

Post-Judgment Turnover Receivership Hearing Myths

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SUMMARY OF QUALIFICATIONS:

Robert E. Jenkins has been a licensed attorney for 19 years and began serving as a court-appointed receiver in 2012. He is now a fulltime post-judgment turnover receiver and has been appointed to aid in the recovery of nonexempt assets for the payment of judgments in **more than 1,000 cases by 382 courts in 109 counties** throughout Texas. Receiver Jenkins is dedicated to his duty of serving as an agent of the Court within the strictures established by the receivership orders and treating all defendants with dignity and respect.

Receiver Jenkins is the principal attorney in Jenkins Law Firm, PC where, prior to becoming a fulltime post-judgment turnover receiver, he represented banks, investors, and business owners in the recovery of consumer and commercial debt, garnishment defense, and judgment enforcement. Having represented national and state banks, he is familiar with institutional protocols and his office has implemented stringent security measures to protect sensitive financial data. Receiver Jenkins also has vast experience in locating and recovering nonexempt assets to liquidate debts and satisfy judgments, and has negotiated resolutions to hundreds of cases.

EDUCATION:

UCLA School of Law, Los Angeles, California, Juris Doctorate, 2000

Honors: UCLA Moot Court Honors Program, Appellate Advocate
American Jurisprudence Award, Legal Writing
Teaching Assistant, Legal Writing

Leadership: UCLA Moot Court Honors Program, President

The University of Texas, Austin, Texas, Bachelor of Journalism *with High Honors*, 1997

PUBLICATIONS:

Running Aground in a Sea of Complex Litigation: A Case Comment on the Exxon Valdez Litigation
18 UCLA J.ENVTL.L. & POL'Y 151 (2000)

LICENSES AND ADMISSIONS:

State Bar of Texas, admitted November 2002 (TX Bar # 24036842)

State Bar of California, admitted December 2000 (CA Bar # 211361)

U.S. Court of Appeals for the Fifth Circuit and the Ninth Circuit

U.S. District Court, Northern and Eastern Districts of TX; Southern, Eastern, and Central Districts of CA

MEMBERSHIPS:

Texas Creditor's Bar Association

Consumer and Commercial Law, TX Bar Section

PROFESSIONAL HONORS:

Texas Rising Stars, 2010

SIGNIFICANT LEGAL EXPERIENCE:

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|----------------|--|
| 2012 - Present | Jenkins Law Firm, PC, Dallas, Texas
Principal Attorney / Shareholder: Serves Judges throughout Texas as a fulltime court-appointed post-judgment turnover receiver. Prior to focusing on receiver practice, represented financial institutions, investors, and business owners in consumer and commercial collections, garnishment defense, and judgment enforcement. |
| 2007 - 2012 | Jenkins Babb, LLP and Robert E. Jenkins, P.C., Dallas, Texas
Managing Partner: Commercial and consumer collections, garnishment defense, foreclosures, enforcing judgments, and serving as court-appointed receiver. |
| 2003-2007 | Vial, Hamilton, Koch & Knox, LLP, Dallas, Texas
Litigation Associate: Practiced commercial and business litigation in the recovery of consumer and commercial debt, foreclosures, and judgment enforcement. |
| 2000-2002 | Seltzer Caplan McMahon Vitek, San Diego, California
Litigation Associate: Practiced business and real estate litigation. |

Post-Judgment Turnover Receivership Hearing Myths

The Defendant Must Have Notice of the Receivership Hearing. FALSE

Turnover Receiver May Be Appointed *Ex Parte*: A court may appoint a turnover receiver *ex parte* with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment. See Tex. Civ. Prac. & Rem. Code §31.002(b)(3); *Ex Parte Johnson*, 654 S.W.2d 415, 418 (Tex. 1983) (stating that notice and hearing prior to issuance of the turnover order was not required under predecessor statute); *Sivley v. Sivley*, 972 S.W.2d 850, 860 (Tex. App.-Tyler 1998, no pet.) (“The [turnover] statute itself does not provide for notice or a hearing to be afforded a judgment debtor in a turnover proceeding.”); *Plaza Court v. West*, 879 S.W.2d 271, 276 (Tex. App.--Houston [14th Dist.] 1994, no writ.) (recognizing the turnover statute does not provide for notice to be afforded a judgment debtor in a turnover proceeding); *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 272 (Tex. App.--Houston [14th Dist.] 1992, writ denied); *Williams Farms Produce Sales, Inc. v. R & G Produce Co.*, 443 S.W.3d 250, 255 (Tex. App.-Corpus Christi 2014, no pet.) (turnover statute itself does not require notice and a hearing prior to issuance of a turnover order).

