rule on the basis of uncontroverted affidavits, or if controverted then on the basis of evidence presented. TEX. R. CIV. P. 665a.

e. Garnishee's Answer; Discharge; Judgment Under Rule 665, the garnishee's answer must be under oath, in writing, and signed by him. He must give true answers to the questions inquired of in the writ. TEX. R. CIV. P. 665. If the answer reflects that the garnishee is not indebted to the defendant, both when the writ was served and at the time the answer is filed, and has no property belonging to the

defendant, then the garnishee is to be discharged, unless his answer is controverted. If the garnishee fails to file an answer, the court can render a default judgment against the garnishee for the full amount of the judgment against the defendant, plus interest and costs in both the main case and in the garnishment proceeding.

Where the garnishee is indebted to the defendant, or possesses property of the defendant, then judgment is rendered against the garnishee for the amount in question. TEX. R. CIV. P. 668. If the garnishee fails to pay, execution can issue against the garnishee. If the garnishee possesses personalty of the defendant, the court can issue an order of sale under execution. TEX. R. CIV. P. 669 & 672. If the garnishee refuses to deliver personal effects, then contempt can be brought against the garnishee. TEX. R. CIV. P. 670.

IX. "TURNOVER" PROCEEDINGS Prior to 1979, collecting debts in Texas was "the pits." In 1979, the Texas Legislature passed the so-called "turnover statute," art. 3827a, V.A.T.S. That law has been brought forward as TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (Vernon 1997). Section 31.002 of the Civil Practice and Remedies Code gives creditors the power to seek the assistance of the court in collecting money judgments, as to property that cannot readily be attached or levied on by ordinary legal process and is non-exempt.

Among other available remedies listed in the statute, the court can order the judgment debtor to turn over nonexempt property in his possession or control, and all related documents, to the sheriff or constable for execution. Or, the court can appoint a receiver to take possession of the property, sell it, and apply the proceeds to satisfy the judgment. The court can enforce its turnover order by contempt. And (the icing on the cake) a judgment creditor is entitled to recover reasonable costs, *including attorney's fees*, in bringing the turnover proceeding.

The traditional methods of collecting money judgments were cumbersome, and often required the collection attorney to become involved in assisting various government officials in going about their appointed tasks of servings writs, posting notices, etc. Now many of these cumbersome procedures can be shortcut by merely having the court order the debtor to produce non-exempt property to be taken for satisfaction of the judgment.

In is not necessary to attempt collection by more traditional methods before seeking a turnover order. *Hennigan v. Hennigan*, 666 S.W.2d 322, 323 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.). The turnover remedy is cumulative of other collection methods. *Matrix, Inc. v. Provident American Ins. Co.*, 658 S.W.2d 665 (Tex. App.--Dallas 1983, no writ).

The turnover procedure proved handy to the creditor attempting to recover against realty located in Portugal, in *Reeves v. Federal Savings & Loan Ins. Corp.*, 732 S.W.2d 380 (Tex. App.--Dallas 1987, no writ). The court directed the debtor to turn over "all indicia of ownership" to the Portuguese real property.

The turnover procedure is an effective remedy to recover against intangible assets such as accounts receivable, *Arndt v. National Supply Co.*, 650 S.W.2d 547 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.), or promissory notes, *Matrix, Inc. v. Provident American Ins. Co.*, 658 S.W.2d 665 (Tex. App.--Dallas 1983, no writ), or even a chose in action, *Renger Memorial Hospital v. State of Texas*, 674 S.W.2d 828 (Tex. App.--Austin 1984, no writ). However, the court may not enter or enforce an order to turn over exempt property, or the proceeds or disbursements of exempt property. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(f) (Vernon Supp. 1997). *See Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317, 322 (Tex. App.--Dallas 1997, no writ) (can't order turnover of distributions of spendthrift trust).

A turnover order is not available to get at the debtor's paycheck before it is received by the debtor. A turnover order can only go after wages received prior to the issuance of the order. See the discussion at p. S-16 below.

The trial court is not required to order turnover. On appeal, the standard of review is abuse of discretion. *See Commerce Savings Association v. Welch*, 783 S.W.2d 668 (Tex. App.--San Antonio 1990, no writ).

X. REGULATION OF DEFICIENCY JUDGMENTS AFTER FORECLOSING ON REAL ESTATE Sections 51.003, 51.004, and 51.005 of the TEXAS PROPERTY CODE govern foreclosures of real property, and suits for any deficiency after foreclosure.

Section 51.003 provides that if the price at which real property is sold at foreclosure under a deed of trust or contract lien is less than the unpaid balance of the debt secured by the property, and a deficiency results, then any action to collect the deficiency must be brought within two (2) years from the date of the foreclosure sale. A party sued for deficiency may move the court for a determination of the fair market value of the real estate at the time of foreclosure. If the court determines that the fair market value exceeded the price bid at the sale, then the parties sued for deficiency are entitled to a credit for the difference between the fair market value and the bid price, less any other debts secured by liens in the property that were not extinguished in the sale. Any funds received by the plaintiff from private mortgage insurance and the like must also be credited to the deficiency.

Section 51.004 applies to suits for deficiency after court judgment foreclosing a lien and ordering sale. Where the property is sold pursuant to court action and a deficiency is left, any party obligated on the indebtedness, including a guarantor, can bring suit within 90 days of the foreclosure sale for a determination of the fair market value of the property. If the fair market value exceeds the bid price at the sale, the debtor is entitled to a credit for the difference, less the amount of any debt secure by lien in the real property

that was not extinguished in the foreclosure. The creditor must also credit mortgage insurance received.

XI. PROPERTY EXEMPT FROM CREDITORS' CLAIMS Both state law and federal law protect some properties from seizure to pay debts.

A. PROTECTIONS UNDER TEXAS LAW Texas law protects the homestead, and various types of personal property, from the claims of unsecured creditors.[3] These protections are discussed below.

1. Homestead Protection Texas has long been known for its laws relating to the homestead. Historians have observed that many of the politicians of the nation, and later the great state, of Texas were by men who had fled civilized areas of the United States to escape problems with creditors. When these fugitives from commerce sat down to fashion a set of laws to govern Texas, they built into the Texas constitution a number of restrictions upon creditors' ability to recover for their debts. The homestead was one of these.

However, the laws relating to homestead go beyond debtor-creditor relations. Texas law places a number of restrictions on a spouse's or parent's ability to deal with the homestead. And a spouse's homestead interest is protected against the claims of heirs. And Texas recognizes a homestead right as an asset, quite apart from ownership rights in the underlying property, which is subject to division in a divorce. These issues are examined below.

In 1995, the Texas Constitution, art. XVI, § 50, was amended to permit forced sale for "an owelty of partition imposed against the entirety of the property," including pursuant to a divorce decree or agreement incident to divorce.

In November of 1997, Texans amended the Constitution to permit "an encumbrance against homestead property for certain extensions of equity credit." The amended Section is attached as an appendix, beginning at p. S-19.

a. What is a Homestead in Texas? A "homestead" is an estate in land, not just a privilege of exemption or possession. *Andrews v. Security Nat. Bank of Wichita Falls*, 121 Tex. 409, 50 S.W.2d 253, 256 (1932); *Villarreal v. Laredo Nat. Bank*, 677 S.W.2d 600, 607 (Tex. App.--San Antonio 1984, no writ). The homestead right does not depend upon unqualified fee ownership of the land. *Villarreal*, 677 S.W.2d at 606; *Gann v. Montgomery*, 210 S.W.2d 255, 258 (Tex. Civ. App.--Fort Worth 1948, writ ref'd n.r.e.). The homestead right is akin to a life estate. *Sparks v. Robertson*, 203 S.W.2d 622 (Tex. Civ. App.--Austin 1947, writ ref'd).

b. Acquisition of Homestead The following rules apply to the acquisition of a homestead interest in land, under Texas law.

(1) Homestead Requires Some Interest in Land. Homestead can adhere only to some title or interest in land. *Villarreal v. Laredo Nat. Bank*, 677 S.W.2d 600, 606 n. 3 (Tex. App.--San Antonio 1984, no writ). However, fee simple ownership in the land is not required. *Id.* at 606. Sufficient interests include tenancy-in-common, tenancy-at-will, and a right of present possession. *Id.* at 606 n. 3. In *Villarreal*, the provision in the decree of divorce allowing the wife "use and occupancy" of the house until the youngest child turned 18 was a sufficient interest to support a homestead claim for the wife, as against a creditor, even though ownership of the house was awarded by the Decree of Divorce to the husband.

