

TURNOVER PROCEEDINGS

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TURNOVER ORDERS AND SPECIAL PROCEEDINGS

I. **SCOPE OF ARTICLE.** This article provides a general discussion of the "turnover" statute, Texas Civil Practice & Remedies Code ("TCP RC") section 31.002.¹ It is not an exhaustive, in-depth treatment of the subject. Rather, this article covers only the principal topics, such as the parties and property that may be subject to a turnover order, enforcement of an order, and appellate review.

II. **APPLICABLE STATUTES.** The turnover statute is found at Texas Civil Practice & Remedies Code section 31.002. The statute provides:

Sec 31.002 Collection of Judgment Through Court Proceeding.

- (a) A judgment creditor is entitled to aid from a court of appropriate jurisdiction, including a justice court, through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.
- (b) The court may:
 - (1) order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control, together with all documents or records related to the property, to a designated sheriff or constable for execution;
 - (2) otherwise apply the property to the satisfaction of the judgment; or
 - (3) appoint a receiver 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.
- (c) The court may enforce the order by contempt proceedings or by other appropriate means in the event of refusal or disobedience.
- (d) The judgment creditor may move for the court's assistance under this section in the same proceeding in which the judgment is rendered or in an independent proceeding.
- (e) The judgment creditor is entitled to recover reasonable costs, including attorney's fees.
- (f) A court may not enter or enforce an order under this section that requires the turnover of the proceeds of, or the disbursement of, property exempt under any statute, including Section 42.0021, Property Code. This subsection does not apply to the enforcement of a child support obligation or a judgment for past due child support.
- (g) With respect to turnover of property *held* by a financial institution in the name of or on behalf of the judgment debtor as customer of the financial institution, the rights

¹ The predecessor to the turnover statute as it is currently codified was enacted by the Texas Legislature in 1979 as Texas Civil Statutes Annotated art. 3827a.

of a receiver appointed under Subsection (b)(3) do not attach until the financial institution receives service of a certified copy of the order of receivership in the manner specified by Section 59.008, Finance Code.

- (h) A court may enter or enforce an order under this section that requires the turnover of nonexempt property without identifying in the order the specific property subject to turnover.

TEX. CIV. PRAC. & REM. CODE § 31.002 (LEXIS) (effective Sept. 1, 2019) (emphasis added).

The legislature eliminated subsection (a)(1) from the turnover statute in 2017. This amendment became effective June 15, 2017. See 2017 Tex. Sess. Law Serv. Ch. 996 (H.B. 1066) (West). The legislature added subsection (h) to the turnover statute in 2005. This amendment became effective May 17, 2005. See 2005 Tex. Sess. Law Serv. Ch. 52 (H.B. 729) (West). In *Tanner v. McCarthy*, the First District Houston Court of Appeals set aside a turnover order, not based on subsection (h), but subsection (a). 274 S.W.3d 311 (Tex. App.—Houston [1st Dist.] 2008, no pet.). In its discussion, the court of appeals acknowledged that subsection (h) does permit a trial court to enter a turnover order without identifying specific property subject to turnover. However, since this was not an integral part of its decision, it is only dicta.

The legislature added subsection (g) to the turnover statute in 1999. This amendment became effective September 1, 1999. See 1999 Tex. Sess. Law Serv. Ch. 344, § 7.002 (H.B. 2066) (West).

In 2019, the legislature expanded turnover order jurisdiction by including justice courts in subsection (a). Acts 2019, 86th Leg., Ch. S.B. 2364, § 1. This amendment will become effective September 1, 2019. *Id.* § 3. The change applies to collection of any judgment, regardless of whether the judgment was entered before, on, or after the effective date. *Id.* § 2.

The relief available under the turnover statute is limited in part by section 31.0025 which the legislature enacted in 1991. See 1991 Tex. Sess. Law Serv. Ch. 671, § 1 (H.B. 480) (West). This section provides:

Sec. 31.0025 Authority of Court to Order Turnover of Wages.

- (a) Notwithstanding any other law, a court may not, at any time before a judgment debtor, is paid wages for personal services performed by the debtor, enter or enforce an order that requires the debtor or any other person to turn over the wages for the satisfaction of the judgment.
- (b) This section applies to wages in any form, including paycheck, cash, or property.
- (c) This section does not apply to the enforcement of a child support obligation or a judgment for past due child support.

TEX. CIV. PRAC. & REM. CODE § 31.0025 (LEXIS through 2019 Sess.).

III. PURPOSE. The overall purpose of the turnover statute is to help diligent judgment creditors obtain timely satisfaction of their judgments. See *Allard v. French*, 735 S.W.2d 311, 319 (Tex. App.—Fort Worth 1987) *aff'd by* 754 S.W.2d 111 (Tex. 1988), *cert. denied*, 488 U.S. 1006 (1989). The statute accomplishes this purpose by providing a “procedural device by which creditors may reach assets of a debtor that are otherwise difficult to attach or levy on by ordinary legal process.” *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 224 (Tex. 1991); *R & W*

Excavating, Inc. v. Richardson, No. 13-17-00036-CV, 2018 Tex. App. LEXIS 10239, at *9 (Tex. App.—Corpus Christi Dec. 13, 2018, no pet.). The legislature's reasons for enacting the turnover statute are more fully expressed in the House and Senate Committee Reports as follows:

The traditional methods of reaching property of a judgment debtor to satisfy a judgment have been found inadequate in cases where the judgment debtor has property outside the State of Texas, where the judgment debtor owns property interests in such items as contract rights receivable, accounts receivable, commissions receivable and similar acts to property or rights to receive money at a future date. Additionally, there are inadequacies in existing procedures where negotiable instruments, corporate stocks, corporate securities and the like are owned by the judgment debtor but secreted by the judgment debtor in such a fashion that they cannot be found for execution by a levying officer.

The bill makes significant changes in the ability of the judgment creditor to enforce his judgment against his debtor. The changes which the bill makes are open-ended in that they allow a judgment creditor to get aid in collection from the court in the form of an order which requires the debtor to bring to the court all documents or property used to satisfy a judgment. The actual effect of the bill is to require the burden of production of property that is subject to execution to be placed with the debtor instead of the creditor attempting to satisfy his judgment. The bill will allow this to be effective against all property and future rights to property that the debtor might own.

The bill proposes to put a reasonable remedy in the hands of a diligent judgment creditor, subject to supervision of the Court, and establish procedures for reaching the types of property and property interest described above. Similar remedies for certain types of property are provided in Sec. 8.317 of the Uniform Commercial Code as adopted in Texas, but the types of property described there are not adequate to cover most situations. The bill proposes to amplify those rights and to bring Texas in conformity with other states having similar legislation.

Senate Committee on Judicial Affairs, Bill Analysis, Tex. S.B. 965, 66th Leg. R.S. (1979), and House Committee on Judicial Affairs, Bill Analysis, Tex. H.B. 1260, 66th Leg. R.S. (1979).

IV. THE TURNOVER PROCESS.

A. Overview of the Turnover Process. The turnover statute is a procedural device that empowers a trial court to assist a judgment creditor in reaching a judgment debtor's property that under traditional remedies was beyond a creditor's reach. See TEX. CIV. PRAC. & REM. CODE § 31.002(a) (LEXIS through 2019 Sess. (excluding S.B. 2364)); *Kennedy v. Hudnall*, 249 S.W.3d 520, 524 (Tex. App.—Texarkana 2008, no pet.). The term "turnover" comes from the trial judge's ability to order the debtor to deliver or "turn over" nonexempt assets to an officer or a receiver. See § 31.002(a); *Ex parte Johnson*, 654 S.W.2d 415, 417 (Tex. 1983) (construing former article 3827a, the predecessor to section 31.002). The turnover procedure is not an exclusive remedy, and the creditor will oftentimes need to employ additional remedies, such as a temporary restraining order to prevent further secreting or wasting of assets, a writ of garnishment to impound property due the debtor from a third party, or an order setting aside a fraudulent transfer. See e.g., *Gerjets v. Davila*, 116 S.W.3d 864, 867 (Tex. App.—Corpus Christi 2003, no pet.) (turnover order and TRO); *Patriot Residential Mgmt. Servs., LLC v. Wells Fargo Bank, N.A.*, No. 02-12-00253-CV, 2013 Tex. App. LEXIS 6610, at *3 (Tex. App.—Fort Worth May 30, 2013, no pet.) (turnover order and garnishment action).

