

# **Advanced Writ scenarios**

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Brazoria County, Precinct Three**

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Court Of Criminal Appeals.**

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## **Our Objectives:**

- Identify ways to handle situations that arise during executions;
- Apply the step-by-step process taught in class to real world situations;
- Discuss best practices for making demand and what to do based on the person's answer;
- Identify the duties and liabilities of the executing officer;
- Recognize situations where officer safety could be a concern;
- Utilize technology to access important information and resources.

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## **Resources:**

- Texas Civil Practices and Remedies Code, Chapters 31, 34, 62
- Texas Rules of Appellate Procedure
- Texas Code of Criminal Procedure
- Texas Rules of Civil Procedure 621-656, 696-716
- Texas Property Code, Chapters 12, 24, and 94
- Texas Finance Code
- Texas Tax Code
- Texas Civil Process Field Guide from TJCTC
- Practical Guide to Writs of Execution

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## **Do you have any scenarios?**

- During this first hour or during the break, please email [mark.zuniga@txstate.edu](mailto:mark.zuniga@txstate.edu) or contact me during the break with any interesting scenarios you have seen so you can tell us how you handled it.
- We'll discuss these scenarios in the second hour.

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## **When you find yourself in a tight spot**

- Stop what you are doing
- Identify the issues
- Search rules and code for applicable answers
- Contact TJCTC and/or other constables to compare similar experiences
- Visit with your county attorney

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## **Liability regarding execution of writs. (1/2)**

Generally, an officer is not liable for damages resulting from the execution of a writ if the officer in good faith executes or attempts to execute the writ as provided by law and the Texas Rules of Civil Procedure. Tex Civ. Prac. & Rem. Code § 7.003(a).

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## **Liability regarding execution of writs. (2/2)**

An officer shows that the officer acted in good faith when the officer shows that 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. Tex Civ. Prac. & Rem. Code § 7.003(c).

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## **Writs of possession**

An officer not liable for damages resulting from the execution of the writ if the officer executes the writ in good faith and with reasonable diligence. Tex. Prop. Code § 24.0061(g)

An officer may use reasonable force in executing a writ of possession. Tex. Prop. Code § 24.0061(h)

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## **Jumping right in....**

Scenario 1:

**Judge told me to do it**

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## **Is there a problem here?**

You receive a writ of sequestration. In the order, signed by the judge after being presented by the plaintiff's attorney, it states that you have the authority to remove locks, gates, etc.

What do you do?

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## **Can this be sold?**

Scenario 2:

**Executing on a "Cause of Action"**

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## **Writ of execution**

In the lawsuit *Hernandez v. Graves*, Cause No. 96-5624487-22, Graves, obtains a judgment for \$36,700. The writ of execution is for personal property “known as Cause No. 96-288118-25, styled as ‘Joel Hernandez v. Cheryl Graves,’ on file in the 96th District Court of Tarrant County, Texas, which personal property is located in a file maintained by the District Clerk of Tarrant County, Texas, 100 N Calhoun St, Fort Worth, Texas 76196.”

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## **“The Cause of Action” (1/4)**

The second petition filed by Hernandez alleges that Graves took action to steal their joint business when their personal relationship began going downhill. The petition alleges that Graves began changing ownership papers of the company, removing Hernandez’ name, and making her the sole owner.

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## **“The Cause of Action” (2/4)**

Graves’ attorney stated that the Petition is what is to be levied and sold, that there is not a judgment in the case (96-288118-25). He stated that the Petition has value (mentioning in the conversation that it *may* be a value of \$200,000) even though it has not yet been heard by the court. The Petition does not stipulate a monetary value being sought by the plaintiff (Joel Hernandez).

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## **“The Cause of Action” (3/4)**

The Writ of Execution orders the Constable to levy and sale the “cause of action” – the Petition.

The Petition is a suit filed from Hernandez against GRAVES.

So.....if a Constable levies on the Petition, it effectively removes the lawsuit against GRAVES and leaves Hernandez with nada...

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## **“The Cause of Action” (4/4)**

- 1) Is selling the court case (096-288118-22) legal even though no judgment, or value, is assigned?
- 2) If the court case, or “cause of action”, may legally be sold, how am I to determine its value?
- 3) Is the “cause of action” worth \$36,700 so that the writ may be satisfied?

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## **Tex. Prop. Code § 12.014 (1/2)**

- (a) A judgment or part of a judgment of a court of record or an interest in a cause of action on which suit has been filed may be sold, regardless of whether the judgment or cause of action is assignable in law or equity, if the transfer is in writing.
- (b) A transfer under this section may be filed with the papers of the suit if the transfer is acknowledged or sworn to in the form and manner required by law for acknowledgement or swearing of deeds.

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## **Tex. Prop. Code § 12.014 (2/2)**

- (c) If a transfer of a judgment is filed, the clerk shall record the transfer appropriately. If a transfer of a cause of action in which a judgment has not been rendered is filed, the clerk shall note and briefly state the substance of the transfer on the court docket at the place where the suit is entered.
- (d) A transfer filed under this section is notice to and is binding on a person subsequently dealing with the judgment or cause of action.