(2) When Right Arises. A homestead right arises upon the intention of a person to use the premises for homestead purposes, coupled with occupancy or some overt act of preparing to occupy the premises for that purpose. *Kostelnik v. Roberts*, 680 S.W.2d 532, 536 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.); *Davis v. McClarken*, 378 S.W.2d 358, 360 (Tex. Civ. App.--Eastland 1954, no writ). The Supreme Court recently said, however, that "[w]hile occupying a piece of property as homestead, a person cannot establish a homestead right in another place by 'attempting to live there in the future.'" *Caulley v. Caulley*, 34 TEX. SUP. CT. J. 417, 418 (March 6, 1991).

(3) Designation of Homestead. The owner's having designated or not designated the property as homestead for property tax purposes is not controlling. *Dodd v. Harper*, 670 S.W.2d 646 (Tex. App.--Houston [1st Dist.] 1983, no writ). Such designation, or the lack thereof, is merely one evidentiary factor to consider on the ultimate question, which is whether the claimant intended to make the property his homestead. *See Caulley, supra* at 417, 418.

(a) Forcing Designation. The Property Code provides a way for a creditor to require a person to declare a homestead. Where execution is issued against someone who holds land which might be homestead, the judgment creditor can give the judgment debtor notice to designate homestead. The notice must state that upon failure of the debtor to designate a homestead, the court will appoint a commissioner to make such a designation, at the debtor's expense. TEX. PROP. CODE ANN. § 41.021 (Vernon Supp. 1998). The debtor has until 10:00 a.m. on the Monday following the twentieth day after service of notice to designate his homestead, by filing a written designation with the court issuing writ of execution. The designation must include a plat. TEX. PROP. CODE ANN. § 41.022 (Vernon Supp. 1998). If the debtor fails to do so, then on motion of the judgment creditor filed within 90 days of issuance of execution, the court issuing execution must appoint a commissioner, together with a surveyor and others whose assistance is needed. The commissioner is to file his designation, and plat, on behalf of the judgment debtor, within 60 days of appointment, or within such time as the court may allow. Either the judgment creditor or the judgment debtor may, within 10 days thereafter, request a hearing from the court on the designation, and by filing exceptions to the designation prior to hearing be entitled to present evidence for or

against the designation. TEX. PROP. CODE ANN. § 41.023 (Vernon Supp. 1998). After the hearing, the court designates the homestead, and orders sale of any excess property. The fees and expenses of the commissioner, appraiser and others appointed, are taxed against the debtor as costs of execution. TEX. PROP. CODE. ANN. § 41.023 (Vernon Supp. 1998).

c. Size of Homestead The size of the homestead is set in Section 41.002 of the Texas Property Code. An urban homestead consists of not more than one acre of land, which can be in one or more lots, together with any improvements thereon. TEX. PROP. CODE ANN. § 41.002(a) (Vernon Supp. 1998). A rural[4] homestead for a family is not more than 200 acres, and for an individual not more than 100 acres, whether in one or more parcels, together with any improvements thereon. TEX. PROP. CODE ANN. § 41.002(b) (Vernon Supp. 1998). The sizes given in the Property Code apply to all homesteads, regardless of when they were created. TEX. PROP. CODE ANN. § 41.002(d) (Vernon Supp. 1998).

d. Loss of Homestead A homestead interest can be lost by death, abandonment or alienation. *Posey v. Commercial National Bank*, 55 S.W.2d 515 (Tex. Comm'n App.--1932, judgment adopted).

(1) Death. As stated above, the homestead status can terminate as a result of death. Upon the death of both spouses, the property ceases to be homestead. *Williamson v. Lewis*, 346 S.W.2d 957, 959 (Tex. Civ. App.--Fort Worth 1961, writ ref'd). The fact that one spouse dies does not deprive the survivor of an existing homestead right. *Julian v. Andrews*, 491 S.W.2d 721, 727 (Tex. Civ. App.--Fort Worth 1973, writ ref'd n.r.e.). *Accord*, *Cox v. Messer*, 469 S.W.2d 611 (Tex. Civ. App.--Tyler 1971, no writ).

(2) Abandonment. The homestead status of land can be lost by abandonment. *Paddock v. Siemoneit*, 147 Tex. 571, 218 S.W.2d 428 (1949). If the homestead claimant is married, however, the homestead cannot be abandoned without the consent of the claimant's spouse. TEX. PROP. CODE ANN. § 41.004 (Vernon Supp. 1998). *See In re Johnson*, 112 B.R. 15 (Bkrtcy. E.D. Tex. 1989).

(a) Temporary Absence Not Fatal. It has been held that a temporary absence from a homestead, and even temporary removal to another state, does not alone constitute abandonment of the homestead. *McFarland v. Rousseau*, 667 S.W.2d 929, 931 (Tex. Civ. App.--Corpus Christi 1984, no writ).

(b) Temporary Renting Not Fatal. The temporary renting of the homestead does not destroy its homestead character provided the claimant has not acquired another homestead. TEX. PROP. CODE ANN. § 41.003 (Vernon Supp. 1998).

(c) Moving Out Upon Separation Not Fatal. Several Texas courts have faced the question of whether a spouse's leaving the home upon marital separation constitutes abandonment of that spouse's homestead interest.

1/ The *Posey* Case. In *Posey v. Commercial Nat. Bank*, 55 S.W.2d 515 (Tex. Comm'n App. 1932, judgm't adopted), a husband conveyed his one-half community property interest in the parties' home to his wife in anticipation of divorce. Creditors of the husband claimed the conveyance constituted an abandonment of his homestead protection, and that his one-half interest was received by the wife subject to the husband's debts. The court rejected the argument, holding that the husband's homestead interest inured to the benefit of the wife.

2/ The *Sakowitz* Case. In *Sakowitz Bros. v. McCord*, 162 S.W.2d 437 (Tex. Civ. App.--Galveston 1942, no writ), the court rejected an argument that the filing of a divorce and issuance of a temporary injunction denying the husband access to the parties' home constituted abandonment by the husband of the homestead protection of his one-half interest in the property. The court held that once the homestead character of property is established, it continues through a divorce for so long as some members of the family continue to occupy the property.

3/ The *Rimmer* Case. In *Rimmer v. KcKinney*, 649 S.W.2d 365 (Tex. App.--Fort Worth 1983, no writ), creditors argued that a husband had abandoned the homestead character of his one-half community property interest in the parties' home when he moved from the home after the divorce was filed and later conveyed his one-half interest to his wife pursuant to the decree of divorce. Because the wife and two daughters continued to live in the house, the court held that its homestead character continued. The appellate court observed certain differences from the facts in the *Sakowitz Bros.* case: that in *Rimmer* the husband moved out voluntarily, rather than in obeisance to an injunction; and further that the conveyance in *Rimmer* was from husband to wife, rather than from both spouses to a third party, as in *Sakowitz Bros.* The differences were not deemed significant.

4/ Other Authorities. See also *Villarreal v. Laredo Nat. Bank*, 677 S.W.2d 600, 606 (Tex. App.--San Antonio 1984, no writ) ("[a]s a general rule, the complete breaking up of the family for any cause does not operate to forfeit the homestead right of one who has acquired it and continues to use the property as his home"); *Wierzchula v. Wierzchula*, 623 S.W.2d 730, 732 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ) ("[t]he homestead character of the property is not destroyed by a divorce if one of the parties to the divorce continues to maintain it as homestead").