The trial court's power to order the turnover of assets is discretionary and will be overruled by an appellate court only if there has been an abuse of that discretion. See *Beaumont Bank*, 806 S.W.2d at 226; see also *Suttles v. Vestin Realty Mortg. I, Inc.*, 317 S.W.3d 412, 416 (Tex. App.—Houston [1st Dist.] 2010, no pet.). A trial court abuses its discretion when it "acts without reference to any guiding rules and principles." *Sivley v. Sivley*, 972 S.W.2d 850, 860 (Tex. App.—Tyler 1998, no pet.); *Alexander Dubose Jefferson & Townsend LLP v. Chevron Phillips Chem. Co. LP*, No. 09-14-00313-CV, 2019 Tex. App. LEXIS 2050, at *7 (Tex. App.—Beaumont Mar. 14, 2019, no pet.) (same). "If the underlying judgment is reversed on appeal, then the turnover order must be reversed also." *Matthiessen v. Schaefer*, 915 S.W.2d 479, 480 (Tex. 1995); see also *Ross v. Nat'l Center for the Emp't of the Disabled*, 201 S.W.3d 694, 695 (Tex. 2006); *Propel Fin. Servs., LLC v. Conquer Land Utils., LLC*, Nos. 13-18-00280-CV, 13-18-00313-CV, 2019 Tex. App. LEXIS 3113, at *10 (Tex. App.—Corpus Christi Apr. 18, 2019, no pet.).

B. Initiation of Proceedings. When a turnover order is in the nature of an attachment, a judgment creditor need not delay an application for turnover relief until a court issues a writ of execution. See *Childre v. Great Sw. Life Ins. Co.*, 700 S.W.2d 284, 286-87 (Tex. App.—Dallas 1985, no writ). Further, a judgment creditor has the option to move for the court's assistance in either "the same proceeding in which the judgment is rendered or in an independent proceeding." See TEX. CIV. PRAC. & REM. CODE § 31.002(d) (LEXIS through 2019 Sess. (excluding S.B. 2364)). A separate suit may be necessary, however, if the creditor wishes to join a third party who holds or claims the property. See e.g., *Beaumont Bank*, 806 S.W.2d at 227. On a related note, third parties who seek solely to protect an alleged interest in the property that is the subject of a turnover motion, and not to attack the substance of the underlying judgment, may intervene in a proceeding for turnover relief, even though the trial court already has rendered final judgment. See *Breazeale v. Casteel*, 4 S.W.3d 434, 436-37 (Tex. App.—Austin 1999, pet. denied); see also *Alexander Dubose Jefferson & Townsend LLP v. Chevron Phillips Chem. Co., L.P.*, 540 S.W.3d 577, 584-85 (Tex. 2018).

If all other statutory requirements are met, a creditor need not first exhaust other remedies before seeking turnover relief. See *Universe Life Ins. Co. v. Giles*, 982 S.W.2d 488, 493 (Tex. App.—Texarkana 1998, pet. denied); see also *Heckert v. Heckert*, No. 02-16-00213-CV, 2017 Tex. App. LEXIS 10570, at *7 (Tex. App.—Fort Worth Nov. 9, 2017, no pet.) (mem. op.). Furthermore, a judgment debtor's appeal from the judgment does not, of itself, prevent turnover relief, provided that the debtor has not superseded the judgment's enforcement by a proper bond or other procedure. *Texas Emp'rs' Ins. Ass'n v. Engelke*, 790 S.W.2d 93, 95 (Tex. App.—Houston [1st Dist.] 1990, no writ).

A judgment creditor initiates an order to turnover property by filing an application for turnover. The primary purpose of the turnover proceeding is to ascertain whether an asset is in the judgment debtor's possession or subject to his control. See *Beaumont Bank*, 806 S.W.2d at 227. When applying for turnover relief, the judgment creditor should state the following:

- * A description of the parties;
- * A description of the judgment, including when and where it was rendered, amounts due, and that it is not dormant and its enforcement is not suspended or otherwise superseded;
- * The extent to which the judgment is unsatisfied;
- * A description of the present or future rights to property believed to be held by the judgment debtor and not exempt from attachment, execution, or seizure for the satisfaction of the judgment, along with a description of any records or documents relating to these rights and necessary to their collection or enforcement;

- * An explanation of why the property rights cannot readily be attached or levied upon by ordinary legal process;² and
- * A description of the relief sought by the judgment creditor, including attorney's fees and costs.

See David Hittner, *Texas Post-Judgment Turnover and Receivership Statutes*, 45 TEX. B.J. 417, 417-18 (1982).

In a turnover proceeding, a creditor need only show "some evidence" of possession or control of the subject asset by the judgment debtor. *Brink v. Ayre*, 855 S.W.2d 44, 46 (Tex. App.—Houston [14th Dist.] 1993, no writ); see also *Cre8 Int'l, LLC v. Rice*, No. 05-14-00377-CV, 2015 Tex. App. LEXIS 5613, at *12 (Tex. App.—Dallas June 3, 2015, no pet.) (mem. op.). Once the judgment creditor makes this showing, however, the trial court is not automatically required to order a turnover of the asset. See *Brink*, 855 S.W.2d at 46. Rather, the trial court has discretion to decide whether and in what form turnover relief should be ordered. *Id.* For example, in exercising its discretion, one factor the court may consider is the judgment debtor's ability to meet his living expenses if the turnover relief is granted. See *id.*

The turnover statute does not provide for notice or a hearing to be afforded a judgment debtor in a turnover proceeding. A final judgment puts the debtor on notice that satisfaction will be pursued and that post judgment proceedings will follow. See *Sivley*, 972 S.W.2d at 860; see also, *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270, 272 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

In *Sivley*, the Tyler Court of Appeals considered whether the trial court's failure to provide prior notice and a hearing before the issuance of the turnover order under TCPRC 31.002 violated the debtor's constitutional rights to due process and trial by jury, even though the turnover statute does not expressly require notice or a hearing. 972 S.W.2d at 860. In holding that the trial court did not abuse its discretion by issuing the turnover order without additional notice or hearing, the court relied on the United States Supreme Court's analysis in *Endicott-Johnson Corp. v. Encyclopedia Press*. See *id.* at 860-61. Though due process of law states that an individual is entitled to notice and hearing before that individual is deprived of a property right, the *Endicott* Court stated:

the established rules of our system of jurisprudence do not require that a defendant 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 a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment. Thus, in the absence of a statutory requirement, it is not essential that he be given notice before the issuance of an execution against

² This explanation may no longer be necessary given the most recent amendment to TCPRC 31.002, which eliminated the requirement that property subject to the statute "cannot readily be attached or levied on by ordinary legal process." However, other sources for turnover application forms continue to include this explanation. For example, 8 Tex. Jur. PI & Pr. Forms § 152:82 still includes this explanation on the form from its November 2017 update. Although a few courts refer to this element, they do so while discussing the 2015 code. *Hamilton Metals, Inc. v. Glob. Metal Servs., Ltd.*, No. 14-17-00670-CV, 2018 Tex. App. LEXIS 9596, at *5 (Tex. App.—Houston [14th Dist.] Nov. 27, 2018, no pet.); *EastWest Bridge v. Tech. Partners FZ, LLC*, Civil Action No. 3:11-CV-2417-L, 2019 U.S. Dist. LEXIS 9514, at *2 (N.D. Tex., Jan. 18, 2019).

his tangible property; after the rendition of the judgment he must take "notice of what will follow," no further notice being "necessary to advance justice."

