

Foundations of Civil Process

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1

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2

Topics

- Civil vs Criminal
- Types of Civil Process
- Writs that Require Seizure and Attachment
- Exempt Property
- Reasonable Force
- Officer Approach & Safety
- Working with County Officials
- Liability Issues
- Resources

3

**“It’s a civil
matter.
Let the constable
handle it.”**

4

2

Civil vs. Criminal

5

Interested in Court Structure and Jurisdiction?

- See Handout 1 – Court Structure Chart from Texas Office of Court Administration

6

Civil Law vs. Criminal Law

- **Criminal Law** regulates the conduct of individuals through threats of fines and imprisonment.
- **Civil Law** defines the legal significance of public and private acts and regulates conduct through injunctions and the award of money damages.

7

How Are They Different?

- In a **criminal case**, the state brings an action against an individual to punish him for breaking one of their laws.
- In a **civil case**, a person brings a lawsuit seeking some sort of redress for an injury he claims to have suffered. The redress is usually in the form of money or return of property.

8

Parties

- **Criminal** – State vs. Defendant
- **Civil** – Plaintiff vs. Defendant, Judgment Creditor, Judgment Debtor

9

Judgments

- **Criminal Judgments** may result in the guilty party being assessed a fine only or a fine and a period of confinement or community service.
- **Civil Judgments** usually require the party adjudged of a wrongful act to compensate the wronged party in the form of money or the return/possession of property.

10

Officer Role in Civil Cases

- In a **civil case**, the peace officer is required to follow the rules and the laws that govern the service and execution of civil documents.

11

Types of Civil Process

12

Citations & Notices

- Court documents that let a defendant know that a case has been filed against them or that they are required to be in court.
- “Serve and forget”
 - Just remember, service includes filing a **Return of Service!**

13

Capias & Warrants

- Court documents that require law enforcement to take a person into custody and bring them to court or jail.

14

Writs

- An order commanding the person to whom it is directed to perform or refrain from performing a specified act.

15

Let's Take a Look at the Civil Process Field Guide!

16

Writs that Require Seizure & Attachment

17

Writs that Require Seizure or Attachment

- **Writ of Execution** - Seize property to satisfy a judgment by sale.
- **Property Attachment** - Seize property and dispose of as directed (sale or return).
- **Distress Warrant** - Seize business property on a commercial non-payment of rent.
- **Writ of Possession** - Enter and remove tenant from the property.
- **Sequestration** - Seize property from subject while case is pending.
- **Person or Child Attachment** - Directs officer to attach person and deliver as instructed by court.

18

Exempt Property

19

Exempt Property

- Exempt property is property that the law allows a person to keep away from creditors if they owe a debt.
- Each state chooses what property is exempt.
- The types of property are generally those types that would allow a person to keep their job and have a place to live.

<https://www.tjctc.org/tjctc-resources/Charts-and-Checklists.html>

20

More Exempt Property Resources

- TJCTC has a self-paced module
- Civil Process Field Guide
- Practical Guide to Writs of Execution

21

Common Exempt Property in Texas

22

Homestead

- Each person or family can designate a homestead that will be safe from creditors.
- Most people know about this, because there are also property tax benefits to designating a homestead. See <https://comptroller.texas.gov/taxes/property-tax/exemptions/residence-faq.php> for more info.

23

Rural vs. Urban

A homestead is considered to be **urban** if, at the time the designation is made, the property is:

- located within the limits of a **municipality** or its extraterritorial jurisdiction or a platted subdivision; *and*
- **receives the services of** police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality:
 - electric; natural gas; sewer; storm sewer; and water.

