PRE-TRIAL RECEIVERSHIPS

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State Bar of Texas
12TH ANNUAL
BUSINESS DISPUTES
September 10-11, 2020

CHAPTER 20

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David previously taught Appellate Advocacy at Texas Wesleyan University School of Law located in Fort Worth. David is licensed and has practiced in the U.S. Supreme Court; the Fifth, Seventh, and Eleventh Federal Circuits; the Federal District Courts for the Northern, Eastern, Southern and Western Districts of Texas; the Texas Supreme Court and various Texas intermediate appellate courts. Although David is based in Fort Worth (Tarrant County, Texas), he has a state-wide practice.

David has authored many legal articles and spoken at numerous legal education courses on both trial and appellate issues. His articles have been cited as authority by the Texas Supreme Court and the Texas Courts of Appeals located in El Paso, Waco, Texarkana, Beaumont, Tyler and Houston (Fourteenth District), and a federal district court in Pennsylvania. David's articles also have been cited by McDonald and Carlson in their Texas Civil Practice treatise, William v. Dorsaneo in the *Texas Litigation Guide*, and various authors in the *Baylor Law Review*, *St. Mary's Law Journal*, *South Texas Law Review* and *Tennessee Law Review*.

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I. INTRODUCTION

A plaintiff often needs to seek a remedy before trial to protect it from immediate injury, to protect the assets made the basis of the suit, or to discover the real condition of the parties' relationship or business. There are different types of relief that a plaintiff can seek. For example, a plaintiff may seek a writ of injunction to prohibit or require certain conduct where the plaintiff proves the elements for injunctive relief. However, an injunction may not be sufficient where there is an ongoing business or relationship that requires regular management. In that circumstance, a plaintiff may need an independent third party to step in and manage the business or relationship until there is a trial on the merits of the parties' claims and defenses. A receivership takes the business or relationship out of the hands of the parties, and for that reason, it is a drastic remedy that should be carefully scrutinized and only granted when adequately proven. The following paper discusses the pre-trial remedy that is potentially available to a plaintiff: a receivership.

II. OTHER PRE-TRIAL REMEDIES

Before a party should seek receivership relief, it should consider other alternate and similar remedies, such as attachment, sequestration, garnishment, injunctions, audits, and repossession.

A. Attachment

Attachment is an extraordinary remedy whereby a plaintiff can levy on a defendant's non-exempt property before judgment. Attachment is normally done in an ex parte procedure due to the plaintiff's need to prevent the defendant from disposing of or concealing assets during the pendency of litigation. *Midway National Bank v. West Texas Wholesale Co.*, 447 S.W.2d 709, 710 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.). There is no common law procedure for an attachment, and the right to such a remedy is found in the Texas Civil Practice and Remedies Code Section 61 and in the Texas Rules of Civil Procedure 592-609.

A party should consider whether it is entitled to an attachment. A writ of attachment is typically used to create a lien or to levy against non-exempt property of the debtor before a judgment is entered. Attachment is not a cause of action in and of itself, but a remedy incidental to an underlying lawsuit between a creditor and debtor and is used to prevent the debtor from disposing of or hiding assets during the pendency of litigation. *Midway Nat. Bank v. West Tex. Wholesale Co.*, 447 S.W.2d at 710. A writ of attachment may be used for both personal property and real property. Tex. Civ. Prop. & Rem. Code §61.042 & §61.043. Attachment, unlike sequestration, is used to establish a lien against the debtor's property other than property which serves as collateral for the debt. A writ of attachment is viewed essentially as an execution of a judgment before a judgment is entered, and therefore attachment is viewed as a harsh remedy and requires strict compliance with the rules and requirements. *S.R.S. World Wheels v. Enlow*, 946 S.W.2d 574, 575 (Tex. App.—Fort Worth 1997, orig. proceeding); *Carpenter v. Carpenter*, 476 S.W.2d 469, 470 (Tex. Civ. App.—Dallas 1972, no writ). As a result, the statutes and rules governing this remedy must be strictly followed. *S.R.S. World Wheels*, 946 S.W.2d at 575; *Carpenter*, 476 S.W.2d at 470.

A writ of attachment may be issued at the initiation of a suit or at any time during the progress of a suit, but may not be issued before a suit has been instituted. Tex. Civ. Prac. & Rem. Code Ann. § 61.003. A writ of attachment may be issued even though the plaintiff's debt or demand is not due. *Id*. at § 61.004.