Endicott-Johnson Corp. v. Encyclopedia Press, 266 U.S. 285, 288 (1924).

The Texas Supreme Court adopted the *Endicott* analysis in *Ex parte Johnson*. 654 S.W.2d 415, 418 (Tex. 1983). In that decision, the Court suggested that notice and hearing prior to issuance of a turnover order are not required by noting in a footnote that the judgment debtor was "on notice that post judgment collection proceedings would follow." *Id.* at 418 n.1. But if turnover relief is sought in an independent proceeding, then service of citation on the judgment debtor is required under Texas Rule of Civil Procedure 99. TEX. R. CIV. P. 99.

C. Parties Subject to Turnover Order. Section 31.002 expressly empowers a court to order a judgment debtor to turn over the nonexempt property that the debtor possesses or that is subject to the debtor's control. The Texas courts of appeals disagree, however, as to whether turnover orders can be issued against third party non judgment debtors.

Some courts have held that in circumstances where a third party retains property that is shown to be nonexempt, owned by a judgment debtor, and subject to the debtor's possession or control, the trial court may issue a turnover order against the third party. See *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317, 324 (Tex. App.—Dallas 1997, writ denied); *Dale v. Fin. Am. Corp.*, 929 S.W.2d 495, 498 (Tex. App.—Fort Worth 1996, writ denied); *Int'l Paper Co. v. Garza*, 872 S.W.2d 18,19 (Tex. App.—Corpus Christi 1994, no writ); *Daniels v. Pecan Valley Ranch, Inc.*, 831 S.W.2d 372, 384 (Tex. App.—San Antonio 1992, writ denied). Other courts have concluded that turnover orders may issue only against the judgment debtor, with one court even noting that any other conclusion may be constitutionally suspect. See *Bay City Plastics, Inc. v. McIntyre*, 106 S.W.3d 321 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (after recognizing a split in the various courts of appeals on the issue of whether a turnover order can be issued against a third party not named in the original action, the First District Court of Appeals in Houston applied the general rule in *Beaumont Bank* that the turnover statute cannot be applied to non-judgment debtors); see also, *Parks v. Parker*, 957 S.W.2d 666, 668 n.1 (Tex. App.—Austin 1997, no pet.); *Cross, Kieschnick & Co. v. Johnston*, 892 S.W.2d 435, 439 (Tex. App.—San Antonio 1994, no writ) (reversing turnover order against partners when underlying judgment involved corporation).

Recently, however, the Texas Supreme Court acknowledged that "courts are troubled by . . . the extent to which a turnover order can affect the rights of non-judgment debtors," but held that the turnover statute does not provide trial courts the authority to "decide the substantive rights of the parties properly before it in a turnover proceeding, let alone the rights of strangers to the underlying judgment." *Alexander Dubose Jefferson & Townsend LLP*, 540 S.W.3d at 584-85. The Court declined to "delineate the appropriate mechanism for resolving competing substantive claims to property sought in a turnover application." *Id.* at 586.

The courts have since echoed the supreme court's view. See *Van Dyke v. Littlemill Ltd.*, No. 14-18-00237-CV, 2019 Tex. App. LEXIS 4247, at *21 (Tex. App.—Houston [14th Dist.] May 23, 2019, no pet. h). On remand, a court provided that a creditor may not seek a turnover order against third parties without other initial proceedings. *Alexander Dubose Jefferson & Townsend LLP*, 2019 Tex. App. LEXIS 2050, at *18.

D. Burden of Proof.

1. Proof by Judgment Creditor. The motion for turnover relief must be supported by evidence introduced at a hearing on the motion. TCPRC 31.002 requires "a factual

showing that the judgment debtor has nonexempt property that is not readily subject to ordinary execution" *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 628 (Tex. App.—Fort Worth 2006, pet. denied). To satisfy this requirement,

the trial court is to have a hearing, determine what specific assets are exempt, and what assets are subject to the court's order and then to direct the payment as the court determines is proper. If the statute requires a factual showing of nonexempt property, the court has to be acting with regard to certain specific property that it will direct be turned over to satisfy a judgment. It is not to be left to the debtor to determine what property that person has and whether it is exempt.

Bergman v. Bergman, 828 S.W.2d 555, 557 (Tex. App.—El Paso 1992, no writ). A literal interpretation of section 31.002 suggests that the movant must produce evidence to show that:

- * the movant is a creditor under a valid and enforceable judgment;
- * the judgment debtor owns property;
- * the property is not exempt from forced sale; and
- * reasonable attorney's fees have been and will be incurred in the process.

In *Tanner v. McCarthy*, the First District Houston Court of Appeals set aside a turnover order after finding that there was no evidence in the record to indicate the judgment debtor owned any nonexempt property that could not be readily attached or levied on by ordinary legal process. See 274 S.W.3d at 320.³ Thus, the judgment creditor had failed to satisfy the basic requirements of TCPRC 31.002(a). *Id.* at 323. In *Tanner*, the plaintiffs set forth unsupported general statements to this effect, but had not provided any evidence in support. The *Tanner* court noted that “[s]ection 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.” *Id.* at 322. However, the court did state that a trial court must nonetheless determine that the request falls within the scope of section 31.002 and must have some evidence before it to establish the necessary conditions. *Id.*

The courts of appeals are split on the issue of which party has the burden to prove that property is nonexempt or exempt. Compare e.g., *Stephenson v. LeBoeuf*, Nos. 14-02-00130-CV, 14-02-00134-CV, 2003 WL 22097781 (Tex. App.—Houston [14th Dist.] Sep. 11, 2003, no pet.) (burden is on creditor to show that “(1) debtor owns the property, (2) the property cannot be readily attached,⁴ and (3) the property is not exempt”), and *Roosth v. Roosth*, 889 S.W.2d 445, 459 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (party asserting exemption has the burden to prove exemption), with *Sloan v. Douglass*, 713 S.W.2d 436, 441 (Tex. App.—Fort Worth 1986, writ ref’d n.r.e.) (creditor must establish property is nonexempt, and if debtor raises defense of exemption, creditor has the burden to overcome defense). Some courts of appeals believe the better interpretation is to have the burden of proving an exemption on the debtor. See *Pillitteri v.*

³ Part of the court’s reasoning included analysis of the eliminated subsection (a)(1), and the court noted that the applicant presented no evidence to satisfy subsection (a)(1). However, this reasoning was not likely dispositive, so this case is still relevant to show the burden for establishing subsection (a) of the current statute.

⁴ Per the amended statute, which no longer includes subsection (a)(1), a creditor may no longer need to show this element; however, no court has yet overturned this decision.

Brown, 165 S.W.3d 715, 722-23 (Tex. App.—Dallas 2004, no pet.) (“if a judgment debtor claims that an asset is exempt, it is the debtor’s burden to prove the exemption”); *Burns*, 948 S.W.2d at 324; see also *Leibman v. Grand*, 981 S.W.2d 426, 433 (Tex. App.—El Paso 1998, no pet.) (stating that a party asserting an exemption generally bears the burden of proving the exemption). One recent case, however, attempts a compromise between the courts of appeals on this issue. See *In re C.H.C.*, 290 S.W.3d 929 (Tex. App.—Dallas 2009, no pet. h.). *In re C.H.C.* cites *Buller* and *Pillitteri* for the proposition that the judgment creditor “bears the burden of tracing the assets to the judgment debtor”, and *Burns* for the proposition that the judgment debtor must show the property is exempt from execution. See *id.* at 930. Moreover, the court in *Goodman v. Compass Bank* cites to *Pillitteri* for the proposition that “[o]nce a judgment creditor traces the assets to the judgment debtor, a presumption arises that those assets are in the debtor’s possession and the burden then shifts to the debtor to account for those assets.” No. 05-15-00812-CV, 2016 Tex. App. LEXIS 8338, at *15 (Tex. App.—Dallas Aug. 3, 2016, no pet.).