(3) Alienation. Traditionally a Texas home owner could convey his homestead to a corporation, then have the corporation mortgage the property and pay the loan proceeds over to the individual. In *In re Rubarts*, 896 F.2d 107 (5th Cir. 1990), the court held that where the lender knew that the transfer of the homestead to the corporation was a ruse to circumvent Texas homestead protection, that the lien in the home was void. In the event of bank failure, however, the *D'Oench, Duhme* doctrine would make the paperwork binding. *See* 12 U.S.C.A. § 1823(e) (West 1988). *See* McKnight, *supra* at 429.

e. Homestead in Other Spouse's Separate Property A spouse can have a homestead interest in land which is the separate property of the other spouse. *Villarreal v. Laredo Nat. Bank*, 677 S.W.2d 600, 606 (Tex. App.--San Antonio 1984, no writ). *See Caulley v. Caulley*, 806 S.W.2d 795 (Tex. 1991). This interest, or the right to use the property as a residence, can be awarded to the custodial spouse for the duration of the minority of the parties' children.[5] *Hedtke v. Hedtke*, 248 S.W.2d 21, 12 (Tex. 1923). *See Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 138 (Tex. 1977); *Villarreal v. Laredo Nat. Bank*, 677 S.W.2d 600, 606 (Tex. App.--San Antonio 1984, no writ). A homestead interest in the other spouse's separate property also constitutes a property right which can be awarded, or compensated for, on divorce. *See Wierzchula v. Wierzchula*, 623 S.W.2d 730 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ). Presumably, sums awarded for such a homestead interest would be exempt from creditor's claims for six months after receipt, under TEX. PROP. CODE ANN. § 41.001 (Vernon Supp 1998).

f. Liens Under the Texas constitution,[6] only five liens can be foreclosed against a homestead: purchase money liens, tax liens, builder's and mechanic's liens, an owelty of partition (including one arising from a divorce) and home equity loans which comply with the November, 1997 constitutional amendment.[7]

(1) Vendor's Lien. A vendor's lien is a lien which secures the unpaid portion of the purchase price of the property.

(a) Express Vendor's Lien. Ordinarily, the vendor's lien is retained in the deed conveying title to the purchaser. The vendor's lien can further be secured by a deed of trust, providing for non-judicial foreclosure if default is made in the payment of the purchase money indebtedness.

(b) Implied Vendor's Lien. The Texas Supreme Court has ruled that where one party sells realty on credit to another, an implied vendor's lien arises to secure the debt. *McGoodwin v. McGoodwin*, 671 S.W.2d 880 (Tex. 1984). In *McGoodwin*, the wife conveyed her interest in the parties' homestead to the husband pursuant to an agreement incident to divorce. No vendor's lien was retained in the deed. The Supreme Court held that an implied vendor's lien arose from the property settlement agreement, securing the wife's one-half community property interest conveyed. The Court specifically noted that the lien reached only the undivided one-half community property interest conveyed by the wife to the husband, and not the one-half interest already owned by the husband. *Id.* at 883.

A similar result was reached by the Austin Court of Appeals in *Colquette v. Forbes*, 680 S.W.2d 536 (Tex. App.--Austin 1984, no writ), where an implied vendor's lien was held to have arisen from the agreement incident to divorce even though no vendor's lien was retained in the deed conveying the husband's one-half community property interest in the property to the wife. *See* McKnight, *Family Law: Husband and Wife*, 39 SW. L. J. 1, 19, 26-27 (1985).

In *Stapler v. Stapler*, 720 S.W.2d 271 (Tex. App.--Fort Worth 1986, no writ), an ex-husband was allowed to judicially foreclose on an implied vendor's lien in real estate awarded to his ex-wife in their agreement incident to divorce, where the ex-wife failed to pay an obligation owed to the IRS as required by the agreement. This was so, even though there was no language in the agreement to suggest that the realty was awarded to the ex-wife in consideration for her paying the IRS debt.

The implied lien in one-half of the property, as described in *McGoodwin*, probably was not affected by the 1995 constitutional amendment.

(2) Mechanic's, Contractor's or Materialman's Lien. The mechanic's, contractor's or materialman's lien is covered by Chapter 53 of the Texas Property Code. Chapter 53: describes persons entitled to the lien, and the property which is subject thereto; describes the procedure for perfecting the lien; provides for the withholding of funds by the owner on behalf of subcontractors; etc. Ordinarily, however, the family home will be homestead, and will be protected by Section 41.001 of the Texas Property Code. Section 41.001 provides that an encumbrance may be properly fixed on homestead property for work and material used in constructing improvements on the property only "if contracted for in writing as provided by Sections 53.254(a), (b), and (c)." TEX. PROP. CODE ANN. § 41.001(3) (Vernon Supp. 1998).

(3) Tax Lien. On January 1 of each year a tax lien attaches to property to secure all taxes, penalties and interest ultimately imposed for the year on that property. TEX. TAX CODE ANN. § 32.01 (Vernon Supp. 1998). This lien takes priority over a homestead interest in the property. *Id.* § 32.05(a) (Vernon 1992). The lien also has priority over other debts of the owner, even if they are secured by a prior lien on the property. *Id.* § 32.05(b) (Vernon 1992). Priority as to a federal tax lien is controlled by Texas law subject, however, to any contrary provision of federal law on the subject. *Id.* § 32.04 (Vernon 1992). The tax lien may be foreclosed.

(4) Equitable Lien. Even before the 1995 amendment to Section 50, Texas courts held that on divorce, where the court awards the house to one party and a money judgment to the other for his or her interest in the home, the money judgment could be secured by an equitable lien, created in the decree of divorce, which is enforceable against a claim of homestead. *Lettieri v. Lettieri*, 654 S.W.2d 554 (Tex. App.--Fort Worth 1983, writ dism'd). In *Wierzchula v. Wierzchula*, 623 S.W.2d 730, 732 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ), the court said that in a divorce action a lien could be placed on a spouse's separate property homestead "to secure the payment of the amount awarded to the other spouse for the spouse's homestead interest." *Accord*, *Wren v. Wren*, 702 S.W.2d 250, 252 (Tex. App.--Houston [1st Dist.] 1985, no writ). An equitable lien can also be awarded to secure a judgment for

reimbursement for payments made on purchase money loans, home improvement loans, or property taxes on the home. *Eggemeyer v. Eggemeyer*, 623 S.W.2d 462, 466 (Tex. App.--Austin 1981, writ dism'd). *See Buchan v. Buchan*, 592 S.W.2d 367 (Tex. Civ. App.--Tyler 1979, writ dism'd) (husband awarded judgment to offset leasehold interest in wife's separate property residence taken from him in divorce). Professor McKnight stated:

> Texas courts have generally acknowledged that in a suit for divorce a lien may be placed upon a spouse's homestead in order to secure the payment of a money judgment awarded to the other spouse for his or her homestead interest.

McKnight, *Family Law: Husband and Wife*, 38 SW. L.J. 131, 154 (1984).

In *In re Miller*, 58 B.R. 192 (Bankr.S.D.Tex. 1985), the bankruptcy judge ruled that an equitable lien created by a divorce decree was an implied vendor's lien, enforceable against a homestead. The lien arose at the time of rendition of the decree of divorce, and did not have to be abstracted in order to be perfected. However, an issue exists as to what extent such a lien can be avoided in bankruptcy. *See Farrey v. Sanderfoot*, ___ U.S. ___, 111 S. Ct. 1825, 114 L.Ed.2d 337 (1991) (in bankruptcy, former husband avoided a lien in homestead securing divorce award to former wife of $ 29,000); *Faires v. Billman*, 849 S.W.2d 455 (Tex. App.--Austin 1993, no writ) (discussing avoidance of lien).

(a) But Only For Interest in Homestead. Professor McKnight has suggested that the homestead is not subject to the imposition of an equitable lien for any claims "except liens for improvements and taxes attributable to the premises and interest in the property made the basis of the homestead and for improvements and taxes." McKnight, *supra* at 154-55, citing *Eggemeyer v. Eggemeyer*, 623 S.W.2d 462, 466 (Tex. Civ. App.--Waco 1981, writ dism'd); *Day v. Day*, 610 S.W.2d 195, 199 (Tex. Civ. App.--Tyler 1980, writ ref'd n.r.e.).[8] It appears that an equitable lien can also be fixed in the homestead for a reimbursement claim for payment of a vendor's lien indebtedness, as well. An interesting question exists regarding a separate property home. Where the home is the separate property of one spouse, can the other spouse be given a judgment secured by lien in the homestead for his or her "homestead interest" in the other spouse's separate property? The court in *Wierzchula v. Wierzchula*, 623 S.W.2d 730 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ) said "yes." Thus, although *Eggemeyer* would prohibit the divesting of title to separate realty and awarding it to the other spouse, perhaps a money judgment can be awarded to the other spouse who relinquishes his or her "homestead interest" in the other spouse's separate property home. The 1995 amendment to Section 50 is not, by its terms, limited to an owelty of partition for an award of a *community property* homestead interest. Section 50 says "resulting from a division or an award of a family homestead in a divorce proceeding." TEX. CONST., Art. XVI, § 50.