Property Code 41.002(c)

24

Manufactured & Mobile Homes

- Generally treated as **personal property**!
- Owner can elect to treat as real property by following procedures in Property Code 2.001.
 1. Make sure the Statement of Ownership (Occupations Code 1201.207) reflects that the owner has elected to treat as real property; and
 2. File a certified copy of the Statement of Ownership in the real property records in the county where the home is located.
- Helpful FAQs for owners can be found at TDHCA's website:
<https://www.tdhca.state.tx.us/mh/faqs-sol.htm>

25

Tools of the Trade

- Must be of items fairly belonging to trade.
- Those items which have merely general value and use in business are not included within scope of exemption.
- *In re Erwin*, 199 B.R. 628, Bankr. L. Rep. (CCH) P 77111 (Bankr. S.D. Tex. 1996).
- Examples:
 - Tractor, motor grader, paver, and roller in paving business. *In re Hernandez*, 131 B.R. 61 (Bankr. W.D. Tex. 1991).

26

Co-Mingled Property

- If a person mixes exempt and non-exempt property (usually money in a bank account), it may lose its exemption

27

What About Businesses?

28

2022 Updates

New judgment forms with the appropriate language

- Updated forms on TJCTC website

New garnishment notices

New receivership order

Exempt property hearings

29

Notices for Exempt Property Hearings

- Notice of Protected Property Rights, Protected Property Claim Form, and Instructions must be served by receiver or judgment creditor on the judgment debtor.
- The receiver or officer **must not sell** the personal property or **distribute proceeds** recovered to the judgment creditor within 14 days of service of the above documents (17 days if service is made by mail). *See Rule 679b(b).*

30

Exempt Property Hearing Procedure

1. Judgment debtor files a Protected Property Claim for or another sworn document with the same information.
2. Court sets the hearing and notifies the parties (including receivers, constables, or sheriffs involved in the case).
 1. Hearing must be within 10 days of when the exemption claim was filed unless there is good cause to extend the time.
3. The receiver or officer cannot sell the judgment debtor's property until after the court determines the exemption claim.

31

The Exempt Property Hearing

- Burden of Proof
 - On the judgment debtor
 - Can be met with the sworn statement if it is not challenged
- If the court determines the property is exempt, the court must order it released within 3 business days.
- No appeal

32

Reasonable Force

33

Reasonable Force

“The level of power that is necessary used against another person that is appropriate to protect yourself, family members or property.”

Mostly applicable in criminal matters and limited in civil matters.

The Law Dictionary (2022)
Retrieved from <https://thelawdictionary.org/reasonable-force/>

34

General Rule for Use of Force When Serving Process

- Officer must exercise ordinary care.
- Officer may not use excessive force such as kicking in a door or committing assault on the defendant.
- Cannot use force to get in but can use force to get out.

Patton v. Slade, 38 S.W. 832, 833 (Tex. Civ. App. 1897, no writ); Mendoza v. Singer Sewing Mach. Co., 84 S.W.2d 715, 716 (Tex. 1935)

35

Writs that Allow Use of Reasonable Force

- Writ of Possession (PC 24.0061)
- Writ of Re-Entry (PC 92.009)
- Writ of Retrieval (PC 24A.003)
- Writ of Attachment for a Child (FC Sec. 152.311(e))

What level of force would be considered “reasonable” to execute these writs?

36

Watch Out!

“The officer executing this writ may use reasonable force as necessary to enforce this order.”

May not be a valid order!!

37

Officer Approach & Safety

38

19

Officer Approach Tips

- Not a criminal matter and only the Rules of Civil Procedure apply
- Limited use of force and entry (if any at all)
- Officer safety must be a priority
- Contact & cover principles
- Writs may turn volatile at any moment

39

Working with County Officials

40

Get to Know Other Officials!

- Commissioners
- County and District Attorneys
- Treasurer
- Auditor
- Clerks
- Coordinators
- Other Law Enforcement Agencies
- Who else?

41

Liability Issues

42

General Duties & Powers

To do or not to do...

43

General Duties

- The constable **shall** execute and return as provided by law each process, warrant, and precept that is directed to the Constable and is delivered by a lawful officer (including eviction notices).
- The constable **shall** attend each justice court held in the precinct.