2. Proof by Judgment Debtor. The debtor should plead and offer evidence to support any affirmative defense, such as payment of judgment debt, release, discharge in bankruptcy, or dormancy. See *Matrix, Inc. v. Provident Am. Ins. Co.*, 658 S.W.2d 665, 667 (Tex. App.—Dallas 1983, no writ) (interpreting article 3827a). One court has held that it is improper for a judgment debtor to assert a right to set off the underlying judgment debt by an amount allegedly owed the debtor by the judgment creditor, because this would “allow the judgment debtor to choose the manner in which it will satisfy the judgment.” *Schliemann v. Garcia*, 685 S.W.2d 690, 692-93 (Tex. App.—San Antonio 1984, no writ) (interpreting article 3827a). Once a creditor shows that a debtor owns or controls property, the debtor has the burden of accounting for or otherwise showing the unavailability of the property. *Fitzgerald v. Cadle Co.*, No. 12-16-00338-CV, 2017 Tex. App. LEXIS 9734, at *3 (Tex. App.—Tyler Oct. 18, 2017, no pet.); see also *Pillitteri*, 165 S.W.3d at 722-23.

E. Property Subject to Turnover Order.

1. Property Subject to Turnover Order.

TCPRC 31.002 allows turnover only for property that is owned by the judgment debtor and not exempt from attachment, execution, or seizure for the satisfaction of liabilities. See e.g., *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306 (Tex. App.—Dallas 1992, no writ). The trial court has jurisdiction to determine if property of the judgment debtor is exempt. See *Leibman*, 981 S.W.2d at 433. Under section 31.002(f), however, personal property exemptions do not prevent turnover of property for satisfaction of a child support obligation. TEX. CIV. PRAC. & TEM. CODE § 31.002(f) (LEXIS through 2019 Sess. (excluding S.B. 2364)).

A court’s turnover order need not “identify[] in the order the specific property subject to turnover;” however, the order must be directed at definite nonexempt property. *Id.* § 31.002(h); see *In Re Montgomery*, 138 S.W.3d 569, 573 (Tex. App.—Beaumont 2004, no pet.).⁵ In *Montgomery*, the trial court had entered a turnover order commanding a relator to deliver all cash in the debtor’s control to a constable at a certain date and time. *Id.* at 572. The order was issued

⁵ While no court opinions have expressly treated this case negatively, *Montgomery*’s holding may be superseded by the statute’s 2005 amendment that added subsection (h), which states that a turnover order does not have to identify specific property. Since 2005, state courts no longer use the “definite, clear, and concise” language provided in *Burns* and *Finotti*; however, some federal courts continue to use or rely on this language. *Holt v. Sakowitz*, No. 01-05-01194-CV, 2007 Tex. App. LEXIS 3403, at *1 (Tex. App.—Houston [1st Dist.] Apr. 27, 2007), *opinion withdrawn by, Rehearing dismissed by* 2007 Tex. App. LEXIS 4048 (Tex. App.—Houston [1st Dist.] May 23, 2007) (Only recent Texas case using such language); *Shanze Enters. v. Amigo MGA, LLC*, No. 3:13-cv-4311-D, 2014 U.S. Dist. LEXIS 154290, at *5 (N.D. Tex. 2014); see also *Nieman v. Hale*, No. 3:14-mc-38-B-BN, 2015 U.S. Dist. LEXIS 136981, at *7 (N.D. Tex. 2015).

ex parte and did not clearly identify a specific cash sum to be turned over. *Id.* The Beaumont Court of Appeals reversed this order, stating that without reference to a specific sum, the relator would not have a reasonable opportunity to meet any subsequent contempt charges by way of a defense or explanation. *Id.* at 573. This turnover order was not sufficiently specific to support contempt for failure to comply, and thus was ineffective and overturned. *Id.* at 574; *see also, Bergman*, 828 S.W.2d at 557. When identifying property subject to turnover, “the trial court’s order must be definite, clear, and concise, leaving the debtor no doubt about his duty and not calling for interpretation, inferences, or conclusions.” *Burns*, 948 S.W.2d at 324; *see also, Finotti v. Old Harbor Co.*, No. 05-97-01365, 1999 WL 1034607, at *1 (Tex. App.—Dallas Nov. 16, 1999, no pet.) (a turnover “order must be definite, clear, and concise in its description of the property to be turned over eliminating the need for any interpretations, inferences or conclusions” on the part of the judgment debtor). The trial judge lacks discretion to simply order a judgment debtor to pay a set sum of money without at least “identifying what specific nonexempt property or rights thereto that he possessed or controlled which would enable him to comply with the order.” *Ex parte Prado*, 911 S.W.2d 849, 850 (Tex. App.—Austin 1995, no writ).

Property that may be affected by turnover relief includes property outside the State of Texas and the United States, secreted property, and intangible property rights (e.g., interests in limited partnerships, future rights in property, causes of action, and domain names). *See Barrera v. State*, 130 S.W.3d 253 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (finding that three pieces of real property and a certificate of deposit were within the scope of the turnover statute); *Lozano v. Lozano*, 975 S.W.2d 63, 68 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (affirming that trial judge had authority to order the turnover of property outside of the state); *Reeves v. Federal Say. & Loan Ins. Core.*, 732 S.W.2d 380, 382 (Tex. App.—Dallas 1987, no writ) (same); *Renger Memorial Hosp. v. State*, 674 S.W.2d 828, 830 (Tex. App.—Austin 1984, no writ) (stating that future rights in property are subject to turnover relief); *Restrepo v. All. Riggers & Constructors, Ltd.*, 538 S.W.3d 755, 759 (Tex. App.—El Paso 2017, no pet.) (holding that a domain name is not exempt personal property); *see also* Reagan Wm. Simpson, *A Practitioner’s Review of Civil Appeals Under the 1997 Texas Rules of Appellate Procedure*, 29 ST. MARY’S L.J. 595, 684 (1998).

Negotiable instruments or other documents evidencing property rights, including corporate share certificates, have been viewed as being within the scope of section 31.002. *See Trinity Fin. Servs., Inc. v. Crockett*, No. 05-97-02061-CV, 2000 WL 140505, at *1 (Tex. App.—Dallas Feb. 8, 2000, no pet.) (finding that stock in a corporation was within the scope of the turnover statute); *see also, World Fuel Servs. Corp v. Moorehead*, 229 F. Supp. 2d 584, 587 (N.D. Tex. 2002) (holding that although the turnover statute does not authorize a court to issue orders against third party non-judgment debtors who are not under the debtor’s control, the mere fact that assets have been pledged to third parties does not necessarily mean that they are not owned by or subject to the control of the debtor. Where corporate stock has merely been pledged to a third party, the debtor still controls his rights and interest to this stock.); *see also, Arndt v. Nat’l Supply Co.*, 650 S.W.2d 547, 549 (Tex. App.—Houston [14th Dist.] 1983, writ ref’d n.r.e.) (the same as to corporate shares); *Matrix. Inc.*, 658 S.W.2d at 668 (the same as to promissory notes). An independent contractor’s bank accounts and accounts receivable, such as an attorney’s fee income, can also be subject to turnover through the appointment of a receiver. *See Hennigan v. Hennigan*, 677 S.W.2d 495, 496 (Tex. 1984) (interpreting article 3827a); *see also, 3D Tower Ltd.*, 824 S.W.2d at 272-73; *Arndt*, 650 S.W.2d at 549. Other types of property that are properly the subject of turnover relief include rental income and interest income. *See Copher v. First State Bank of Pittsburgh, Texas*, 852 S.W.2d 738, 739 (Tex. App.—Fort Worth 1993, no writ); *Schultz v. Cadle Co.*, 825 S.W.2d 151, 154 (Tex. App.—Dallas 1992, writ denied); *First City Nat’l Bank of Beaumont v. Phelan*, 718 S.W.2d 402, 403 (Tex. App.—Beaumont 1986, writ ref’d n.r.e.) (interpreting article 3827a).