(5) Equitable Subrogation to Lien. Under certain circumstances, where a party pays an indebtedness secured by lien, that party is equitably subrogated to the lienholder's secured position. In *Citizens Sav. Bank & Trust Co. v. Spencer*, 105 S.W.2d 671, 677 (Tex. Civ. App.--Amarillo), *writ dism'd*, 110 S.W.2d 1151 (Tex. 1937), it was said:

> A third person who has paid or has loaned money to pay a debt secured by a vendor's lien, is entitled to be subrogated to the rights of the vendor where the money was advanced at the debtor's request and for his benefit.

See also Henke v. First Southern Properties, 586 S.W.2d 617, 621 (Tex. Civ. App.--Waco 1979, writ ref'd n.r.e.) (one who discharges a vendor's lien upon land, even homestead, either by paying as surety, or at the request of the debtor, or at a judicial sale, which for some reason fails to convey the title, is subrogated to the lien of the creditor to the extent of the payment made). It can be argued that a spouse, or even an unmarried "partner," should equitably subrogate to a vendor's, mechanic's, or tax lien in the other spouse's or partner's property, where funds of the former have been used to pay indebtednesses secured by such liens. Equitable subrogation was given the status of a legal right, with the adoption of the 1995 amendment to Section 50. Section 50 now permits enforcement of a lien relating to the refinancing of a lien against the homestead, including refinancing of a federal tax debt of *both* spouses.

g. Sale of the Homestead and Title Insurance Under Texas law, the homestead is immune from execution for judgment liens, except for liens connected with purchase money debts, improvements loans and tax liens. TEX. CONST. art. 16 § 50. And the proceeds from sale of the homestead are immune from garnishment for six months, after the date of sale, during which time they can be reinvested in another homestead. TEX. PROP. CODE ANN. § 41.001(c) (Vernon Supp. 1998). Nevertheless, outstanding judgment liens can affect the ability to sell the homestead, since no one will buy without title insurance and title companies often refuse to insure the title of a homestead as long as judgment liens appear to exist against the property. The situation was described in Tandy & Black, *Fundamentals of Title Insurance*, STATE BAR OF TEXAS ADVANCED REAL ESTATE LAW COURSE D-25 (1985):

> In the ordinary course of business, when examination of title discloses abstracted and recorded judgment liens against the seller of putative homestead property, the almost universal response of Texas title insurers is a requirement that such judgment liens be released of record. Such releases are usually forthcoming only as the result of partial or complete satisfaction paid to the judgment-creditor from the seller's proceeds of sale. Certainly, on its face, this practice would seem to be in derogation of the constitutional and statutory protection afforded to the homestead. Practically speaking, however, as a matter of title insurance underwriting standards, the

> purely factual nature of homestead status cannot be satisfactorily demonstrated for the purpose of disregarding prior recorded abstracts of judgment against the seller-owner. The only other acceptable alternative for the title company would require the seller to institute a district court proceeding, citing the judgment-creditors as parties-defendant, out of which would hopefully come a judicial determination that, by reason of proven uninterrupted homestead status, the creditors' liens have not attached to the property being sold.

As a practical matter, when the buyer of financier requires title insurance as a condition of purchase, a seller with outstanding judgment liens may have to use some of the proceeds from sale of his homestead to discharge such liens, even though the liens are not enforceable against such proceeds at the time of sale.

h. Fraud Can Vitiate Homestead Protection In *Kolstelnick v. Roberts*, 680 S.W.2d 532 (Tex. Civ. App.--Corpus Christi 1984, writ ref'd n.r.e.), the court ruled that the homestead exemption cannot be used as a shield against imposition of a constructive trust where the homestead claimants knowingly misused property transferred to them for the benefit of another. The trial court imposed a constructive trust for the benefit of a third party, upon a mobile home and other property alleged to be homestead. However, in *Curtis Sharp Custom Homes, Inc. v. Glover*, 701 S.W.2d 24 (Tex. App.--Dallas 1985, no writ) (en banc), a divided Dallas Court of Appeals concluded that a constructive trust could not be imposed on a homestead interest established prior to the wrongdoing. Thus, in that case a judicially-created equitable lien in homestead was held *void* where is secured a judgment for the recovery of embezzled funds which were used to *improve* a homestead.

Compare these cases with *In re Lodeck*, 61 B.R. 66 (Bkrtcy. W.D. Tex 1986), in which the bankruptcy judge held that an equitable lien given to secure a constructive trust imposed on a homestead for funds traced into improvements made to the homestead was not a judicial lien avoidable under Code Section 522(f)(1).

i. Federal Preemption In *United States v. Rodgers*, 461 U.S. 677 (1983), the United States Supreme Court decided that the Texas law of homestead has been preempted by the Internal Revenue Code insofar as the Code affords the United States government the right to collect taxes owed to the government out of property recognized under Texas law as homestead. In *Rodgers*, the Supreme Court held that a husband's tax liability could be paid out of proceeds derived from selling his share of homestead property, even if that property is also the homestead of his wife, who had no liability to the United States government. The Supreme Court further held that the government was not constrained to sell only the husband's interest in the property, but rather that the entire homestead property could be sold, with the government collecting its due from the husband's share of the proceeds. The wife's share of the proceeds would be given to her after the sale of her home.

It has been argued that the federal Home Owners' Loan Act of 1933 and related regulations permit a federally chartered savings and loan association to take an enforceable mortgage in a Texas homestead in circumstances which under Texas law would be impermissible. *See* McKnight, *Family Law: Husband and Wife*, 45 SW.L.J. 415, 430 (1991).

2. Personal Property Exemptions Section 42.001 of the Texas Property Code sets out personal property which can be exempt from the claims of creditors. An individual can have up to $ 30,000.00, and a family up to $ 60,000.00, in specified types of personal property that are protected from creditors' claims. The aggregate value to be considered is exclusive of any liens, security interests, or other charges encumbering the property. Of course, the exemption does not apply if the personalty is pledged as collateral for the indebtedness being collected. Landlords' claims also can penetrate the exemption. TEX. PROP. CODE ANN. § 42.001 (Vernon Supp. 1998). Retirement benefits are also protected, without regard to amount. TEX. PROP. CODE ANN. § 42.0021 (Vernon Supp. 1998). Article 21.22 of the Texas Insurance Code exempts certain insurance policy proceeds. *See* p. S-15 below.

a. The "Laundry List" Various types of personalty eligible for exemption are listed in Section 42.002, and include: home furnishings; comestibles; farming or ranching vehicles and implements; tools, equipment, books, and apparatus (including boats and motor vehicles) used in a trade or profession; wearing apparel; two firearms; and athletic and sporting equipment (including bicycles); one 2, 3, or 4-wheeled vehicle for each member of the family with a driver's license or who is dependent on another for transportation; and various other items. Also subject to exemption is the present value of life insurance, to the extent that a family member or dependent is a beneficiary. Current wages for personal service are also exempt. See the discussion at p. S-16.

b. Retirement Benefits Section 42.0021 establishes a state law exemption for retirement plans. This exemption is completely independent from the $ 30,000.00 or $ 60,000.00 limit established by Section 42.002. The plan must be a "qualified plan" under the Internal Revenue Code. IRA's and SEP's are included. However, the exemption does not apply to overfunded IRA's, where the sums deposited exceed the deductible contributions permitted by the Internal Revenue Code. Non-taxable rollovers are protected. Several savings clauses are included in the statute in the event that the statute is preempted by Federal law. TEX. PROP. CODE ANN. § 42.021 (Vernon Supp. 1998). The issue of preemption is an important one, as explained below.

(1) Preemption by ERISA. The United States Supreme Court has ruled that the federal statute governing "qualified" retirement plans of private employers (ERISA), preempted a Georgia statute which exempted ERISA plans from

garnishment. *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, S.Ct. 2182, 100 L.Ed.2d 836 (1988). Under the *Mackey* case, a state statute is pre-empted if it relates to an employee benefit plan, or in other words has a connection with or makes reference to an ERISA plan.[9] Section 42.0021 of the Texas Property Code dangerously relates to a number of different types of retirement programs, ERISA plans being only one of them. ERISA has been held to preempt Property Code Section 42.0021(a). *In re Dyke*, 943 F.2d 1435, 1444 (5th Cir. 1991). Because part of the statute had been preempted as to ERISA, there was some concern that the entire statute, with all of its other exemptions, may have been invalidated, even as to non-ERISA plans. The statute itself contains a severance clause, supporting the validity of whatever portion of the statute that is not preempted. TEX. PROP. CODE ANN. § 42.0021(a) (Vernon Supp. 1991). In *In re Dyke*, 943 F.2d 1435, 1446-50 (5th Cir. 1991), the Fifth Circuit Court of Appeals held that the preemption of the ERISA-related provisions in Property Code Section 42.0021 did not destroy the validity of the rest of the statute. *See In re Volpe*, 943 F.2d 1451 (5th Cir. 1991) (no limit on number if IRA's that can be exempted).