"A writ of original attachment is available to a plaintiff in a suit if: (1) the defendant is justly indebted to the plaintiff; (2) the attachment is not sought for the purpose of injuring or harassing the defendant; (3) the plaintiff will probably lose his debt unless the writ of attachment is issued; and (4) specific grounds for the writ exist under Section 61.002." Tex. Civ. Prac. & Rem. Code Ann. § 61.001. Section 61.002 provides that attachment is available if:

> (1) the defendant is not a resident of this state or is a foreign corporation or is acting as such; (2) the defendant is about to move from this state permanently and has refused to pay or secure the debt due the plaintiff; (3) the defendant is in hiding so that ordinary process of law cannot be served on him; (4) the defendant has hidden or is about to hide his property for the purpose of defrauding his creditors; (5) the defendant is about to remove his property from this state without leaving an amount sufficient to pay his debts; (6) the defendant is about to remove all or part of his property from the county in which the suit is brought with the intent to defraud his creditors; (7) the defendant has disposed of or is about to dispose of all or part of his property with the intent to defraud his creditors; (8) the defendant is about to convert all or part of his property into money for the purpose of placing it beyond the reach of his creditors; or (9) the defendant owes the plaintiff for property obtained by the defendant under false pretenses.

Id. at § 61.002. *See also McQuade v. E.D. Sys.*, 570 S.W.2d 33, 35 (Tex. Civ. App. Dallas 1978, no writ).

A writ of attachment is generally not available for claims for unliquidated debts. *Sharman v. Schuble*, 846 S.W.2d 574, 576 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding). Attachment is not appropriate if the amount of the claim is so uncertain that a jury must determine the final amount of damages. *In re Argyll Equities, LLC*., 227 S.W.3d 268 (Tex. App.—San Antonio 2007, orig. proceeding); *S.R.S. World Wheels*, 946 S.W.2d at 575. However, a writ of attachment may issue for unliquidated damages if the underlying contract provides a rule for ascertaining such damages. *In re Argyll Equities, LLC*, 227 S.W.3d at 268.

The procedure for an attachment is as follows. To apply for a writ of attachment, a plaintiff or the plaintiff's agent or attorney must file with the court an affidavit that states: (1) general grounds for issuance under Sections 61.001(1), (2), and (3); (2) the amount of the demand; and (3) specific grounds for issuance under Section 61.002. Tex. Civ. Prac. & Rem. Code Ann. § 61.022(a). *See also Sharman v. Schuble*, 846 S.W.2d at 576. The affidavit shall be filed with the papers of the case. Tex. Civ. Prac. & Rem. Code Ann. § 61.002(b).

Before a writ of attachment may be issued, the plaintiff must execute a bond that: (1) has two or more good and sufficient sureties; (2) is payable to the defendant; (3) is in an amount fixed by the judge or justice issuing the writ; and (4) is conditioned on the plaintiff prosecuting his suit to effect and paying all damages and costs adjudged against him for wrongful attachment. *Id*. at § 61.023(a). *See also FDIC v. Texarkana Nat'l Bank*, 673 S.W.2d 262, 263 (Tex. App.—Texarkana 1984, no writ); *Carpenter v. Carpenter*, 476 S.W.2d 469, 470 (Tex. Civ. App.—Dallas 1972, no writ). The plaintiff shall deliver the bond to the officer issuing the writ for that officer's approval. Tex. Civ. Prac. & Rem. Code Ann. § 61.023. The bond shall be filed with the papers of the case. *Id.* at § 61.023(b).

There are important limits to attachment. A writ of attachment may be levied only on property that by law is subject to levy under a writ of execution. *Id*. at § 61.041. A person other than the defendant may claim attached personal property by making an affidavit and giving bond in the manner provided by law for trial of right of property. *Id*. at § 61.044.

The officer attaching personal property shall retain possession until final judgment unless the property is: (1) replevied; (2) sold as provided by law; or (3) claimed by a third party who posts bond and tries his right to the property. *Id*. at § 61.042. To attach real property, the officer levying the writ shall immediately file a copy of the writ and the applicable part of the return with the county clerk of each county in which the property is located. *Id*. at § 61.043 (a). If the writ of attachment is quashed or vacated, the court that issued the writ shall send a certified copy of the order to the county clerk of each county in which the property is located. *Id*. at § 61.043(b). Unless quashed or vacated, an executed writ of attachment creates a lien from the date of levy on the real property attached, on the personal property held by the attaching officer, and on the proceeds of any attached personal property that may have been sold. *Id*. at § 61.061.

If the plaintiff recovers in the suit, the attachment lien is foreclosed as in the case of other liens. The court shall direct proceeds from personal property previously sold to be applied to the satisfaction of the judgment and the sale of personal property remaining in the hands of the officer and of the real property levied on to satisfy the judgment. *Id*. at § 61.062(a). A judgment against a defendant who has replevied attached personal property shall be against the defendant and his sureties on the replevy bond for the amount of the judgment plus interest and costs or for an amount equal to the value of the replevied property plus interest, according to the terms of the replevy bond. *Id*. at § 61.063.