A cash sum that is in a judgment debtor's possession or control is also the proper subject of a turnover order. See *Buller*, 806 S.W.2d at 227; *Buttles v. Navarro*, 766 S.W.2d 893, 894 (Tex. App.—San Antonio 1989, no writ) (wages received and deposited are no longer exempt “current wages”). It is almost always impossible, however, for a judgment creditor to specifically identify a particular cash sum due to its fungible nature; accordingly, the burden of proof shifts to the judgment debtor to account for the cash once the creditor traces a specific sum to the debtor—a debtor’s simple assertion that “I spent it” is unacceptable. See *id.* at 226-27. The portion of the cash that the judgment debtor can prove was spent must be deducted from the total. See *id.* at 227.

2. Certain Property Not Subject to Turnover Order.

An individual debtor’s ownership of partnership interest and limited liability company interest as a member do not appear subject to turnover orders under TCPRC 31.002. Pursuant to Texas Business Organizations Code (“BOC”) Section 101.112, a judgment debtor’s membership interest may not be foreclosed on under the BOC or any other law. The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor’s membership interest. TEX. BUS. ORGS. CODE § 101.112(d) (LEXIS through 2019 Sess.). The creditor of a member or of any other owner of a membership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company. *Id.* The 2007 amendments to the BOC, with respect to charging orders, amended remedies available to make it even more restrictive and to narrow the rights of a judgment creditor. *Id.* § 101.112; 2007 Tex. Sess. Law Serv. Ch. 688, § 98 (H.B. 1737) (West); 1991 Tex. Sess. Law Serv. Ch. 901, § 46 (West) (expired January 1, 2010).

The Legislature further limited a judgment creditor’s right to obtain a limited partner’s partnership interest to the exclusive remedy of a charging order, thus removing limited partnership interest from the effect of the turnover statute. *Id.* § 153.256; see also *Stanley v. Reef Sec., Inc.*, 314 S.W.3d 659, 663 (Tex. App.—Dallas 2010, no pet.); *Dispensa v. Univ. State Bank*, 951 S.W.2d 797, 800 (Tex. App.—Texarkana 1997, pet. denied) (a charging order is the sole means by which a judgment creditor can reach an individual debtor’s partnership interest). However, proceeds from a judgment debtor’s partnership or corporate membership distribution may be subject to the turnover statute. See *Henderson v. Chrisman*, 05-14-01507-CV, 2016 WL 1702221, at *2 (Tex. App.—Dallas Apr. 27, 2016, no pet.).

Cash that qualifies as “current wages” as opposed to “income” is exempt from operation of the turnover statute. *Schultz*, 825 S.W.2d at 153. In *Schultz*, the court found that a judgment debtor received “income” when his professional association deposited his paycheck in a bank account owned by a limited partnership because such was a transfer of his right to receive wages. *Id.* at 153-54. A creditor can avoid this problem by describing the source of the cash as income from an enterprise or property, proceeds from a specific contract or account, or similar designations of the source. See e.g., *id.* at 153-54; *Devore v. Cent. Bank & Trust*, 908 S.W.2d 605, 609 (Tex. App.—Fort Worth 1995, no writ) (viewing payment to an independent contractor as income in the absence of an employment arrangement).

TCPRC sections 31.0025 (a) and (b) prohibit courts from ordering judgment debtors to turnover their wages before they are paid, but subsection (c) permits wage turnover if the debt is a child support obligation. TEX. CIV. PRAC. & REM. CODE § 31.0025 (LEXIS through 2019 Sess.) As to “proceeds” of exempt property, section 31.002(f) provides that, except for collection of child support, a court cannot order a turnover of the “proceeds” of property exempt under any statute, including section 42.0021 of the Property Code. *Id.* “Proceeds” include the cash one receives from cashing a paycheck and what one receives from negotiating an instrument. See Hearings

on Tex. H.B. 1029 before the Senate Committee On Jurisprudence, 71st Leg., R.S. (May 2, 1989) (statement of Rep. A. Overstreet, drafter of bill). Appellate courts have reversed orders that required a wage earner to turn over the proceeds of paychecks, retirement checks, and other exempt assets. See *Caulley v. Caulley*, 806 S.W.2d 795, 798 (Tex. 1991) (a paycheck); *Bergman*, 888 S.W.2d at 586 (a retirement check); *Burns*, 948 S.W.2d at 322 (proceeds from exempt spendthrift trust). Thus, even when property is no longer exempt under any other statute, if it represents proceeds or disbursements of exempt property, it is not subject to a turnover order. See *Burns*, 948 S.W.2d at 323; but see *Henderson*, 2016 Tex. App. LEXIS 4402, at *2 (concluding that a judgment creditor can "seek[] the turnover of proceeds from a [LLC] membership [or partnership] distribution if and when such a distribution is made and in the judgment debtor's possession").

A cause of action is also a property right that is subject to the turnover statute. *Charles v. Tamez*, 878 S.W.2d 201, 205 (Tex. App.—Corpus Christi 1994, writ denied). Causes of action held by judgment debtors ordinarily can be turned over to a receiver to sell or prosecute with the proceeds to be applied to the judgment debt. However, public policy can block the application of section 31.002 to some actions, such as:

* **Actions against the judgment creditor.** Based on the Texas Constitution's "open courts" policy, a judgment debtor's cause of action against a judgment creditor cannot be "turned over" when the effect would be to eliminate that cause of action. See *Criswell*, 843 S.W.2d at 305-07.

* **Actions against the judgment creditor's attorney for malpractice.** A judgment debtor cannot be ordered to "turnover" unasserted, denied causes of action for legal malpractice for failure to settle under the Stowers doctrine. See *Tamez*, 878 S.W.2d at 208. Other courts have invalidated even voluntary assignments of asserted malpractice claims. See *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 389-90 n.3 (Tex. App.—Houston [14th Dist.] 1997, writ dismissed by agreement); *Zuniga V. Groce, Locke & Hebdon*, 878 S.W.2d 313, 317-18 (Tex. App.—San Antonio 1994, writ refused).

* **Unasserted or denied claim against judgment debtor's liability carrier.** The court in *Tamez* also invalidated the turnover of an unasserted, denied cause of action against an insurer for failure to settle a lawsuit. 878 S.W.2d at 208. The Corpus Christi Court of Appeals explicitly did not address whether an asserted or ignored cause of action against an insurer for unreasonable failure to settle may be "turned over." *Id.* at 208-09. In *Republic Ins. Co. v. Millard*, the turnover order of a judgment debtor's asserted claim against an insurer for failure to defend was upheld. See 825 S.W.2d 780, 785 (Tex. App.—Houston [14th Dist.] 1992, no writ).

F. Judicial Aid. When granting turnover relief to a judgment creditor, the court may, by injunction or other means, employ any or all of the following methods:

* Order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control, together with all documents or records related to the property, to a designated sheriff or constable for execution. [A trial court has the power to compel a judgment debtor to execute documents if those documents will help collect a judgment debt. See *Burns*, 948 S.W.2d at 328;]

* Otherwise apply the property to the satisfaction of the judgment. [A turnover order cannot be used to determine a party's substantive rights or property rights of third parties. See *Lozano*, 975 S.W.2d at 68;]

* Appoint a receiver 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. [A turnover order may not order the turnover of property directly to a judgment creditor. *Lozano*, 975 S.W.2d at 69.] [The appointment of a receiver lies within the discretion of the trial court. *Huffmeyer v. Mann*, 49 S.W.3d 554, 559 (Tex. App.—Corpus Christi 2001, no pet.). Whether a bond is necessary for the appointment of a post judgment receiver is also discretionary with the trial court. *In re Estate of Herring*, 983 S.W.2d 61, 64 (Tex. App.—Corpus Christi 1998, no pet.).] [Under newly added subsection (g), however, a receiver's rights as to property held by a financial institution in the name of or on behalf of the judgment debtor as customer of the financial institution do not attach until the financial institution receives service of a certified copy of the order of receivership in the manner specified by section 59.008 of the Finance Code. See TEX. CIV. PRAC. & REM. CODE § 31.002(g) (LEXIS through 2019 Sess.).]