Qualified retirement plans are also protected from garnishment by anti-assignment provisions contained within ERISA itself. *See e.g., Commercial Mortgage Ins., Inc. v. Citizens Nat. Bank of Dallas*, 526 F.Supp. 510 (N.D. Texas 1981). Such plans may also be protected from garnishment by operation of state spendthrift trust laws, if the plans constitute spendthrift trusts under state property law.

(2) Are Retirement Benefits Protected in Bankruptcy? Property of a debtor in bankruptcy can be excluded from the debtor's "estate" if, under 11 U.S.C. § 541(c)(2), there is a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law . . . ." ERISA is such an "applicable nonbankruptcy law," so that a debtor's rights in an ERISA-qualified plan are excluded from the estate by virtue of ERISA's anti-assignment clause. *Patterson v. Shumate*, 504 U.S. 753, 119 L.Ed.2d 519, 112 S. Ct. 2242 (1992). *See generally Craig v. Kaler*, 204 Bankr. 756 (D.N. Dakota 1997) (discussing what "ERISA qualified" means).

c. Current Wages and Health Aids Exempted Regardless of Value Property Code Section 42.001 exempts all current wages for personal services, without regard to the aggregate limitations. The exemption does not apply to enforcement of court-ordered child support payments. The statute also exempts "professionally prescribed health aids of a debtor or a dependent of a debtor."

d. Aggregate Now Includes "Unpaid Commissions" (Up to 25%) Property Code Section 42.001 exempts "unpaid commissions for personal services not to exceed 25 percent of the aggregate limitations," but those unpaid commissions are to be included in the aggregate calculation. Thus, the Legislature is essentially discriminating against self-employed service providers who work on commission, by including commissions receivable in the aggregate limit. However, the misfortune is even greater for self-employed persons who render personal services for a fee. Current income from personal services is not exempted at all. *See generally* McKnight, *Family Law: Husband and Wife*, 45 SW.L.J. 415, 431 n. 158 (1991) (noting distinction between "commissions for personal services" and "current income from personal service contracts" in 1989 legislative session).

e. Designation of Personalty Exceeding Monetary Cap Property Code Section 42.003 provides a procedure for the debtor to determine which items of personalty will be seized if the total personalty exceeds the $ 30,000.00/60,000.00 maximum. Failing that, the officer executing on the items can designate what will be levied upon. TEX. PROP. CODE ANN. § 42.003.

f. Special Fraudulent Conveyance Provision Property Code Section 42.004 regulates fraudulent converting of non-exempt property into exempt property. If non-exempt property is used to acquire exempt property, or to make improvements to, or pay debts on, exempt property, and this is done with the intent to defraud, delay, or hinder an interested person[10] from obtaining what he may be entitled to, then the otherwise exempt property will lose its exempt status. If the transaction is structured so that a secured debt to a third party is paid on exempt property, the aggrieved party subrogates to the rights of the other lien-holder. A claim under this Section must be brought within 2 years. 72nd Leg., R.S., ch. 175, § 1, 1991 TEX. SESS. LAW SERV. 789 (Vernon). A creditor with a claim that is unliquidated or contingent at the time of the transaction must bring suit within one year of when the claim is reduced to judgment. TEX. PROP. CODE ANN. § 42.004 (Vernon Supp. 1998).

g. Proceeds of Insurance Policy Insurance Code, art. 21.22, § 1 exempts all proceeds payable under an insurance policy issued by a life, health or accident insurance company from execution, attachment or garnishment. Although not explicitly listed, this presumably would include a disability policy issued by such a company. TEX. INS CODE ANN., art. 21.22 (Vernon Supp. 1998). One case has held that this statute does not protect the receipt of the cash surrender value of a policy. *In re Brothers*, 94 B.R. 82 (Bankr. N.D. Tex. 1988). The treatment of those moneys would fall under Section 42.002(7) of the Property Code. Another case has held that this statute did not protect proceeds from the settlement of a personal injury claim due from a *liability* insurance carrier. In the case of *In re Powers*, 112 B.R. 178 (Bankr. S.D. Tex. 1990), the bankruptcy judge ruled that the phrase "life, health or accident insurance company" does not include a casualty or liability insurance company, and that sums due a debtor from a liability insurance company are not exempt under this statute.

h. Rules of Marital Property Liability May Offer Protection A debtor need fall back on the protections of the personal property exemption statute only if the property in question is subject to the debt. If the creditor has a judgment against only the husband for a contractual claim, then the wife's sole

management community property and her separate property are not subject to seizure for the claim, and would not be included in the calculation of the $ 30,000.00 worth of family personalty that can be exempted. *See* TEX. FAM. CODE ANN. § 3.202 (West Handbook 1998 ed.).

3. Protection of Current Wages for Personal Service In Texas, there has always been a ban against garnishing current wages from a debtor's employer. Exemption statutes have also protected current wages. However, aggressive creditors made incursions into this forbidden area using the "turnover statute." The law on the point is set out below.

a. The Relevant Constitutional and Statutory Provisions TEX. CONST. art. XVI, sec. 28, provides that "no current wages for personal service shall ever be subject to garnishment, except for the enforcement of court-ordered child support payments." The Supreme Court defined "garnishment" as "a statutory proceeding whereby the property, money, or credits of one person in the possession of, or owing by another are applied to the payment of the debt of a debtor by means of proper statutory process issued against the debtor and the garnishee." *Beggs v. Fite*, 130 Tex. 46, 106 S.W.2d 1039, 1042 (1937), quoted in *Raborn v. Davis*, 33 TEX. SUP. CT. J. 249 (February 21, 1990), *vacated*, 33 TEX. SUP. CT. J. 633 (June 27, 1990). TEX. CIV. PRAC. & REM. CODE ANN. § 63.004 (Vernon 1997) provides that "current wages for personal service are not subject to garnishment." TEX. PROP. CODE ANN. § 42.001(b)(1) (Vernon Supp. 1998) lists "current wages for personal services" as being exempt from seizure, except to pay child support, and the amount is not to be included in the aggregate total of exempt property. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(f) (Vernon 1997) provides that a court may not require the post-judgment turnover of exempt property, which would by virtue of Property Code Section 42.001(b)(1) include current wages for personal services.

B. PROTECTIONS UNDER FEDERAL LAW Federal social security benefits are exempted from legal process under 42 U.S.C.A. § 407 (West 1991). Federal workers comp awards are exempt from creditors' claims, under 5 U.S.C.A. § 8130 (West 1996).

Federal exemption statutes for various other types of assets are as follows:

• Railroad Retirement Benefits, 45 U.S.C. § 231m

• Civil Service Benefits, 5 U.S.C.A. § 8346 (West 1996)

• Retired Serviceman's Family Protection Plan Annuity, 10 U.S.C.A. § 1440 (West Supp. 1997)

• Qualified Private Plans Under ERISA Must Be Protected From Alienation; 26 U.S.C.A. § 401(a)(13) (West Supp. 1997); 29 U.S.C.A. § 1056(d) (West 1985)

The doctrine of sovereign immunity prohibits a creditor of a recipient of federal monies from garnishing the United States government except where such garnishment is permitted by federal statute. *See U.S. v. Stelter*, 567 S.W.2d 797 (Tex. 1978).

XII. CONTEMPT ENFORCEMENT ON APPEAL The following are some additional considerations bearing upon contempt enforcement, generally.

1. Interlocutory Orders In *Ex parte Pryor*, 800 S.W.2d 511 (Tex. 1990), the Supreme Court held that the fact that a decree is interlocutory does not prevent the trial court from enforcing the decree by contempt powers.

2. Before Plenary Power Expires In *Ex parte Pryor*, 800 S.W.2d 511 (Tex. 1990), the Supreme Court ruled that a court could enforce its decree even before plenary power had expired under TEX. R. CIV. P. 329b.