B. Sequestration

Sequestration is a statutory remedy which provides for the preservation of property when there are conflicting claims of ownership or liens pending in litigation, or a risk of the loss, waste or injury to such property. *McComic v. Scrinopskie*, 76 S.W.2d 539, 540 (Tex. Civ. App.—Texarkana 1934, no writ). Unlike attachment, the levy of writ of sequestration does not create a lien on the sequestered property. Therefore, sequestration is most often used by a creditor with a security interest or lien in the property which is the subject of the sequestration. *Radcliff Fin. Corp. v. Industrial State Bank*, 289 S.W.2d 645, 649 (Tex. Civ. App.—Beaumont 1959, no writ). There is no common law procedure for a sequestration, and the right to such a remedy is found in the Texas Civil Practice and Remedies Code Section 62 and in the Texas Rules of Civil Procedure 696-716.

A writ of sequestration can be used for both real and personal property. A writ of sequestration is rarely used for land or immoveable improvements, but it can be used in connection with minerals, timber, or rents. Texas Civil Practice and Remedies Code §62.001 provides that a writ of sequestration is available to the plaintiff in a suit if (1) the suit is for title or possession of personal property or fixtures or for foreclosure or enforcement of a mortgage, lien, or security interest on personal property or fixtures and a reasonable conclusion may be drawn that there is immediate danger that the defendant or the party in possession of the property will conceal, dispose of, ill-treat, waste, or destroy the property or remove it from the county during the suit; (2) the suit is for title or possession of real property or foreclosure or enforcement of a mortgage or lien on real property and a reasonable conclusion may be drawn that there is immediate danger that the defendant or the party in possession of the property will

use his possession to injure or ill-treat the property or waste or convert to his own use, the timber, rents, fruits or revenue of the property; (3) the suit is for the title or possession of property from which the plaintiff has been ejected by force or violence, or (4) the suit is to try title to real property, to remove a cloud from the title of real property, to foreclose a lien on real property or to partition real property and the plaintiff makes an oath that one or more of the defendants is a non-resident of the state. Tex. Civ. Prac. & Rem. Code § 62.001. *See also Marrs v. South Tex. Nat'l Bank*, 686 S.W.2d 675, 677-78 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

The application for a writ of sequestration must be made under oath and must set forth: (1) the specific facts stating the nature of the plaintiff's claim; (2) the amount in controversy, if any; and (3) the facts justifying issuance of the writ. *Id*. at § 62.022. *See also Marrs v. South Tex. Nat'l Bank*, 686 S.W.2d at 677-78; *Monroe v. General Motors Acceptance Corp.*, 573 S.W.2d 591, 593 (Tex. Civ. App.—Waco 1978, no writ).

The defendant may seek dissolution of an issued writ of sequestration by filing a written motion with the court. Tex. Civ. Prac. & Rem. Code § 62.041(a). The right to seek dissolution is cumulative of the right of replevy. *Id*. at § 62.041(b). The filing of a motion to dissolve stays proceedings under the writ until the issue is determined. *Id*. at § 62.041(c). Unless the parties agree to an extension, the court shall conduct a hearing on the motion and determine the issue not later than the 10th day after the motion is filed. *Id*. at § 62.042. Following the hearing, the writ must be dissolved unless the party who secured its issuance proves the specific facts alleged and the grounds relied on for issuance. *Id.* at § 62.043(a). *See also Rexford v. Holliday*, 807 S.W.2d 356, 358 (Tex. App.—Houston [1st Dist.] 1991, no writ). If the writ is dissolved, the action proceeds as if the writ had not been issued. Tex. Civ. Prac. & Rem. Code § 62.043(b).

If a writ is dissolved, any action for damages for wrongful sequestration must be brought as a compulsory counterclaim. *Id*. at § 62.044. *See also Dennis v. First State Bank*, 989 S.W.2d 22, 27 (Tex. App.—Fort Worth 1998, no pet.). In addition to damages, the party who sought dissolution of the writ may recover reasonable attorney's fees incurred in dissolution of the writ. Tex. Civ. Prac. & Rem. Code § 62.044.

As with most extraordinary remedies, a writ of sequestration is an ancillary remedy which must be pursued in connection with a suit related to the property to be sequestered. Tex. Civ. Prac. & Rem. Code §62.002. Like attachment, a writ of sequestration may be issued for personal property under a mortgage or a lien even though the right of action on the mortgage or lien has not accrued. Tex. Civ. Prac. & Rem. Code § 62.003. A writ of sequestration requires a bond to be filed by the applicant. Tex. R. Civ. P. 698.

The sequestered property is not placed in the possession of the plaintiff seeking the sequestration, but is seized and held by the sheriff or constable pending resolution of the suit or replevy by the defendant, which replevy requires the posting of a bond. Tex. R. Civ. P. 699, 701, 702, & 703. An officer who retains custody of sequestered property is entitled to just compensation and reasonable charges to be determined by the court that issued the writ, and the officer's compensation and charges shall be taxed and collected as a cost of suit. Tex. Civ. Prac. & Rem. Code §62.062. *See also Multi-Moto Corp. v. ITT Commercial Fin. Corp.*, 806 S.W.2d 560, 569 (Tex. App.—Dallas 1990, writ denied).