Courts reason that an *ex parte* turnover order does not unfairly surprise a judgment debtor because the judgment puts the debtor on notice that post-judgment collection proceedings will follow. *Ex parte Johnson*, 654 S.W.2d at 418 n.1; *Thomas v. Thomas*, 917 S.W.2d 425, 433-34 (Tex.App.--Waco, 1996, no writ) (stating a judgment was subject to collection, and notice can be implied that the creditor would attempt to collect on the judgment and affirming granting *ex parte* turnover relief.); *Ross*, 824 S.W.2d at 272, citing *Merritt v. Harris County*, 775 S.W.2d 17, 21 (Tex.App.—Houston [14th Dist.] 1989, writ denied).

Additionally, Courts have repeatedly rejected the argument that *ex parte* turnover proceedings violate due process:

[D]ue process does not require that a complainant who has been granted an opportunity to be heard and has had his day in court should, after a judgment has been rendered against him, have further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment against him.

In re Guardianship of Bays, 355 S.W.3d 715, 720 (Tex. App.-Fort Worth 2011, no pet.) citing *Ex Parte Johnson*, 654 S.W.2d at 418; see also *Sivley*, 972 S.W.2d at 860-861; *Thomas v. Thomas*, 917 S.W.2d 425, 433-34.

Additionally, courts have rejected the argument that an *ex parte* turnover proceeding violates Rule 21 of the Texas Rules of Civil Procedure requiring all motions be served on all parties not less than three days before the time specified for the hearing. See *Sivley*, 972 S.W.2d at 861 (instructing that while the turnover statute “does not expressly state that turnover orders may be granted without notice, the statute, when read in context, provides aid in the satisfaction of judgments without the need to give notice”, and that “where a rule of procedure conflicts with a legislative enactment, the rule must yield”). “Since Section 31.002 does specifically not require notice, then no notice is required pursuant to Rule 21.” *Id.*

Moreover, a brief survey of Texas case law specifically addressing turnover orders confirms a receiver may be appointed *ex parte*. For example, see the following:

- In *Sivley v. Sivley*, 972 S.W.2d 850 (Tex.App.Tyler 1998, no pet.), a motion for turnover order was **filed and granted the same day** without a hearing. *Id.* at 859. The court addressed whether an *ex parte* entry of a turnover order was proper under Section 31.002 and due process. In doing so, the Court analyzed the constitutional considerations of *ex parte* postjudgment collection proceedings. Following an extensive discussion, the *Sivley* court concluded that based upon the provisions of the statute and the established rules of jurisprudence that a defendant who has been granted an opportunity to be heard and had his day in court, should not, after a judgment have a further notice and hearing before supplemental proceedings are taken to reach property in satisfaction of the judgment.
- In *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 273 (Tex. App.-Houston [14th Dist.] 1992, writ denied), the court rejected a judgment debtor’s challenge to a turnover order issued *ex parte* stating that a judgment puts the debtor on notice “that satisfaction will be pursued.” *Ross*, 824 S.W.2d at 272, citing *Merritt v. Harris County*, 775 S.W.2d 17, 21 (Tex.App.--Houston [14th Dist.] 1989, writ denied) (noting “section 31.002 does not provide for notice to be afforded defendant in a turnover proceeding” and affirming *ex parte* turnover order).

- In *Plaza Court, Ltd. v. West*, 879 S.W.2d 271, 276 (Tex.App.--Houston [14th Dist.] 1994, no writ), an original mandamus action, the relator contended that the trial court abused its discretion by entering an *ex parte* turnover order without notice or a hearing. Citing the statute as its authority, the Court held that the relators did not have the right to notice or a hearing regarding the attempt to effect enforcement of the turnover order.
- In *Thomas v. Thomas*, 917 S.W.2d 425, 433-34 (Tex.App.--Waco 1996, no writ), the Court stated that a judgment was subject to collection, and notice can be implied that the creditor would attempt to collect on the judgment.