3. While Order is on Appeal Some rather tricky rules apply to contempt enforcement of an order or decree which is being appealed.

a. Order Being Appealed Enforceable Unless Suspended The mere fact that an order is appealed does not affect its validity or enforceability, unless the effect of the order is properly suspended. *Ex parte Henderson*, 512 S.W.2d 37, 39 (Tex. Civ. App.--El Paso 1974) (visitation provisions of a modification order enforceable by contempt although order on appeal, unless the effect of the order is suspended by trial or appellate court). *See* TEX. FAM. CODE ANN. § 109.002 (West Handbook 1998 ed.) as to appeals from an order in a suit affecting the parent-child relationship. In *Ex parte Wright*, 538 S.W.2d 483, 484 (Tex. Civ. App.--Beaumont), the Court said:

> Just as Chief Justice Burger stated in Maness v. Meyers, 419 U.S. 449, 458, 95 S.Ct. 584, 591, 42 L.ed.2d 574, 583 (1975):
>
> "We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but absent a stay, to comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect."

See Ex parte Jackman, 663 S.W.2d 520, 524 (Tex. Civ. App.--Dallas 1983) (person may be held in contempt for violating an injunctive decree, even though a motion for new trial was pending at the time of the contemptuous act).

However, once an order has been reversed on appeal, it cannot be enforced by contempt for non-compliance after reversal, even if the reversal itself is being appealed to the Supreme Court, according to *Ex parte Rutherford*, 556 S.W.2d 853, 854 (Tex. Civ. App.--San Antonio 1977) (Murray, J., dissenting). No cases were found discussing

post-reversal contempt enforcement of an order that was violated prior to being reversed.

b. Which Court May Enforce Order Being Appealed From? Some care must be taken in determining which court can enforce an order or decree while it is being appealed.

(1) Only Appellate Court, Once Jurisdiction Attaches. Once jurisdiction over a cause has passed to an appellate court, the trial court loses jurisdiction to enforce its own judgment by contempt, and that power is transferred to the appellate court. *Schultz v. Fifth Court of Appeals*, 810 S.W.2d 738 (Tex. 1991); *Ex parte Boniface*, 650 S.W.2d 776, 778 (Tex. 1983); *Whitt v. Whitt*, 685 S.W.2d 731 (Tex. App.--Houston [14th Dist.] 1984, no writ).[11] The Court of Appeals' jurisdiction attaches when the appeal bond, or its equivalent, is filed. *Ammex Warehouse Co., Inc. v. Archer*, 381 S.W.2d 478, 482 (Tex. 1964); *Byrd v. Pharris*, 663 S.W.2d 856, 857 (Tex. App.--San Antonio 1983, no writ)[12]. The Supreme Court's jurisdiction attaches when an application for writ of error is filed. *Davis v. Huey*, 571 S.W.2d 859, 863 (Tex. 1978).

A special provision in the Family Code permits the court in a divorce or suit affecting the parent-child relationship, within thirty days after an appeal is perfected, to make "any order necessary to preserve and protect the safety and welfare of the child during the pendency of the appeal as the court may deem necessary and equitable." TEX. FAM. CODE ANN. § 109.001 (West Handbook 1998 ed.). The trial court retains jurisdiction to enforce a temporary order made under Section 11.11(e) during the appeal, unless the effect of the temporary order is suspended by the appellate court. TEX. FAM. CODE ANN. § 109.001(b) (West Handbook 1998 ed.). An equivalent provision applies to divorces. *See* TEX. FAM. CODE ANN. § 6.502 (West Handbook 1998 ed.).

XIII. APPENDIX Attached as an Appendix is TEX. CONST., art. XVI, § 50, as amended by Texas voters in November of 1997. The language reflects the new terms pertaining to "home equity loans."

APPENDIX

TEX. CONST., ART. XVI, § 50
Home Equity Loans

50. Homestead; protection from forced sale; mortgages, trust deeds and liens

Sec. 50. (a) The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for:

(1) the purchase money thereof, or a part of such purchase money;
(2) the taxes due thereon;
(3) an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding;
(4) the refinance of a lien against a homestead, including a federal tax lien
resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner;
(5) work and material used in constructing new improvements thereon, if contracted for in writing, or work and material used to repair or renovate existing improvements thereon if:

(A) the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead;

(B) the contract for the work and material is not executed by the owner or the owner's spouse before the 12th day after the owner makes written application for any extension of credit for the work and material, unless the work and material are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health or safety of the owner or person residing in the homestead and the owner of the homestead acknowledges such in writing;

(C) the contract for the work and material expressly provides that the owner may rescind the contract without penalty or charge within three days after the execution of the contract by all parties, unless the work and material are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health or safety of the owner or person residing in the homestead and the owner of the homestead acknowledges such in writing; and

(D) the contract for the work and material is executed by the owner and the owner's spouse only at the office of a third-party lender making an extension of credit for the work and material, an attorney at law, or a title company;

(6) an extension of credit that:

(A) is secured by a voluntary lien on the homestead created under a written agreement with the consent of each owner and each owner's spouse;

(B) is of a principal amount that when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the homestead does not exceed 80 percent of the fair market value of the homestead on the date the extension of credit is made;

(C) is without recourse for personal liability against each owner and the spouse of each owner, unless the owner or spouse obtained the extension of credit by actual fraud;

(D) is secured by a lien that may be foreclosed upon only by a court order;

(E) does not require the owner or the owner's spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit;

(F) is not a form of open-end account that may be debited from time to time or under which credit may be extended from time to time;

(G) is payable in advance without penalty or other charge;

(H) is not secured by any additional real or personal property other than the homestead;

(I) is not secured by homestead property designated for agricultural use as provided by statutes governing property tax, unless such homestead property is used primarily for the production of milk;

(J) may not be accelerated because of a decrease in the market value of the homestead or because of the owner's default under other indebtedness not secured by a prior valid encumbrance against the homestead;

(K) is the only debt secured by the homestead at the time the extension of credit is made unless the other debt was made for a purpose described by Subsections (a)(1)-(a)(5) of this section;

(L) is scheduled to be repaid in substantially equal successive monthly installments beginning no later than two months from the date the extension of credit is made, each of which equals or exceeds the amount of accrued interest as of the date of the scheduled installment;

(M) is closed not before:

(i) the 12th day after the later of the date that the owner of the homestead submits an application to the lender for the extension of credit or the date that the lender provides the owner a copy of the notice prescribed by Subsection (g) of this section; and

(ii) the first anniversary of the closing date of any other extension of credit described by Subsection (a)(6) of this section secured by the same homestead property;

(N) is closed only at the office of the lender, an attorney at law, or a title company;

(O) permits a lender to contract for and receive any fixed or variable rate of interest authorized under statute;

(P) is made by one of the following that has not been found by a federal regulatory agency to have engaged in the practice of refusing to make loans because the applicants for the loans reside or the property proposed to secure the loans is located in a certain area:

(i) a bank, savings and loan association, savings bank, or credit union doing business under the laws of this state or the United States;

(ii) a federally chartered lending instrumentality or a person approved as a mortgagee by the United States government to make federally insured loans;

(iii) a person licensed to make regulated loans, as provided by statute of this state;

(iv) a person who sold the homestead property to the current owner and who provided all or part of the financing for the purchase; or

(v) a person who is related to the homestead property owner within the second degree of affinity or consanguinity; and

(Q) is made on the condition that:

(i) the owner of the homestead is not required to apply the proceeds of the extension of credit to repay another debt except debt secured by the homestead or debt to another lender;

(ii) the owner of the homestead not assign wages as security for the extension of credit;

(iii) the owner of the homestead not sign any instrument in which blanks are left to be filled in;

(iv) the owner of the homestead not sign a confession of judgment or power of attorney to the lender or to a third person to confess judgment or to appear for the owner in a judicial proceeding;

(v) the lender, at the time the extension of credit is made, provide the owner of the homestead a copy of all documents signed by the owner related to the extension of credit;

(vi) the security instruments securing the extension of credit contain a disclosure that the extension of credit is the type of credit defined by Section 50(a)(6), Article XVI, Texas Constitution;

(vii) within a reasonable time after termination and full payment of the extension of credit, the lender cancel and return the promissory note to the owner of the homestead and give the owner, in recordable form, a release of the lien securing the extension of credit or a copy of an endorsement and assignment of the lien to a lender that is refinancing the extension of credit;

(viii) the owner of the homestead and any spouse of the owner may, within three days after the extension of credit is made, rescind the extension of credit without penalty or charge;

(ix) the owner of the homestead and the lender sign a written acknowledgment as to the fair market value of the homestead property on the date the extension of credit is made; and

(x) the lender or any holder of the note for the extension of credit shall forfeit all principal and interest of the extension of credit if the lender or holder fails to comply with the lender's or holder's obligations under the extension of credit within a reasonable time after the lender or holder is notified by the borrower of the lender's failure to comply; or

(7) a reverse mortgage.