C. Garnishment

Garnishment is a statutory proceeding whereby the property, money, or credits of a debtor in the possession of another are applied to the payment of the debt. *Bank One, Tex. v. Sunbelt Sav.*, 824 S.W.2d 557, 558 (Tex. 1992). Prejudgment garnishment allows a plaintiff to protect assets of a defendant that are in the possession of a third party who is not otherwise a party to the case. When a court issues a writ of garnishment and it is served, the property held by the third party (the garnishee) is frozen until the court determines the underlying case. Tex. Civ. Prac. & Rem. Code § 63.003. There is no common law procedure for a pre-trial garnishment, and the right to such a remedy is found in the Texas Civil Practice and Remedies Code Section 63 and in the Texas Rules of Civil Procedure 657-679.

A writ of garnishment is available if: (1) an original attachment has been issued; (2) a plaintiff sues for a debt and makes an affidavit stating that: (A) the debt is just, due, and unpaid; (B) within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt; and (C) the garnishment is not sought to injure the defendant or the garnishee; or (3) a plaintiff has a valid, subsisting judgment and makes an affidavit stating that, within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment. Tex. Civ. Prac. & Rem. Code § 63.001. After service of a writ of garnishment, the garnishee may not deliver any effects or pay any debt to the defendant. If the garnishee is a corporation or joint-stock company, the garnishee may not permit or recognize a sale or transfer of shares or an interest alleged to be owned by the defendant. Tex. Civ. Prac. & Rem. Code § 63.003(a). *See also Moody Nat'l Bank v. Reibschlager*, 946 S.W.2d 521, 523 (Tex. App.—Houston [14th Dist.] 1997, writ denied); *Chandler v. El Paso Nat'l Bank*, 589 S.W.2d 832, 836 (Tex. Civ. Ap.—El Paso 1979, no writ).

Because it may impound the money or property of an alleged debtor even before a judgment is obtained against him, the remedy of garnishment is summary and harsh. *Beggs v. Fite*, 130 Tex. 46, 106 S.W.2d 1039,

1042 (Tex. 1937). *In re ATW Invs., Inc*., No. 04-17-00045-CV, 2017 Tex. App. LEXIS 2404 (Tex. App.—San Antonio March 22, 2017, original proceeding). A garnishment order must strictly conform with statutory requirements. *Id*. A writ of garnishment may issue when the plaintiff's suit arises out of a contract and the demand is liquidated, that is, the claim is not contingent, is capable of being definitely ascertained by the usual means of evidence, and does not rest in the discretion of the jury. *Cleveland v. San Antonio Bldg. & Loan Ass'n*, 148 Tex. 211, 223 S.W.2d 226, 228 (Tex. 1949).

A writ of garnishment may be issued only when the demand is not contingent, is capable of ascertainment by the usual means of evidence, and does not rest in the discretion of the jury. *Albright v. Regions Bank*, No. 13-08-262-CV,2009 Tex. App. LEXIS 8308, 2009 WL 3489853, at *4 (Tex. App.—Corpus Christi Oct. 29, 2009, no pet.); *In re Tex. Am. Express, Inc.*, 190 S.W.3d 720, 725 (Tex. App.—Dallas 2000, orig. proceeding). When damages are unliquidated and in their nature uncertain, the demand is not subject to garnishment. *Id.* Further, a tort action is not subject to garnishment because it is both contingent and unliquidated. *Id.; Cleveland v. San Antonio Bldg. & Loan Ass'n*, 148 Tex. 211, 223 S.W.2d 226, 228 (Tex. 1949). A fraud claim is not proper as a basis for allowing a prejudgment garnishment order because, as a tort matter, the damages are unliquidated and uncertain. *Fogel v. White*, 745 S.W.2d 444, 446 (Tex. App.—Houston [14th Dist.] 1988, orig. proceeding).

Except as otherwise provided by state or federal law, current wages for personal service are not subject to garnishment. Tex. Civ. Prac. & Rem. Code § 63.004. The garnishee shall be discharged from the garnishment as to any debt to the defendant for current wages. *Id*. *See also Davidson Tex., Inc. v. Garcia*, 664 S.W.2d 791, 793 (Tex. App.—Austin 1984, no writ).

Service of a writ of garnishment on a financial institution named as the garnishee in the writ is governed by Section 59.008 of the Texas Finance Code, which provides:

> a) A claim against a customer of a financial institution shall be delivered or served as otherwise required or permitted by law at the address designated as the address of the registered agent of the financial institution in a registration filed with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution.
>
> (b) If a financial institution files a registration statement with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution, a claim against a customer of the financial institution is not effective as to the financial institution if the claim is served or delivered to an address other than that designated by the financial institution in the registration as the address of the financial institution's registered agent.
>
> (c) The customer bears the burden of preventing or limiting a financial institution's compliance with or response to a claim subject to this section by seeking an appropriate remedy, including a restraining order, injunction, protective order, or other remedy, to prevent or suspend the financial institution's response to a claim against the customer.
>
> (d) A financial institution that does not file a registration with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution, is subject to service or delivery of all claims against customers of the financial institution as otherwise provided by law.