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## **Opps he did it again**

Scenario 3:

**Judge makes a mistake**

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## **What was the judge thinking?**

You levy on the judgment debtor's property pursuant to a Writ of Execution. After you levy on the property, but before it has been sold, the court contacts you and says they failed to notice the judgment had gone dormant. What should you do? What if the sale had already occurred?

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## **What sort of mistakes have you seen on a writ? How did you fix them?**

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# **In small things forgotten**

Scenario 4:

**Dangerous abandoned property**

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**You're executing a writ of possession**

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No one is at the leased premises when you execute the writ. While there are lots of worthless items left in the apartment, you find a firearm and ammunition in the unit. You are not thrilled with the idea of having them placed at the curb.

What would you do?

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# **In large things forgotten**

Scenario 5:  
**Mobile Home**

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## **What to do with a mobile home?**

Writ of possession for a mobile home in a mobile home park. The mobile home is owned by the defendant who was only renting space in the park. Defendant is absent, believed to be deceased and the mobile home is in such poor condition as to be unmovable. Upon execution of the writ, what becomes of the personal property inside the mobile home? Is it to be removed, inventoried and placed outside the mobile home as if it was in a house or apartment, or is it to be left inside the mobile home for the plaintiff to dispose of when disposing of the trailer?

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PART 6:  
**Avoiding service of process**

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**First, what are some of the more creative ways you have found and served someone?**

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## **An obstacle to service of process**

You go to serve Mr. Smith at the business where he works. You contact the business's personnel director, who then went back into the restricted area of the business and advised Mr. Smith that the you were there to serve him with process. Mr. Smith declines to come out to accept the paperwork. The personnel director refuses to let you go into the restricted area.

One of your colleagues suggests swearing out a complaint against the director for preventing execution of civil process, a class C misdemeanor. What do you do? Any other options?

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## **Tex. Pen. Code § 38.16**

- (a) A person commits an offense if he intentionally or knowingly by words or physical action prevents the execution of any process in a civil cause.
- (b) It is an exception to the application of this section that the actor evaded service of process by avoiding detection.
- (c) An offense under this section is a Class C misdemeanor.

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# **Leveraging the criminal system**

PART 7:

**Arresting debtors**

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## **Throw Bronson in jail**

We Rent Boats, Inc., sues Bronson because he stopped paying on his boat, the “Boomer Schooner.” The judge issues a Writ of Sequestration. When you approach Bronson, he admits that he owes the money, and he admits that he was supposed to give the boat back if he didn’t pay. However, he won’t give it back and won’t tell you where it is.

The creditor’s attorney wants you to arrest Bronson? Can you? Is that a good idea?

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## **Hindering secured creditors is a crime (1/2)**

Tex. Pen. Code § 32.33

(b) A person who has signed a security agreement creating a security interest in property or a mortgage or deed of trust creating a lien on property commits an offense if, with intent to hinder enforcement of that interest or lien, he destroys, removes, conceals, encumbers, or otherwise harms or reduces the value of the property.

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## **Hindering secured creditors is a crime (2/2)**

(c) For purposes of this section, a person is presumed to have intended to hinder enforcement of the security interest or lien if, when any part of the debt secured by the security interest or lien was due, he failed:

(1) to pay the part then due; and

(2) if the secured party had made demand, to deliver possession of the secured property to the secured party.

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Scenario 8:

## **Bankruptcy and the Automatic Stay**

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## **11 U.S.C. § 362**

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

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## **11 U.S.C. § 362(a) (1/2)**

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
- (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

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## **11 U.S.C. § 362(a) (2/2)**

- (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
- (4) any act to create, perfect, or enforce any lien against property of the estate; [or]
- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title.

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## **Scenario**

Landlord files an eviction suit. Tenant appears for trial but loses and the court enters a judgment for possession against her. The next day she files a bankruptcy petition in federal bankruptcy court.

Is the case automatically stayed due to the bankruptcy filing?

What if the petition is filed after the appellate deadline has passed and a writ of possession has been requested?

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## **11 U.S.C. § 362(b)**

(22) Subject to subsection (l) [inapplicable in Texas], under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor

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## ***In re Nicholson, 2019 WL 2524291, at \*3 (B.A.P. 9th Cir. June 18, 2019)***

For the exception to the automatic stay apply, the landlord must obtain a final, non-appealable judgment for possession prior to the debtor's bankruptcy filing.

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## **Scenario 9: Garnishing a Bank**

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## **Service on a bank**

You have to serve a petition for writ of garnishment against a bank. You go to the branch where the judgment debtor banks. They refuse service and direct you to the office in the downtown of a nearby city. You go there and they refuse service as well.

What do you do?

If it turns out that you can serve Bob, someone who goes to your church, can you serve him after the Sunday service?