G. Attorney's Fees and Costs. Under TCPRC 31.002(e), a judgment creditor that prevails in a turnover proceeding is entitled to recover reasonable costs, including attorney's fees. If a creditor does not prevail, no attorney's fees need be awarded. See *Roosth*, 889 S.W.2d at 458; *Dallas Power & Light Co. v. Loomis*, 672 S.W.2d 309, 312 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). Some courts have held that attorney's fees are governed by TCPRC sections 38.001 through 38.006. See e.g., *Carlyle Real Estate Ltd. Partnership-X v. Leibman*, 782 S.W.2d 230, 233 (Tex. App.—Houston [1st Dist.] 1989, no writ). Under section 38.003, there is a rebuttable presumption that the usual and customary attorney's fees are reasonable. *Id.* In *Cortland Line Co., Inc. v. Israel*, the Fourteenth District Houston Court of Appeals held that attorney's fees are mandatory under chapter 38 if there is proof of the reasonableness of the fees. See 874 S.W.2d 178, 184 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (stating that the court has discretion in fixing the amount of the fees, but no discretion in denying them if they are proper under the statute).

Section 38.004 allows a court to take judicial notice of the usual and customary attorney's fees and of the contents of the case file without receiving further evidence. See *id.* In determining how much to award, the trial court can consider such factors as the nature and complexity of the case, the amount in controversy, the amount of time and effort required, and the expertise of counsel. See *Thomas v. Thomas*, 917 S.W.2d 425, 437 (Tex. App.—Waco 1996, no writ). The amount a party recovers is also another factor to consider in awarding attorney's fees. See *Burns*, 948 S.W.2d at 327. Like the turnover order itself, the trial court's decision to award attorney's fees is reviewed under an abuse of discretion standard. *Id.* at 436.

H. Enforcement of Turnover Order. Under TCPRC 31.002(c), a turnover order may be enforced by contempt proceedings. A court's contempt powers are generally addressed by Texas Government Code section 21.002. *Loya v. Alvarez*, No. 92-9532, 1994 WL 118318, at *2 (Tex. D. Jan. 26, 1994); see also *Kidd v. Lance*, 794 S.W.2d 586, 588 (Tex. App.—Austin 1990, orig. proceeding). Under that provision, a court may fine a person in contempt up to \$500, imprison him for up to six months, or both. See *Alvarez*, 1994 WL 118318, at *2. The trial court can dispose of a contempt motion even if an appeal of the turnover order has been perfected but has not been superseded or stayed. *In Re Sheshtawy*, 154 S.W.3d 114, 122-23 (Tex. 2004), *superseded by statute as stated in In re Phillips*, 296 S.W.3d 682 (Tex. App.—El Paso 2009, orig. proceeding) (when a final judgment has not been superseded or stayed pending an appeal, either the trial court or the court of appeals may entertain a motion for contempt; however, if the motion is filed in the court of appeals, it should be referred to the trial court for hearing and fact finding).

The use of coercive contempt orders, such as incarceration, to enforce turnover orders has created opposition due to the Texas Constitution's provision that no person can be imprisoned "for debt." See TEX. CONST. art. 1, § 18. In *Ex parte Roan*, for example, a contempt order against a judgment debtor who refused to pay attorney's fees awarded to the judgment creditor in the

turnover order was voided based on the prohibition on contempt as a debt collection device. See 887 S.W.2d 462, 463-65 (Tex. App.—Dallas 1994, orig. proceeding); *but see In re Wiese*, 1 S.W.3d 246, 251 (Tex. App.—Corpus Christi 1999, orig. proceeding) (holding that contempt order was not unconstitutional because relator was not being imprisoned for "debt," but rather as punishment for failing to obey the court's turnover order). Contempt for failure to turn over cash to pay the judgment debt has also been held constitutionally prohibited. See *Ex parte Prado*, 911 S.W.2d 849, 850 (Tex. App.—Austin 1995, no writ). In *Ex parte Buller*, on the other hand, the court held that the imprisonment of a debtor is not unconstitutional if that debtor is able to pay. See 834 S.W.2d 622, 627 (Tex. App.—Beaumont 1992, orig. proceeding); see also *Santibanez v. Wier McMahon & Co.*, 105 F.3d 234, 241-42 (5th Cir. 1997).

The laws of Texas generally do not allow the collection of attorney's fees through contempt proceedings. See *In re Wiese*, 1 S.W.3d at 251; *Ex parte Roan*, 887 S.W.2d at 464 (both relying on the general assertion in *Wallace v. Briggs*, 348 S.W.2d 523, 525-26 (Tex. 1961)). However, enforcing a judgment for past due child support through contempt proceedings, including attorney's fees incurred, is allowable because neither the amount of child support nor the accompanying attorney's fees are considered "debts" for which collection by contempt is prohibited by the Texas Constitution. See *In re Estrello*, 130 S.W.3d 391 (Tex. App.—Beaumont 2004, orig. proceeding) (the taxing of attorney's fees in a child support action falls outside the constitutional prohibition of imprisonment for debt); see also *In re Moers*, 104 S.W.3d 609 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (attorney's fees are permissibly taxed as child support when incurred in a support enforcement proceeding, and are not considered debt and may be enforced through a contempt proceeding); *Ex parte Wessell*, 807 S.W.2d 17, 20 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding).

I. Appellate Review. When a turnover order resolves property rights and acts as a mandatory injunction, it is a final and appealable judgment. See e.g., *Schultz v. Fifth Judicial District Court of Appeals*, 810 S.W.2d 738, 740 (Tex. 1991), *abrogated on other grounds by In re Sheshtawy*, 154 S.W.3d 114, 123-25 (Tex. 2004). Parts of a turnover order "can be injunctive in nature and, thus, final and appealable, while other provisions of the same order can be interlocutory and unreviewable because they do not resemble injunctive relief." *Alexander Dubose Jefferson & Townsend LLP*, 540 S.W.3d at 587. In *Alexander*, the Texas Supreme Court held that a turnover order that directed a portion of contested funds to be deposited into the court's registry did not function as a mandatory injunction because it did not determine ownership rights as to the funds. *Id.* Therefore, the Court concluded that a turnover order "is not a final, appealable judgment when it merely orders funds subject to an as-yet-unadjudicated ownership dispute into the court's registry." *Id.* at 578. Alternatively, a final order granting turnover relief can be suspended pending an appeal by the use of a supersedeas bond. See *Schultz*, 810 S.W.2d at 739 n.3.

A turnover order is reviewed under an abuse of discretion standard. See *Buller*, 806 S.W.2d at 226; *Oxbow Calcining LLC v. Port Arthur Steam Energy, L.P.*, Nos. 09-18-00359-CV, 09-18-00392-CV, 2018 Tex. App. LEXIS 10271, at *29 (Tex. App.—Beaumont Dec. 13, 2018, no pet.). Under this standard, a court ponders two questions: (1) Did the trial court have sufficient information upon which to exercise its discretion; and (2) did the trial court err in its application of discretion? See *In Re J.M.L.*, 243 S.W.3d 727, 729 (Tex. App.—El Paso 2007, no pet.); see also *Lindsey v. Lindsey*, 965 S.W.2d 589, 591 (Tex. App.—El Paso 1998, no pet.). Answering the first question requires consideration of the sufficiency of the evidence. *Leibman*, 981 S.W.2d at 429. The second question requires determining whether the trial court made a reasonable decision. See *id.* at 430. A trial court abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Roosth v. Daggett*, 869 S.W.2d 634, 637 (Tex. App.—Houston [14th Dist.] 1994, no writ) (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985)), *abrogated on other grounds by Tucker v. Thomas*, 405 S.W.3d 694, 711 (Tex. 2011).