Local Government Code § 86.021(a) & (e)

44

General Powers

- The constable may execute any civil or criminal process throughout the county in which the constable's precinct is located and in other locations as provided by law.
- The constable may serve process in a contiguous county.

Local Government Code § 86.021(b) & (d)

45

General Prohibitions

- If the constable is a party to or interested in the outcome of the suit, they **cannot** serve any process related to the suit.
- The constable **cannot** retain a fee paid for serving civil process in the constable's official capacity other than the constable's regular salary or compensation.
- The constable **cannot** serve process outside their official capacity if that process can be served in the constable's official capacity.

Local Government Code § 86.021(d)

46

Duties & Liability

47

Failure to Execute Process

- If a constable fails or refuses to execute and return a process, warrant, or precept that is lawfully directed and delivered to the constable, they can be subject to contempt
 - Injured party moves for contempt
 - Constable given 10 days notice of the motion
 - Hearing
 - Fine is from \$10-\$100 with costs for the benefit of the injured person

Local Government Code § 86.024

48

Refusal or Neglect in Official Duties

- Clerk, Sheriff, or other officer who neglects or refuses to perform a duty required under TRCP or under CRPC is liable for actual damages only in a suit brought by the injured person.
- Officer can also be punished for contempt of court for neglect or refusal in performance of those duties
 - (same as LGC 86.024)
 - Injured party moves for contempt
 - Constable given 10 days notice of the motion
 - Hearing
 - Fine is from \$10-\$100 with costs for the benefit of the injured person
- Can't seek both damages and contempt.

Civil Practice and Remedies Code § 7.001

49

Liability

- Most liability issues that a constable has are related to statutory duties outlined in the Local Government Code and Civil Practice and Remedies Code.
- Civil Practice and Remedies Code Chapter 34 is the exclusive remedy for an officer's violation of duties related to execution and writs, even those found outside of Ch. 34.
 - This is separate from the contempt provisions in the Local Government Code.

Civil Practice and Remedies Code § 34.076

50

Liability (continued)

- Lawsuits under Chapter 34 of the Civil Practice and Remedies Code must be:
 - Brought in the county where the officer holds office
 - No later than the 1st anniversary of the date on which the plaintiff accrues

Civil Practice and Remedies Code § 34.086

51

Immunity from Lawsuit

- Official Immunity
 - For government employees for personal liability
- Sovereign Immunity
 - For government entities
- Judicial Immunity & Derived Judicial Immunity
 - for judiciary & non-judges acting as an arm of the court
 - Generally, more broad than official immunity

52

What Duties Do You Have?

Liability is linked to duties!

53

Duty to Act in Good Faith

- What is “in good faith”?
- “a reasonably prudent officer, under the same or similar circumstances, could have believed that the officer’s conduct was justified based on the information the officer possessed when the conduct occurred.”
- Best Practices
- Proof & Controverting Evidence

Civil Practice and Remedies Code § 7.003

54

Duty of Successor in Office

- Complete any unfinished business as if the constable started it.
- Proceed in the same manner as the officer who received the writ or other civil process.

Civil Practice and Remedies Code § 34.062; Local Government Code § 86.025

55

Scenario 1

The constable's first day in office he finds a box labeled "miscellaneous writs" under his desk. Inside he finds writs that are unexpired but rapidly approaching the time limit for them to expire. He can't find any documentation about what has been done on each of the writs anywhere in his office.

What do you do?

56

Duty to Endorse Writ Properly

- **Must** endorse every writ received with the date and **exact** time it was received.
- This becomes an issue if you receive more than one writ on the same day for the same person.
 - In that case, number them as they are received.

Civil Practice and Remedies Code § 34.063; Texas Rule of Civil Procedure § 636

57

Duty Related to Seized Property

- Officer can be held liable if there is an injury or loss of property due to the officer's negligence.
- Take care to ensure that property is stored properly and with due care.
- Keep good records and communicate with both parties about any special concerns about particular property seized.