Practical Consideration: If the defendant is given a copy of the Application to Appoint Receiver and/or notice of the receivership hearing, he will have a road map of the Receiver's actions (which type of property is being pursued) and is likely to take efforts to hide, move, or abscond with the property before the hearing even begins.

Because the turnover statute does not require a judgment defendant be given notice and an opportunity to be heard, and neither due process nor TRCP Rule 21 are violated by *ex parte* post-judgment collection proceedings, a turnover receiver may be appointed *ex parte*.

A Receiver Bond is Required. FALSE

No Receiver Bond Is Required for Turnover Receivership Under CPRC §31.002: In a **post-judgment** receivership under section 31.002 of the Texas Civil Practice and Remedies Code ("CPRC") no receiver bond is required. Unlike a **pre-judgment** receivership that expressly requires a bond under Rule 695a of the Texas Rules of Civil Procedure ("TRCP") to protect the pre-judgment defendant from a wrongfully appointed receiver, in a post-judgment receivership the plaintiff has already won a judgment. There is no uncertainty as to liability. As such, the requirements of CPRC chapter 64 and TRCP section 695a are not applicable in a post-judgment turnover receivership brought pursuant to CPRC section 31.002.

Courts have repeatedly noted the distinction between a post-judgment turnover receivership under CPRC section 31.002 and a pre-judgment receivership under TRCP 695. See *Schultz v. Cadle Co.*, 825 S.W.2d 151, 154-55 (Tex. App.-Dallas 1992) (holding requirements of Chapter 64 inapplicable because section 31.002 governed), writ denied, 852 S.W.2d 499 (Tex. 1993) (per curiam); *Holland v. Alker*, No. 01-05-00666-CV, 2006 WL 1041785, at *7 (Tex. App.-Houston [1st Dist.] Apr. 20, 2006, pet. denied) (mem. op.) (same); see also *Unit 82 Joint Venture v. Mediacopy Tex., Inc.*, 349 S.W.3d 42, 45 n.2 (Tex. App.-El Paso 2010), rev'd on other grounds, 377 S.W.3d 694 (Tex. 2012). (noting the difference between "a liquidation receivership as opposed to a receivership to preserve property in a pre-judgment context").

Judge Hittner's article addressed the need, or more precisely the lack thereof, for a bond in the event of the appointment of a post-judgment receiver under the Turnover Statute and advised "**there is a strong view that since the underlying obligation has been determined by final judgment, the judgment debtor will not be harmed if no bond, or merely a nominal bond, is required.**" *Childre v. Great Sw. Life Ins. Co.*, 700 S.W.2d 284 (Tex. App.--Dallas 1985, no writ) (quoting David Hittner, *Texas Post-Judgment Turnover & Receivership Statutes*, 45 Tex. Bar J. 417, 420 (1982)). Accordingly, no receiver bond is required by law in a post-judgment receivership.

Practical Consideration: Requiring a Receiver Bond, even a nominal one, creates a burden on the court administrator (holding, accounting for, then refunding the bond money with interest), a cost to the County for interest accruing on the bond, and the plaintiffs. It is this Receiver's experience that in the small minority of cases where a bond was required (mostly in my first 1-2 years as a receiver), it can take 1-3 months to receive the bond refund check after the Order to release the bond is signed, requiring the case to remain open and additional follow-ups by Receiver's staff. Additionally, many receivership payment plans need to exceed 3 years to get the monthly payment to a small enough amount for the defendant to pay. More than 3 years is a long time to tie-up bond money waiting for the payment plan to conclude. Finally, it is this Receiver's experience that no bond has ever been awarded to a defendant and neither I nor any of the plaintiffs requesting my appointment were ever ordered to pay damages to a defendant arising from the post-judgment receivership. Of course, the best protection of a defendant in a receivership is not a Receiver Bond -- it's appointing an experienced receiver.