When review by appeal is inadequate, an appellate court may hear a petition for writ of mandamus and thereby review the actions of a trial court on a turnover request. See *Enis v. Smith*, 883 S.W.2d 662, 663 (Tex. 1994). A turnover order also may be challenged through a writ of habeas corpus. See *Prado*, 911 S.W.2d 849. If a judgment debtor refuses to obey a turnover order, the trial court may find the debtor in contempt and confine the debtor. The debtor can petition an appellate court for a writ of habeas corpus. See *Ex parte Swate*, 922 S.W.2d 122, 124 (Tex. 1996). The debtor must show that the turnover order is void as exceeding the trial court's power or as depriving the debtor of due process of law. See *Ex parte Chambers*, 898 S.W.2d 257, 259-60 (Tex. 1995). An appellate court will always issue a writ of habeas if the commitment or contempt order is void because it was never within the court's power to issue it. See *In re Sheshtawy*, 154 S.W.3d at 117.

V. FORMS. To assist the judgment creditor's attorney, forms for the turnover motion and order are attached. These forms come from the November 1998 and 1999 edition of the Texas Litigation Guide and November 2018 edition of Texas Practice Guide: Creditors Rights. Variation in format will occur depending on the nature and the circumstances of the turnover remedy.

MOTION FOR TURNOVER ORDER

TO THE HONORABLE COURT:

_____ [Name of judgment creditor], referred to in this motion as Movant, applies for an order to aid the satisfaction of a judgment rendered by the Court in favor of Movant and against _____ [name of judgment debtor], referred to as Defendant, and as grounds for the order shows:

I.

Movant, as the _____ [party status in underlying lawsuit, e.g., plaintiff] in the above styled and numbered cause, was awarded judgment of this Court on _____ [date] against _____ [name of judgment debtor] for _____ [damages or child support] of \$ _____ [amount of judgment], together with interest on that amount at the rate of _____ percent per annum from the date of judgment until paid, and costs of court. The judgment is now final, fully enforceable, and due to Movant _____ [in full or in the sum of \$ _____ (unpaid balance)] plus interest accruing from and after the date of this motion.

II.

Defendant owns or controls one or more properties not exempt from attachment, execution, or other seizure for the satisfaction of liabilities. These properties, their value and location, are described as follows:

1. _____ [Describe item of property, source of income, or future right to receive property on which turnover relief is sought together with value of item and description of any documents representing debtor's ownership, interest, or control].

2. [Continue property list].

III.

None of the properties owned or controlled by Defendant listed above can be readily attached or levied on by ordinary legal process. Movant will show that [state reason why each item of property cannot be reached by ordinary processes]. [If applicable, add: A writ of execution issued by the clerk of this Court was returned nulla bona by the Sheriff of _____ County and is on file among the papers in this cause.]⁶

IV.

Movant requests that the Court order Defendant to turn over the property listed above, together with all documents and records related to the property, to the County Sheriff for sale as under writ of execution and application of the proceeds to the satisfaction of Movant's judgment. Alternatively or in addition, Movant asks the court to appoint a disinterested, qualified third person as receiver of the property and order Defendant to turn over the property and the rights to receive such property, as well as documents and records relating to the property, to the receiver. The Court should authorize and empower the receiver to seize or otherwise take possession and control of all of Defendant's right, title, and interest in the property and to _____

⁶ Courts have not yet ruled on whether this language is still necessary given the elimination of subsection (a)(1) from TCPRC 31.002.

[describe what receiver must do to apply property to satisfaction of judgment, including selling specified items, voting corporate shares, managing a business, disbursing proceeds of income producing properties, and so forth].

V.

As a result of Defendant's failure and refusal to pay the judgment rendered in this cause, Movant has been required to retain the undersigned legal counsel to institute and prosecute this motion. Movant will pay and incur liability to pay the fees for those services. Movant is, therefore, entitled to recover from Defendant the sum of \$_____ as a reasonable fee for the attorney's services rendered and to be rendered in this Court. In the event of an appeal or other proceeding in the court of appeals, Movant would be further entitled to \$_____ as a reasonable attorney's fee; in the event of an appeal or other proceeding in the Texas Supreme Court, Movant would be entitled to an additional \$_____.

VI.

[If applicable, continue with allegations justifying ex parte relief, such as restraining Order to preserve status quo of targeted property.]

[Continue]

WHEREFORE, Movant requests that the Court:

1. *[Describe any ex parte relief requested].*
2. After notice and hearing, grant this motion, and:

[Describe orders requested, such as:]

- a. Appoint a qualified person as receiver for the property described in this motion.
 - b. Order Defendant to turn over and deliver to the receiver, without delay, all property listed in this motion and all documents relating to or evidencing Defendant's interest in that property.
 - c. Direct and empower the receiver to possess, control, and deal with the property as set out in this motion or otherwise so as to apply the property toward satisfaction of Movant's judgment.
3. Render judgment against Defendant in favor of Movant for attorney's fees as requested, together with interest as allowed by law, costs of suit, and such other and further relief as to which Movant may be entitled.

Respectfully submitted,

[Signature.]

[Add verification if seeking ex parte restraining order]

ORDER SETTING HEARING DATE

IT IS ORDERED that the hearing on the foregoing Motion for Turnover Order is set for _____ [date], at _____, [time], in the courtroom of the _____ [name of court], in _____ [city], Texas.

SIGNED on _____ [date].

JUDGE PRESIDING

CERTIFICATE OF SERVICE

I certify that a true copy of the above Motion for Turnover and Order Setting Hearing Date has this day been _____ [delivered in person or delivered in person by my agent or delivered by courier with receipted delivery or sent by certified mail or sent by telephonic document transfer before 5:00 p.m. of the recipient's local time] to _____ [name, address, and designation, including telecopier number if sent by telecopier, e.g., _____ (name), attorney of record for _____ (name of judgment debtor), at _____ (address)].

SIGNED on _____ [date].

[signature]

Attorney for _____

[name]

ORDER FOR TURNOVER

On _____ [date of hearing], the Court heard the [motion or petition] for judicial assistance filed by [name of judgment creditor], the _____ [party designation in original lawsuit, e.g., plaintiff] in the cause referenced above. The plaintiff appeared in person and by counsel [Name of judgment debtor], the [party designation in original lawsuit, e.g., defendant] in such cause, _____ [appeared in person and by counsel or failed to appear although duly notified of the time and nature of this hearing or as the case may be]. The Court, having considered the evidence, is of the opinion that relief should be granted and the following orders made to assist the applicant in obtaining satisfaction of the judgment rendered by this Court on _____ [date of judgment].

IT IS, THEREFORE, ORDERED that _____ [name of judgment debtor]:

[Describe actions required, as in the examples that follow]

1. Deliver to the Sheriff of _____ County, Texas, that certain _____ [describe item of property or document evidencing its ownership] on or before _____ [date of performance] for execution as ordered herein.

2. Turn over the following described property to the below-named Receiver by delivering each item to the Receiver at _____ [street, city, county address], Texas, on or before _____ [date for performance]:

a. _____ [List items of property or documents evidencing ownership or control of property, such as certificates of title, corporate share certificates, insurance policies, or promissory notes].

b. _____ [Continue as necessary to describe items to be turned over, such as all income or payments received from a specified source].

c. _____ [Include among items to be delivered any relevant books and records or other documents that will enable the receiver to carry out duties imposed by the order].

3. _____ [Include any injunctive order, particularly orders that the judgment debtor refrain from interfering with or hindering the receiver in the performance of the receiver's duties, disbursing any funds from sources ordered turned over to the receiver, or encumbering any assets made the subject of the order].