Civil Practice and Remedies Code § 34.061

58

Scenario 2

You have a writ of execution for a photographer, and the plaintiff's attorney lets you know that he has a large amount of photography equipment that is non-exempt and gives you a description. When you arrive to levy on the property, the photographer(defendant) agrees but explains that some of the boxes shouldn't be opened in a well-lit room – it could damage the film inside.

Is the defendant's information important?

59

Duty to Return Writ Properly

- Make sure that your return reflects what actually happened.
- Proofread, proofread, proofread.
- If you find a mistake, correct it!
 - An officer has 30 days after actual notice of an error or failure to file a return to make amendment/correction.

Civil Practice and Remedies Code §§ 34.064, 34.072

60

Duty to Levy & Sell

- An officer can be held liable if they refuse or fail to levy on or sell property subject to execution.
- The judgment creditor seeking relief under this section has the burden to prove:
 - (1) the judgment creditor has a valid judgment against the judgment debtor;
 - (2) the writ of execution was issued to the judgment creditor;
 - (3) the writ was delivered to the officer;
 - (4) the judgment creditor's judgment was unpaid and unsatisfied;
 - (5) the property to be levied on was subject to execution;
 - (6) the officer failed or refused to levy under the writ; and
 - (7) the amount of actual damages suffered.

Civil Practice and Remedies Code §§ 34.065, 34.073

61

Duty to Levy & Sell (continued)

- Work writs diligently and always stay in communication with the plaintiff.
- Keep good notes and a clear file of what was done.

Civil Practice and Remedies Code §§ 34.065, 34.073

62

Duty to Deliver Money Collected

- A constable **must** pay money collected to the person for whom the constable made the collection
- If the constable does not do this, the constable and sureties could be liable.

Local Government Code § 86.023

63

Best Practices to Avoid Liability

64

Keep Good Records

- Your records can be the **best evidence** that you did not neglect your duties!
- It's hard for a plaintiff to argue with an email or voicemail that they sent you.
- Do not depend on your memory for all the details.

65

Always Endorse Process When You Receive It

- The number one easiest thing to do **all the time!**
- Keeps you organized & helps prioritize the order that you work civil process.

66

Foster Good Relationships with Other County Officials

- Other officials and offices are great resources.
- It is good to have an ally if something goes wrong.
- Officers are better able to complete duties if they work well with other county officials and offices.

67

Follow the Court’s Order

- It is a best practice to ask the court for clarification if something is confusing.
- Any judicial immunity that you may have is derived from the court and going outside the court’s order might mean you lose that.

68

Ask for Help!

- It is much better to admit that you need help with an execution or other civil process duties than to get the county sued for handling it negligently.
- No one will know you need help if you don't ask!

69

Don't Forget You are Executing Civil Process

- This isn't a criminal matter.
- Only use force that is allowed.
- If people fail to comply with court orders, the court may have other mechanisms like contempt that are appropriate.

70

Resources

71

Legal Research Resources

- TJCTC Website (including Civil Process Field Guide and other Deskbooks, self-paced modules, legal board, etc.) - <https://www.tjctc.org/>
- Texas Constitution and Statutes - <https://statutes.capitol.texas.gov/>
- Rules of Civil Procedure - <https://txcourts.gov/rules-forms/rules-standards/>
- Texas State Law Library Self-Help - <https://www.sll.texas.gov/legal-help/>
 - You can also get a library card to the State Law Library to use online resources
- Texas Law Help - <https://texaslawhelp.org/>

72

Resources for the Public

- Texas Law Help - <https://texaslawhelp.org/>
- Texas State Law Library Self-Help - <https://www.sll.texas.gov/legal-help/>
- Texas Attorney General Debt Collection and Relief - <https://www.texasattorneygeneral.gov/consumer-protection/financial-and-insurance-scams/debt-collection-and-relief>
- Toolkit: My Debt Collection Rights in Texas by Texas Appleseed - <https://mydebtcollectionrights.org/>
- TJCTC Self-Represented Litigant Page – www.tjctc.org/srl