Tex. Fin. Code Section 59.008.

D. Audit Relief

A plaintiff may want an independent third party to provide an accounting of the fiduciary relationship before trial. Texas Rule of Civil Procedure 172 allows a court to appoint an auditor to state the accounts between the parties and to make a report thereof to the court. Rule 172 states:

> When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible. The auditor shall verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come within his knowledge. Exceptions to such report or of any item thereof must be filed within 30 days of the filing of such report. The court shall award reasonable compensation to such auditor to be taxed as costs of suit.

Tex. R. Civ. P. 172.

The auditor shall verify the report via an affidavit. *Id*. The court will award compensation to the auditor to be taxed as costs. *Id*. "The purpose of the appointment is to have an account so made up that the undisputed items upon either side may be eliminated from the contest, and the issues thereby narrowed to the points actually in dispute." *In the Matter of Coastal Nejapa, Limited*, 2009 Tex. App. LEXIS 6382, 2009 WL 2476555 at *5 (Tex. App.—Houston [14th Dist.] Aug. 13, 2009, no pet.) (quoting *Dwyer v. Kaltayer*, 68 Tex. 554, 5 S.W. 75, 77 (1887)). For example, one court appointing an auditor to determine an accounting of a partnership. *Sanchez v. Jary*, 768 S.W.2d 933 (Tex. App.—San Antonio 1989, no writ). Either party may object to the report if such objection is filed within 30 days of the report. Tex. R. Civ. P. 172. If objections are filed, then when the report is admitted into evidence, the party preserves the right to offer evidence to contradict it.

Moreover, there may be more than one way to obtain audit relief from a court. *See, e.g., In re Estate of Hoskins*, 501 S.W.3d 295, 2016 Tex. App. LEXIS 9966 (Tex. App.—Corpus Christi Sept. 8, 2016, no pet.) (Appointing a receiver to create a report did not require a finding that all other measures would be inadequate; there was evidence of a breach of trust, and the order did not grant the duties and powers ordinarily conferred upon a receiver but instead resembled appointing an auditor.).

E. Repossession

A secured creditor may be able to repossess property and avoid the judicial process. Under the Texas Business and Commerce Code, after default, a secured party: (1) may take possession of the collateral; and (2) without removal, may render equipment unusable and dispose of collateral on the debtor's premises under Section 9.610. Tex. Bus. & Com. Code § 9.609(a). *See also Schachtner v. Crosby State Bank*, No. 14-03-00424-CV, 2004 Tex. App. LEXIS 468 (Tex. App.—Houston [14th Dist.] Jan. 20, 2004, no pet.). Further, a secured party may proceed under subsection (a): (1) pursuant to judicial process; or (2) without judicial process, if it proceeds without breach of the peace. Tex. Bus. & Com. Code § 9.609(b). If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party that is reasonably convenient to both parties. *Id*. at § 9.609(c). Texas Business and Commerce Code Section 9.610 discusses the secured creditor's disposition of collateral after default. *Id*. at § 9.610.

Repossession by an unsecured creditor may be a crime. *See, e.g., Eisenbach v. State*, No. 13-07-632-CR, 2008 Tex. App. LEXIS 6845 (Tex. App.—Corpus Christi Aug. 28, 2008, pet. ref'd) (evidence was factually and legally sufficient to convict defendant of unauthorized use of a motor vehicle because defendant, who repossessed a vehicle he had sold to a buyer, was not a secured party).

Moreover, if the secured creditor cannot repossess the collateral without creating a breach of the peace, the other remedies set forth herein appear to be more appropriate. *Chapa v. Traciers & Assocs.*, 267 S.W.3d 386 (Tex. App.—Houston [14th Dist.] July 31, 2008, no pet.).

F. Use Of Injunctions To Secure Assets Pre-Trial

1. General Requirements

A plaintiff may need to seek immediate relief from a court to prevent a fiduciary from selling assets, using assets, or failing to distribute assets to the plaintiff. *See, e.g., Hsin-Chi-Su v. Vantage Drilling Co*., No. 14-14-00461-CV, 474 S.W.3d 284, 2015 Tex. App. LEXIS 7192, 2015 WL 4249265, at *5 n.5 (Tex. App.—Houston [14th Dist.] July 14, 2015, pet. denied) (court affirmed temporary injunction based on claim for disgorgement due to breach of fiduciary duty). Texas rules allow a plaintiff to request a temporary restraining order and/or a temporary injunction to provide such relief.