[Continue by including orders authorizing and empowering intermediaries to sell or otherwise deal with debtor's property to satisfy judgment, as in the examples that follow].

[Sheriff to seize and sell property].

IT IS FURTHER ORDERED that the Sheriff of _____ County, Texas, take possession of the property ordered to be delivered to the him/her, levy on such property as under writ of execution, and, after giving notice of sale, sell the property at public auction to the highest bidder for cash, applying the proceeds of the sale to payment of the expenses of sale and court costs, with the balance paid over to _____ [name of judgment creditor] for crediting on the judgment of this court dated _____ [date of judgment]. In so doing, the Sheriff shall perform all duties and procedures as required by the Texas Rules of Civil Procedure for sale under writ of execution.

[Receiver to deal with property or right to property]

IT IS FURTHER ORDERED that _____ [name of receiver] is appointed Receiver for the items owned or controlled by _____ [name of judgment debtor] that are to be delivered to Receiver pursuant to this Order. As to those items, Receiver is ordered, authorized and empowered to:

[Itemize receiver's powers and duties, as in the following examples]

1. Take possession and control of each item of such property to the exclusion of all others.

2. Exercise all powers and rights exercisable by _____ [name of judgment debtor] in reference to _____ [identity and description of controlled entity to be taken over by receiver], including but not limited to the power to _____ [list special powers, such as to act as sole signatory on bank accounts, to vote shares of stock, to pay expenses, and so on].

3. Obtain an offer to purchase any item of such property and apply to this Court, with notice to the parties in this cause, for authority to accept the offer, conclude a sale, and distribute the proceeds.

4. Make monthly accounts and reports to this Court, with copies to the parties in this cause, listing the actions taken pursuant to this Order, including all receipts and disbursements as authorized by this Order, and showing any funds on hand.

5. Make on or more requests to pay from funds on hand the fee and expenses of Receiver, in amounts to be set by the Court, and distribute the balance to one or both parties to this cause as the Court may deem equitable.

[Continue after listing all necessary powers and duties of intermediaries]

IT IS FURTHER ORDERED that _____ [name of judgment creditor] recover from _____ [name of judgment debtor] attorney's fees in the sum of \$_____ for services rendered in this proceeding through the time of this Order. In the event of an appeal or other proceeding in the court of appeals, Movant would be further entitled to \$_____ as a reasonable attorney's fee; in the event of an appeal or other proceeding in the Texas Supreme Court, Movant would be entitled to an additional \$_____. The sum so awarded may be collected along with the sums due under the judgment described in this Order and by the methods set forth above, and by any other process or remedy available.

All relief not expressly granted by this Order is denied.

SIGNED on _____ [date].

JUDGE PRESIDING

Turnover Order (Simple)

No. _____ *[number]*

_____ *[name of plaintiff],*

Plaintiff

In the _____ *[court]* Court of

v.

_____ *[number]* County, Texas

_____ *[name of defendant]*

_____ *[judicial district]*

Defendant

On _____ *[date]*, in the above numbered and entitled cause wherein _____ *[name of plaintiff]* is Judgment Plaintiff and _____ *[name of defendant]* is Judgment Defendant, came on to be heard the Plaintiffs' Motion for Turnover Order under *Tex. Civ. Prac. & Rem. Code Ann. § 31.002*, when came the parties, by and through their attorneys of record, and announced ready for hearing.

The Court, having read the pleadings and having heard the evidence and argument of counsel, was of the opinion that the Plaintiffs' motion should be granted.

It is, therefore, ORDERED by the Court that the Defendant, _____ *[name of defendant]*, shall, on or before seven days from the date this order is signed, turn over to _____ *[name of constable]*, _____ *[county]* County Constable, Precinct _____ *[number]*, at his office _____ *[address]*, _____ *[county]* County, Texas, the _____ *[original stock certificates for all of the shares of stock of (name of corporation), a (type) corporation]*, so that the same may be sold under execution.

Signed the _____ *[date]*.

JUDGE PRESIDING

Plaintiffs' Application for Turnover Order

No. _____ *[number]*

_____ *[name of plaintiff],*

Plaintiff

In the _____ *[court]* Court of

v.

_____ *[number]* County, Texas

_____ *[name of defendant]*

_____ *[judicial district]*

Defendant

To the Honorable Judge of Said Court:

COMES NOW *[name of plaintiff]*, Plaintiff in the above number and entitled cause wherein *[name of defendant]* is Defendant, and files this Plaintiffs' Motion for Turnover Order under *Tex. Civ. Prac. & Rem. Code Ann. § 31.002*, and as grounds therefor, would respectfully show the Court as follows:

On *[date]*, the Court in this cause awarded a judgment in favor of Plaintiff, against the Defendant, *[name of defendant]*, in the sum of \$*[dollar amount]*, plus interest and costs. The judgment is valid, final, and remains entirely unsatisfied. Execution has been returned nulla bona upon the judgment.

On *[date]*, Plaintiff took the oral deposition of the Judgment Defendant, *[name of defendant]*, and learned that the Judgment Defendant has assets which cannot be readily attached or levied upon by ordinary legal process and are not exempt from execution.

At the time of taking of said deposition, *[name of defendant]* testified that he owns all of the outstanding shares of stock of a *[type]* corporation by the name of *[name]*. He also testified that this corporation has a net worth of approximately \$*[dollar amount]*. True copies of excerpts from the deposition of *[name]* are attached hereto, incorporated herein for all purposes, and marked Exhibit 1.

Pursuant to *Tex. Civ. Prac. & Rem. Code Ann. § 31.002*, Plaintiff is entitled to aid from the Court to reach the shares of stock so they may be seized and sold under execution upon this judgment. The Court should order the Judgment Defendant, *[name of defendant]* to turn over the stock certificate for the shares of stock to *[name of constable]*, *[county]* County Constable, Precinct *[precinct]*, at his office on the *[number]* floor of *[address]*, *[county]* County, Texas so that the same may be seized and sold under execution to satisfy this judgment.

Plaintiff has employed *[firm name]* to file this application pursuant to *Tex. Civ. Prac. & Rem. Code Ann. § 31.002* and Plaintiff is entitled to recover a reasonable amount as attorney's fees. The sum of \$*[dollar amount]* would be a reasonable attorney's fee for the Plaintiff.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Judgment Defendant, *[name of defendant]*, be ordered to turn over to Constable *[name]*, Precinct *[number]*, *[county]* County, Texas, all of the certificates for shares of stock of *[name of corporation]*, a *[type]* corporation, so that the same may be sold under execution, and for such other and further relief as is just.

Respectfully submitted,

[Lawyer or law firm]

[Address]

[Telephone no.]

By:

[name]

Signature of [name of lawyer]

State Bar No.:

[number]

Attorney for

[name of party]

[status of your party]

State of Texas

County of *[county]*

Before me, the undersigned authority, on this day personally appeared *[name of affiant]*, who, after being duly sworn on his oath, says and deposes as follows:

"My name is *[name of affiant]*. I am the President of *[title of affiant]*. *[name of plaintiff]* was the plaintiff in case number *[number]* on the docket of this court. I am over twenty-one years of age, of sound mind, and in all respects qualified to make this affidavit. I have read the foregoing Application for Turnover Order and know the contents thereof. The facts stated therein are within my personal knowledge and the same are, in all respects, true and correct."

[name of affiant]

Subscribed and sworn to before me, the undersigned authority, on the *[date]*.

NOTARY PUBLIC in and for the State of Texas.

My commission expires:

[date]

Certificate of Service

I hereby certify that a true copy of this instrument was served upon the Judgment Defendant, by mailing same, properly addressed and postage prepaid to *[name and address of defendant]* by Certified Mail No. *[number]*, return receipt requested, on this the *[date]*.

[name of attorney]