Must Wait 30 Days for Judgment to Become Final Before Ordering Receivership. FALSE

There is No 30-day Waiting Period After Entry of Judgment Required for a Post-Judgment Turnover Receivership: In 1985, the Court of Appeals in Dallas ruled there is no requirement to wait 30 days after a judgment is entered before a turnover receivership can be ordered. See *Childre v. Great S.W. Life Ins. Co.*, 700 S.W.2d 284 (Tex.App.—Dallas 1985, no writ). Following a detailed analysis, the Court noted that turnover receivership is in the nature of an attachment rather than an execution. Additionally, the Court analogized the remedy of post-judgment receivership to the remedy of post-judgment garnishment where a judgment is deemed final and subsisting after the date it is signed unless a supersedeas bond is approved and filed. *Id.* at 287, citing *Taylor v. TransContinental Properties, Ltd.*, 670 S.W.2d 417, 420 (Tex.App.—Tyler 1984, no writ). Therefore, there is no requirement to wait 30 days after entry of the Judgment before granting a post-judgment receivership.

Must Do a Writ of Execution and/or a Writ of Garnishment Prior to Receivership. FALSE

There is No Requirement to First Exhaust Other Remedies After Judgment Prior to a Post-Judgment Turnover Receivership: The case law is clear that a plaintiff does not have to exhaust other methods of collecting its judgment before requesting a receivership. *Universe Life Insurance Company v. Giles*, 982 S.W.2d 488 (Tex.App.—Texarkana 1998, pet. denied). *Hennigan v. Hennigan*, 666 S.W.2d 322, 323 (Tex.App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); *Childre v. Great Sw. Life Ins. Co.*, 700 S.W. 2d 284, 288 (Tex. App.—Dallas 1985, no writ). For example, it is not necessary to show that a writ of execution has been returned *nulla bona* before granting a receivership. *Childre v. Great Sw. Life Ins. Co.*, 700 S.W. 2d 284, 288 (Tex. App.—Dallas 1985, no writ).

Practical Consideration: To require a judgment plaintiff to exhaust other remedies such as execution or garnishment before requesting a post-judgment Turnover Receiver would undermine the very purpose of the Turnover Statute -- to aid the diligent judgment creditor in obtaining satisfaction of his or her judgment in a timely manner. See David Hittner, *Texas Post-Judgment Turnover & Receivership Statutes*, 45 Tex. Bar J. 417, 420 (1982); *Schultz v. Fifth Judicial Dist. Court of Appeals at Dallas*, 810 S.W.2d 738, 739 n. 3 (Tex.1991) (purpose is to aid collection of final money judgments); *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 628 (Tex. App. - Fort Worth 2006, pet. denied) (purpose is to aid judgment creditor in reaching certain property of judgment debtor). As such, a plaintiff is not required by law to exhaust other remedies before a receivership.

Post-Judgment Turnover Receivership is a Harsh and/or Drastic Remedy that Should Rarely be Used. FALSE

The post-judgment Turnover Receivership is not a harsh and/or drastic remedy, unlike other types of receiverships: It is claimed that a receivership is a harsh, drastic remedy, to be used only sparingly. Notably, the “harsh remedy” case law does not apply to post-judgment turnover receiverships under CPRC §31.002 (the “turnover statute”). The harsh/drastring remedy case law either dates from before the turnover statute enacted in 1979 or they are about any of the several other kinds of Texas receiverships such as under Tex.Bus.Corp.Act. art. 7.05 (preserve corporate assets) and Tex.Civ.Prac.Rem.Code chapter 64 (preserve the property or fund that is the subject matter of the lawsuit pending its final conclusion).

Contrary to the position that receivership is a harsh remedy to be used sparingly, the case law actually supports use of the post-judgment turnover receivership remedy. Indeed, the turnover receivership is meant to be an available remedy “for even the smallest of judgments”. *Childre v. Great Sw. Life Ins. Co.*, 700 S.W. 2d 284 (Tex. App.—Dallas 1985, no writ.). Analyzing whether a bond is required for a turnover receivership, *Childre* shows that unless the judgment debtor shows extraordinary circumstances, “... any bond required should not be in an amount that would act as a prohibitive cost or make it economically impossible for the judgment creditor to use the remedies provided in [the turnover statute] for even the smallest of judgments. *Childre* at 289, quoting David Hittner, *Texas Post-Judgment Turnover & Receivership Statutes*, 45 Tex. Bar J. 417, 420 (1982); *Shultz v. Cadle Co.*, 825 S.W.2d 151, 154-155 (Tex.App.—Dallas 1992, writ denied); *Estate of Herring*, 983 S.W.2d 61 (Tex. App.—Corpus Christi, 1999, no pet.)