(b) An owner or claimant of the property claimed as homestead may not sell or abandon the homestead without the consent of each owner and the spouse of each
owner, given in such manner as may be prescribed by law.

(c) No mortgage, trust deed, or other lien on the homestead shall ever be valid unless it secures a debt described by this section, whether such mortgage, trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void.

(d) A purchaser or lender for value without actual knowledge may conclusively rely on an affidavit that designates other property as the homestead of the affiant and that states that the property to be conveyed or encumbered is not the homestead of the affiant.

(e) A refinance of debt secured by a homestead and described by any subsection under Subsections (a)(1)-(a)(5) that includes the advance of additional funds may not be secured by a valid lien against the homestead unless:

(1) the refinance of the debt is an extension of credit described by Subsection (a)(6) of this section; or

(2) the advance of all the additional funds is for reasonable costs necessary to refinance such debt or for a purpose described by Subsection (a)(2), (a)(3), or (a)(5) of this section.

(f) A refinance of debt secured by the homestead, any portion of which is an

extension of credit described by Subsection (a)(6) of this section, may not be secured by a valid lien against the homestead unless the refinance of the debt is an extension of credit described by Subsection (a)(6) of this section.

(g) An extension of credit described by Subsection (a)(6) of this section may be secured by a valid lien against homestead property if the extension of credit is not closed before the 12th day after the lender provides the owner with the following written notice on a separate instrument:

"NOTICE CONCERNING EXTENSIONS OF CREDIT DEFINED BY SECTION 50(a)(6), ARTICLE XVI, TEXAS CONSTITUTION:

"SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION ALLOWS CERTAIN LOANS TO BE SECURED AGAINST THE EQUITY IN YOUR HOME. SUCH LOANS ARE COMMONLY KNOWN AS EQUITY LOANS. IF YOU DO NOT REPAY THE LOAN OR IF YOU FAIL TO MEET THE TERMS OF THE LOAN, THE LENDER MAY FORECLOSE AND SELL YOUR HOME. THE CONSTITUTION PROVIDES THAT:
"(A) THE LOAN MUST BE VOLUNTARILY CREATED WITH THE CONSENT OF EACH OWNER OF YOUR HOME AND EACH OWNER'S SPOUSE;
"(B) THE PRINCIPAL LOAN AMOUNT AT THE TIME THE LOAN IS MADE MUST NOT EXCEED AN AMOUNT THAT, WHEN ADDED TO THE PRINCIPAL BALANCES OF ALL OTHER LIENS AGAINST
YOUR HOME, IS MORE THAN 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME;
"(C) THE LOAN MUST BE WITHOUT RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE UNLESS YOU OR YOUR SPOUSE OBTAINED THIS EXTENSION OF CREDIT BY ACTUAL FRAUD;
"(D) THE LIEN SECURING THE LOAN MAY BE FORECLOSED UPON ONLY WITH A COURT ORDER;
"(E) FEES AND CHARGES TO MAKE THE LOAN MAY NOT EXCEED 3 PERCENT OF THE LOAN AMOUNT;
"(F) THE LOAN MAY NOT BE AN OPEN-END ACCOUNT THAT MAY BE DEBITED FROM TIME TO TIME OR UNDER WHICH CREDIT MAY BE EXTENDED FROM TIME TO TIME;
"(G) YOU MAY PREPAY THE LOAN WITHOUT PENALTY OR CHARGE;
"(H) NO ADDITIONAL COLLATERAL MAY BE SECURITY FOR THE LOAN;
"(I) THE LOAN MAY NOT BE SECURED BY AGRICULTURAL HOMESTEAD PROPERTY, UNLESS THE AGRICULTURAL HOMESTEAD PROPERTY IS USED PRIMARILY FOR THE PRODUCTION OF MILK;
"(J) YOU ARE NOT REQUIRED TO REPAY THE LOAN EARLIER THAN AGREED SOLELY BECAUSE THE FAIR MARKET VALUE OF YOUR HOME DECREASES OR BECAUSE YOU DEFAULT ON ANOTHER LOAN THAT IS NOT SECURED BY YOUR HOME;
"(K) ONLY ONE LOAN DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MAY BE SECURED WITH YOUR HOME AT ANY GIVEN TIME;
"(L) THE LOAN MUST BE SCHEDULED TO BE REPAID IN PAYMENTS THAT EQUAL OR EXCEED THE AMOUNT OF ACCRUED INTEREST FOR EACH PAYMENT PERIOD;
"(M) THE LOAN MAY NOT CLOSE BEFORE 12 DAYS AFTER YOU SUBMIT A WRITTEN APPLICATION TO THE LENDER OR BEFORE 12 DAYS AFTER YOU RECEIVE THIS NOTICE, WHICHEVER DATE IS LATER; AND IF YOUR HOME WAS SECURITY FOR THE SAME TYPE OF LOAN WITHIN THE PAST YEAR, A NEW LOAN SECURED BY THE SAME PROPERTY MAY NOT CLOSE BEFORE ONE YEAR HAS PASSED FROM THE CLOSING DATE OF THE OTHER LOAN;
"(N) THE LOAN MAY CLOSE ONLY AT THE OFFICE OF THE LENDER, TITLE COMPANY, OR AN ATTORNEY AT LAW;
"(O) THE LENDER MAY CHARGE ANY FIXED OR VARIABLE RATE OF INTEREST AUTHORIZED BY STATUTE;
"(P) ONLY A LAWFULLY AUTHORIZED LENDER MAY MAKE LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION; AND
"(Q) LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MUST:
"(1) NOT REQUIRE YOU TO APPLY THE PROCEEDS TO ANOTHER DEBT THAT IS NOT SECURED BY YOUR HOME OR TO ANOTHER DEBT TO THE SAME LENDER;
"(2) NOT REQUIRE THAT YOU ASSIGN WAGES AS SECURITY;
"(3) NOT REQUIRE THAT YOU EXECUTE INSTRUMENTS WHICH HAVE BLANKS LEFT TO BE FILLED IN;
"(4) NOT REQUIRE THAT YOU SIGN A CONFESSION OF JUDGMENT OR POWER OF ATTORNEY TO ANOTHER PERSON TO CONFESS JUDGMENT OR APPEAR IN A LEGAL PROCEEDING ON YOUR BEHALF;
"(5) PROVIDE THAT YOU RECEIVE A COPY OF ALL DOCUMENTS YOU SIGN AT CLOSING;
"(6) PROVIDE THAT THE SECURITY INSTRUMENTS CONTAIN A DISCLOSURE THAT THIS LOAN IS A LOAN DEFINED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;
"(7) PROVIDE THAT WHEN THE LOAN IS PAID IN FULL, THE LENDER WILL SIGN AND GIVE YOU A RELEASE OF LIEN OR AN ASSIGNMENT OF THE LIEN, WHICHEVER IS APPROPRIATE;
"(8) PROVIDE THAT YOU MAY, WITHIN 3 DAYS AFTER CLOSING, RESCIND THE LOAN WITHOUT PENALTY OR CHARGE;

"(9) PROVIDE THAT YOU AND THE LENDER ACKNOWLEDGE THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LOAN CLOSES; AND

"(10) PROVIDE THAT THE LENDER WILL FORFEIT ALL PRINCIPAL AND INTEREST IF THE LENDER FAILS TO COMPLY WITH THE LENDER'S OBLIGATIONS."

If the discussions with the borrower are conducted primarily in a language other than English, the lender shall, before closing, provide an additional copy of the notice translated into the written language in which the discussions were conducted.