A court has the authority to enter temporary injunctive relief to protect a breach-of-fiduciary-duty plaintiff from irreparable injury and to maintain the status quo. *See, e.g., Glassman v. Goodfriend*, 347 S.W.3d 772 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (court signed a temporary injunction and order removing the trustee, terminating the trust, and appointing a successor trustee to wind up the trust); *Ryals v. Ogden*, No. 14-07-01008-CV, 2009 Tex. App. LEXIS 6634 (Tex. App.—Houston [14th] Dist. August 25, 2009, no pet.) (granted temporary injunction against trustee from selling trust property); *In re Holland*, No. 14-09-00656-CV, 2009 Tex. App. LEXIS 7635 (Tex. App.—Houston [14th] Dist. August 20, 2009, no pet.) (granted temporary injunction against executor from interfering with trial court's orders); *Twyman v. Twyman*, No. 01-08-00904-CV, 2009 Tex. App. LEXIS 5552 (Tex. App.—Houston [1st] Dist. July 16, 2009, no pet.) (granted temporary injunction against trustee from withdrawing any additional funds from the trust while litigation was pending); *Farr v. Hall*, 553 S.W.2d 666, 672 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.) (injunction to prohibit executor from proposed stock redemption).

The common law and Texas statutes provide authority for temporary injunctive relief. Texas Civil Practice and Remedies Code section 65.011 authorizes injunctive relief:

> 1) when the applicant is entitled to the relief demanded, and all or part of the relief requires the restraint of some act prejudicial to the applicant; 2) when a party performs or is about

> to perform, or is procuring or allowing the performance of, an act relating to the subject of pending litigation, in violation of the applicant's rights, and the act would tend to render the judgment in that litigation ineffectual; 3) when the applicant is entitled to a writ of injunction under the principles of equity and the laws of Texas relating to injunctions; 4) when a cloud would be placed on the title of real property being sold under an execution, against a party having no interest in the real property, irrespective of any remedy at law; and 5) when irreparable injury to real or personal property is threatened, irrespective of any remedy at law.

Tex. Civ. Prac. & Rem. C. 65.011. Moreover, specific statutes may apply to fiduciaries. For example, Texas Trust Code Section 114.008(2) provides for injunctive relief as a remedy for breach of trust that "has occurred or may occur." Tex. Prop. Code §114.008(2).

A temporary restraining order serves to provide emergency relief and to preserve the status quo until a hearing may be had on a temporary injunction. *Cannan v. Green Oaks Apts., Ltd.*, 758 S.W.2d 753, 755 (Tex. 1988). The purpose of a temporary injunction is to preserve the status quo pending a full trial on the merits. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993); *Trostle v. Trostle*, 77 S.W.3d 908, 916 (Tex. App.—Amarillo 2002, no pet.). The status quo is the last actual peaceable, noncontested status that preceded the controversy. *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004). "The principles governing courts of equity govern injunction proceedings unless superseded by specific statutory mandate. In balancing the equities, the trial court must weigh the harm or injury to the applicant if the injunctive relief is withheld against the harm or injury to the respondent if the relief is granted." *Seaborg Jackson Partners v. Beverly Hills Sav.*, 753 S.W.2d 242, 245 (Tex. App.—Dallas 1988, writ dism'd).

To be entitled to temporary injunctive relief, a plaintiff must plead a cause of action, prove a probable right to relief, and prove an immediate, irreparable injury if temporary relief is not granted. *IAC, Ltd. v. Bell Helicopter Textron*, Inc., 160 S.W.3d 191 (Tex. App.—Fort Worth 2005, no pet.). For example, in *183/620 Group Joint Venture v. SPF Joint Venture*, the court of appeals affirmed a temporary injunction prohibiting the defendants from using funds held by them as fiduciaries for the payment of attorney's fees and expenses in defending the breach of fiduciary duty lawsuit. 765 S.W.2d 901 (Tex. App.—Austin 1989, writ dism. w.o.j.).

2. Probable Right To Recovery

To show a probable right of recovery, an applicant need not establish that it will finally prevail in the litigation, rather, it must only present some evidence that, under the applicable rules of law, tends to support its cause of action. *Camp v. Shannon*, 162 Tex. 515, 348 S.W.2d 517, 519 (Tex. 1961); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 197 (Tex. App.—Fort Worth 2005, no pet.).

In a fiduciary case, there is authority that the usual burden of establishing a probable right of recovery does not apply if the gist of the complaint is that a fiduciary is guilty of self-dealing. *Health Discovery Corp. v. Williams*, 148 S.W.3d 167, (Tex. App.—Waco 2004, no pet.) (interested directors had burden to establish fairness of transaction in temporary injunction proceeding). In a fiduciary self-dealing context, the "presumption of unfairness" attaches to the transactions of the fiduciary, shifting the burden to the defendant to prove that the plaintiff will not recover. *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508-09 (Tex. 1980) (a profiting fiduciary has the burden of showing the fairness of the transactions). If the presumption cannot be rebutted at the temporary injunction stage, then the injunction should be granted as the plaintiff, by simply presenting a prima facie case of the existence of a fiduciary relationship and a probable breach of that duty has adduced sufficient facts tending to support his right to recover on the merits. *Camp v. Shannon*, 348 S.W.2d 517, 519 (Tex. 1961); *Health Discovery Corp. v. Williams*, 148 S.W.3d at 169-70; *Jenkins v. Transdel Corp*., 2004 WL 1404464 (Tex. App.—Austin 2004, no pet.).