The statute’s purpose is to put a reasonable remedy in the hands of a diligent judgment creditor, subject to court supervision. *CRE8 International LLC v Elexis Rice*, 05-14-00377-CV (Tex.App--Dallas June 3, 2015, no pet.). The turnover receivership is simply a procedural device to help the Court enforce its judgments. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, at 223 (Tex. 1991). At the point where a turnover receivership is requested, the defendant has had the opportunity to be heard and liability has already been established. Compare it to a pre-judgment situation where someone is trying to force a business into receivership before any liability has been established or the results of the lawsuit have been determined. It is that pre-judgment receivership that is the harsh/drastring remedy that the case law is warning against.

The idea that receivership is a harsh/drastring remedy comes from non-turnover case law – such as those under requested under Tex.Bus.Corp.Act. art. 7.05 (preserve corporate assets) and Tex.Civ.Prac.Rem.Code chapter 64 (preserve property at issue in a pending lawsuit). In October 2017, a search by my colleague Mike Bernstein on Casemaker for receivership opinions mentioning "harsh remedy" or "drastring remedy" brought up 80 opinions. Receiver Bernstein determined that they are not turnover receivership cases. Some of these are opinions from before there was a turnover statute. The rest are talking about the many other kinds of receiverships. (There was one opinion out of 80 in a turnover context, but the opinion mentioned "harsh remedy" without any analysis, only referring back to an earlier opinion. That earlier opinion was about a receivership under the Texas Securities Act.)

This Turnover Receiver's view is that a turnover receivership is usually no more harsh/drastring than a writ of execution or a garnishment. A receiver can have a bank account released sometimes as quickly as a few hours and up to within a few days of it being captured. In a garnishment, however, it would take much longer to release the bank account. In fact, in a Justice Court garnishment proceeding, the bank is not even required to respond until 14 days after the date of service of the Writ by a Constable or Sheriff (more than 20 days for County and District Court proceedings).

Notably, the legislature recently amended the turnover statute in June 2017 by unanimous vote to remove 1 of the 3 previous requirements, making it much easier for a plaintiff to obtain a turnover receivership. It is reasonable to think that the Legislature would not have lowered the threshold for obtaining a post-judgment receivership if they viewed the turnover receivership as a harsh and/or drastring remedy.

Practical Consideration: If the Court is concerned about the receivership being harsh/drastring, the solution is to appoint a prudent, experienced receiver. The key factor is the receiver selected, not the remedy.

A Post-Judgment Turnover Receivership Must be Supported by a Certain Type of Admissible Evidence. FALSE

The Post-Judgment Turnover Receivership is Not Required to be Supported by a Certain Type of Admissible Evidence – Just "Some Evidence": It has been speciously argued that the evidence supporting a turnover receivership must be "admitted into evidence" and that because a Justice Court is not a court of record the "non-existence of a record of the hearing is conclusive proof that Plaintiff did not make the factual showing required." This argument is (I believe purposely) contrary to the clear law.

"Section 31.002 does not specify, or restrict, the manner in which evidence may be received in order for a trial court to determine whether the conditions of section 31.002(a) exist, nor does it require that such evidence be in any particular form, that it be at any particular level of specificity, or that it reach any particular quantum before the court may grant aid under section 31.002." *Tanner v. McCarthy*, 274 S.W.3d 311, 322 (Tex. App.-Houston [1st Dist.] 2008, no pet.); see also *Gillet v. ZUPT, LLC*, No. 14-15-01033-CV, 2017 WL 716633, at 5 (Tex. App.-Houston [14th Dist.] Feb. 23, 2017, no pet.)

Moreover, courts have recognized that even a lack of evidence to support turnover relief does not automatically invalidate a trial court's order, but is merely a "relevant consideration in determining if the trial court abused its discretionary authority in issuing the order." *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex.1991). Therefore, there is no requirement that a turnover receivership be supported by any certain type of evidence or that the evidence be admitted into a court of record.