(h) A lender or assignee for value may conclusively rely on the written acknowledgment as to the fair market value of the homestead property made in accordance with Subsection (a)(6)(Q)(ix) of this section if:

(1) the value acknowledged to is the value estimate in an appraisal or evaluation prepared in accordance with a state or federal requirement applicable to an extension of credit under Subsection (a)(6); and

(2) the lender or assignee does not have actual knowledge at the time of the payment of value or advance of funds by the lender or assignee that the fair market value stated in the written acknowledgment was incorrect.

(i) This subsection shall not affect or impair any right of the borrower to recover damages from the lender or assignee under applicable law for wrongful foreclosure. A purchaser for value without actual knowledge may conclusively presume that a lien securing an extension of credit described by Subsection (a)(6) of this section was a valid lien securing the extension of credit with homestead property if:

(1) the security instruments securing the extension of credit contain a disclosure that the extension of credit secured by the lien was the type of credit defined by Section 50(a)(6), Article XVI, Texas Constitution;

(2) the purchaser acquires the title to the property pursuant to or after the foreclosure of the voluntary lien; and

(3) the purchaser is not the lender or assignee under the extension of credit.

(j) Subsection (a)(6) and Subsections (e)-(i) of this section are not severable, and none of those provisions would have been enacted without the others. If any of those provisions are held to be preempted by the laws of the United States, all of those provisions are invalid. This subsection shall not apply to any lien or extension of credit made after January 1, 1998, and before the date any provision under Subsection (a)(6) or Subsections (e)-(i) is held to be preempted.

(k) "Reverse mortgage" means an extension of credit:

(1) that is secured by a voluntary lien on homestead property created by a written agreement with the consent of each owner and each owner's spouse;

(2) that is made to a person who is or whose spouse is 55 years or older;

(3) that is made without recourse for personal liability against each owner and the spouse of each owner;

(4) under which advances are provided to a borrower based on the equity in a borrower's homestead;

(5) that does not permit the lender to reduce the amount or number of advances because of an adjustment in the interest rate if periodic advances are to be made;

(6) that requires no payment of principal or interest until:

(A) the homestead property securing the loan is sold or otherwise transferred; or

(B) all borrowers cease occupying the homestead property as a principal residence for more than 180 consecutive days and the location of the homestead property owner is unknown to the lender;

(7) that provides that if the lender fails to make loan advances as required in the loan documents and if the lender fails to cure the default as required in the loan documents, the lender forfeits all principal and interest of the reverse mortgage; and

(8) that is not made unless the owner of the homestead attests in writing that the owner received counseling regarding the advisability and availability of reverse mortgages and other financial alternatives.

(l) Advances made under a reverse mortgage and interest on those advances have priority over a lien filed for record in the real property records in the county where the homestead property is located after the reverse mortgage is filed for record in the real property records of that county.

(m) A reverse mortgage may provide for an interest rate that is fixed or adjustable and may also provide for interest that is contingent on appreciation in the fair market value of the homestead property. Although payment of principal or interest shall not be required under a reverse mortgage until the entire loan becomes due and payable, interest may accrue and be compounded during the term of the loan as provided by the reverse mortgage loan agreement.

(n) A reverse mortgage that is secured by a valid lien against homestead property may be made or acquired without regard to the following provisions of any other law of this state:

(1) a limitation on the purpose and use of future advances or other mortgage proceeds;
(2) a limitation on future advances to a term of years or a limitation on the term of open-end account advances;
(3) a limitation on the term during which future advances take priority over intervening advances;
(4) a requirement that a maximum loan amount be stated in the reverse mortgage loan documents;
(5) a prohibition on balloon payments;
(6) a prohibition on compound interest and interest on interest;
(7) a prohibition on contracting for, charging, or receiving any rate of interest authorized by any law of this state authorizing a lender to contract for a rate of interest; and
(8) a requirement that a percentage of the reverse mortgage proceeds be advanced before the assignment of the reverse mortgage.

(o) For the purposes of determining eligibility under any statute relating to payments, allowances, benefits, or services provided on a means-tested basis by this state, including supplemental security income, low-income energy assistance, property tax relief, medical assistance, and general assistance:
(1) reverse mortgage loan advances made to a borrower are considered proceeds from a loan and not income; and
(2) undisbursed funds under a reverse mortgage loan are considered equity in a borrower's home and not proceeds from a loan.

(p) The advances made on a reverse mortgage loan under which more than one advance is made must be made at regular intervals according to a plan established by the original loan agreement.

(q) To the extent that any statutes of this state, including without limitation, Section 41.001 of the Texas Property Code, purport to limit encumbrances that may properly be fixed on homestead property in a manner that does not permit encumbrances for extensions of credit described in Subsection (a)(6) or (a)(7) of this section, the same shall be superseded to the extent that such encumbrances shall be permitted to be fixed upon homestead property in the manner provided for by this amendment.

(r) The supreme court shall promulgate rules of civil procedure for expedited foreclosure proceedings related to the foreclosure of liens under Subsection (a)(6) of this section.

(s) The Finance Commission of Texas shall appoint a director to conduct research on the availability, quality, and prices of financial services and research the practices of business entities in the state that provide financial services under this section. The director shall collect information and produce reports on lending activity of those making loans under this section. The director shall report his or her findings to the legislature not later than December 1 of each year.

1. A good overview of the conceptual territory is contained in *Citicorp Real Estate v. Banquo Arabe*, 747 S.W.2d 926, 929 (Tex. App.--Dallas 1988, writ denied).

2. Under TEX. R. CIV. P. 657, a judgment is final and subsisting for the purpose of garnishment from the date it is signed, unless the judgment is superseded.

3. *See Laster v. First Huntsville Properties Co.*, 826 S.W.2d 125 (Tex. 1992), discussing the ramifications of dividing ownership of a homestead between Husband and Wife at the time of divorce.

4. Under TEX. PROP. CODE ANN. § 41.002 (Vernon Supp. 1998), a homestead is rural if it is not served by municipal utilities, fire and police protection. Changes in the surroundings and extension of municipal services to a previously rural homestead can make the homestead urban, according to Professor McKnight. See McKnight, *Family Law: Husband and Wife*, 45 SW.L.J. 415, 426-27 (1991).

5. Presumably such a use can be continued for as long as the child support obligation continues, which now can extend beyond majority. *See* TEX. FAM. CODE ANN. § 154.002 (West Handbook 1998 ed.).

6. Federal law preempts state homestead protection in certain instances. *See United States v. Rodgers*, 103 U.S. 2132 (1983). See the discussion at p. F-14.

7. The Texas Property Code says that "[e]ncumbrances may be properly fixed on homestead property for: (1) purchase money; (2) taxes on the property; (3) work and material used in constructing improvements on the property if contracted for in writing as provided by Sections 53.254(a), (b), and (c); (4) an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding; or (5) the refinance of a lien against a homestead, including a federal tax lien resulting from the tax debt of both spouses, if the

homestead is a family homestead, or from the tax debt of the owner." TEX. PROP. CODE ANN. § 41.001(b) (Vernon Supp. 1998).

8. The view would have to be expanded to include home equity loans permitted under the 1997 amendment to TEX. CONST., art. XVI, § 50.

9. The U.S. Supreme Court recently preempted state community property law in *Boggs v. Boggs*, 96-79 (June 2, 1997) [http://supct.law.cornell.edu/supct/html/96-79.html]. The Court did not rely on the ERISA preemption clause. Instead, it relied on traditional preemption analysis.

10. The term "interested person" is not defined in the statute. The next subsection of the same provision substitutes the word "creditor" one time and the term "person with a claim" another time. The old fraudulent conveyance statute, former TB&CC Section 24.02, used the phrase "creditor, purchaser or other interested person." See discussion of interpretive case law in Orsinger, *Intra and Inter Family Transactions*, State Bar of Texas ADVANCED FAMILY LAW COURSE J-20 (1983).

11. The Amarillo Court of Appeals held that *Boniface* is limited to enforcement of property rights and that child support orders can be enforced by the trial court even after appeal from the order has been perfected. *See Bivins v. Bivins*, 709 S.W.2d 374 (Tex. App.--Amarillo 1986, no writ).

12. The operative event in *Boniface* was the filing of the cost bond for appeal. *Ex parte Boniface*, 650 S.W.2d at 778. Note that, in an appeal from an interlocutory order, the transition of jurisdiction to the appellate court occurs only when an appeal bond is timely filed and the record is timely filed. *See Ex parte Browne*, 543 S.W.2d 82, 86 (Tex. 1976).