3. Irreparable Harm

Generally, to be entitled to a temporary injunction, the applicant must show a probable, imminent, and irreparable injury in the interim. *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191 (Tex. App.—Fort Worth 2005, no pet.). "Imminent" means that the injury is relatively certain to occur rather than being remote and speculative. *Limon v. State*, 947 S.W.2d 620, 625 (Tex. App.—Austin 1997, no writ); *City of Arlington v. City of Fort Worth*, 873 S.W.2d 765, 768-69 (Tex. App.—Fort Worth 1994, writ dism'd w.o.j.).

In *Gatlin v. GXG*, Inc., the court of appeals affirmed a temporary injunction against a fiduciary, and regarding the irreparable injury requirement, the court stated:

> Appellees' evidence at the hearing revealed a long history of Gatlin transferring funds from Knox and GXG accounts to his own personal or company accounts, and vice versa. In addition, Jan Farmer, Southwest Industrial's comptroller, testified that Gatlin frequently transferred large sums of money between his companies for reasons she could not explain, and that the documentation relating to these transfers, as well as to the subsidiary

> companies generally, were poorly maintained. This evidence, coupled with the testimony that Gatlin had in the past generated and backdated letters to himself and that he had been uncooperative when Knox sought the return of her records, was sufficient to justify the trial court's conclusion that, if not restrained, Gatlin might continue to divert and conceal assets in his possession pending trial.
>
> We have previously recognized that a legal remedy may be considered inadequate when there is a danger that a defendant's funds will be reduced or diverted pending trial. As we noted in Minexa, the fact that damages may be subject to the most precise calculation becomes irrelevant if the defendants in a case are permitted to dissipate funds that would otherwise be available to pay a judgment. A number of our sister courts have likewise found a party's remedy at law to be inadequate when a defendant's funds will be reduced, pending final hearing, and will not be available in their entirety in the interim. Because there was at least some evidence from which it would be reasonable to infer that appellants' funds would be diverted or dissipated pending trial, we conclude that the trial court did not abuse its discretion in finding appellees' remedy at law inadequate and granting the temporary injunction.

No. 05-93-01852-CV, 1994 Tex. App. LEXIS 4047 (Tex. App.—Dallas April 19, 1994, no pet.); *see also Coffee v. Hermann Hosp. Estate*, No. 01-85-00520-CV, 1986 Tex. App. LEXIS 12878 (Tex. App.—Houston [1st Dist.] May 1, 1986, no pet.) (not designated for publication) (probably injury was shown where "[t]here was testimony from which it might reasonably have been inferred that the Coffees were not cooperative in accounting for assets of the Estate, and that to insure the preservation of the Estate's assets, temporary injunctive relief was necessary.").

In a fiduciary case, there is also authority that the plaintiff is not required to show that it has an inadequate remedy at law. *183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901 (Tex. App.—Austin 1989, writ dism. w.o.j.) (authorities cited therein). In *183/620 Group Joint Venture*, the appellee and other landowners entrusted a large sum of money to the appellants to be held by them as fiduciaries and expended according to the parties' contracts. 765 S.W.2d at 902-03. Pursuant to the contracts, the appellants were to serve as "project manager" of the landowners' properties and expend the money to improve the properties. *Id*. at 902. The appellee subsequently sued the appellants, asserting that the appellants failed to properly manage the construction improvement projects. *Id*. The appellee sought an injunction to require the appellants to repay funds expended in defense of the pending lawsuit and to restrain the appellants from any future expenditures for the same purpose. *Id*. at 902-03. The trial court found that the parties' contracts did not authorize the appellants to use the money entrusted to them for their defense. *Id*. at 903. The trial court further found that a temporary injunction was necessary to maintain the existing status of the trust funds even though there was no showing that appellants would be unable to pay a judgment for damages that might be based on their misappropriation of the funds. *Id*.

The court of appeals initially noted that an inadequate legal remedy must generally be shown before a trial court can grant a temporary injunction. *Id*. The court reasoned, however, that such a showing "is only an ordinary requirement; it is not universal or invariable." *Id*. Where the injunction seeks to restrain a party from expending sums held by them as fiduciaries, the court held that damages would not be an adequate remedy "because the funds will be reduced, pending final hearing, so they will not be available in their entirety, in the interim, for the purposes for which they were delivered to the holder in the first place." *Id*. at 904. Since a breach of fiduciary duty claim is by nature an "equitable" action, even in cases where damages may be sought, if the fiduciary relationship is still continuing, the beneficiary has an equitable right to be protected from further harm. *See id*. Thus, there is never an adequate remedy at law for a breach of fiduciary duty claim. *See id*. *See also Hibbs v. Hibbs*, No. 13-97-755-CV, 1998 Tex. App. LEXIS 1876 (Tex. App.—Corpus Christi March 26, 1998, no pet.) (not designated for publication); *Coffee v. Hermann Hosp. Estate*, No. 01-85-00520-CV, 1986 Tex. App. LEXIS 12878 (Tex. App.—Houston [1st Dist.] May 1, 1986, no pet.) (not designated for publication). *But see Zaffirini v. Guerra*, No. 04-14-00436-CV, 2014 Tex. App. LEXIS 12761 (Tex. App.—San Antonio, Sept. 3, 2014, no pet.) (holding that a breach-of-fiduciary-duty plaintiff must still prove an inadequate remedy to obtain a temporary injunction).

There are many procedural rules that apply to an application for a temporary injunction. The author refers the reader to his lengthy paper "Temporary Injunctive Relief In Texas," which can be found on his blog, www.txfiduciarylitigator.com.

4. Orders To Protect Against Dissipation of Assets

Injunctive relief can be used by creditors to prevent the dissipation, loss or injury of collateral. In order to obtain such relief, a creditor must generally establish a probable right, a probable injury, and the lack of an adequate remedy at law. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). In some situations,

temporary injunctive relief may be preferable to other pre-trial remedies. *Minexa Arizona, Inc. v. Staubach*, 667 S.W.2d 563, 567 (Tex. App.—Dallas 1984, no writ). In *Minexa*, the court held:

> In this respect, Staubach and Altman pleaded the following facts. Several million dollars had been paid by Staubach, Altman, and the members of the class they represent into a trust account maintained by Minexa. These funds were allegedly improperly dissipated when Minexa and the other defendants utilized the funds for purposes other than those listed in the prospectuses. According to the pleadings, only one hundred and twenty thousand dollars remained of the three million dollars paid to Minexa by Staubach, Altman and the other members of the class. Staubach and Altman requested that these funds of Minexa be attached and garnished. Certain funds had been lent by Minexa to a corporation controlled by defendant Wurbs who was also the president of Minexa. The stock of this corporation in turn had been transferred to a Canadian corporation, also controlled by Wurbs and Norton. Furthermore, Wurbs was seeking to establish citizenship on the Isle of Man.
>
> We hold that Staubach's and Altman's pleadings are sufficient to support the issuance of a temporary injunction. *Although Staubach and Altman requested the attachment of funds held by Minexa, this remedy was not adequate to prevent the defendants from transferring the assets of Minexa to other corporations under their control and from placing those assets beyond the trial court's jurisdiction. Nor were the remedies of attachment and garnishment sufficient to preserve assets not known by Staubach and Altman. Thus, the legal remedies of attachment and garnishment are not as efficient in this case as the equitable remedy of an injunction.*
>
> With respect to the argument that the injunction was improper because the damages in this case were readily calculable, we do not see the applicability of this rule in the context of this case. The fact that damages may be subject to the most precise calculation becomes irrelevant if the defendants in a case are permitted to dissipate funds specific that would otherwise be available to pay a judgment. Our holding does not mean that a party may be enjoined from utilizing funds in his possession any time a suit is brought against him. However, such a restraint is warranted in this case since all of the funds in question were provided by Staubach, Altman and other members of their purported class. Some of these funds have allegedly been dissipated by the fiduciaries holding them, while the fiduciaries are seeking to place the remaining funds beyond the jurisdiction of the Texas court. Accordingly, we hold that the restraint placed upon the defendants is warranted in this case.

Id. at 567-68 (emphasis added).

For example, in *Hartwell v. Lone Star, PCA*, the trial court issued temporary injunctive relief to prevent the dissipation of a creditor's collateral. 528 S.W.3d 750 (Tex. App.—Texarkana 2017, pet. dism.). The injunctive relief precluded the defendant from dissipating the collateral. The injunction was generally prohibitive in that it enjoined the defendants from concealing, damaging, or destroying the collateral; forbid any disposition of the collateral without the written consent of plaintiff; forbid the destruction or disposal of any records related to the collateral or disposition of the collateral; and enjoined the use of the defendants' bank accounts, except to pay ordinary living expenses and routine business expenses. These prohibitions were meant to preserve the plaintiff's interest in the collateral and their proceeds. The injunction also provided mandatory relief in that it required the defendants to turn over the collateral and proceeds that defendants had refused to remit to plaintiff.

On appeal, the defendant argued the injunction was in error because there was no showing of an irreparable injury. The court of appeals stated:

> Included within the probable injury are the elements of imminent harm, irreparable injury, and no adequate remedy at law. "An existing remedy is adequate if it 'is as complete and as practical and efficient to the ends of justice and its prompt administration as is equitable relief.'" If the defendant is insolvent, there is no adequate remedy. Further, even if damages are subject to a precise calculation, an injunction will lie to prevent the dissipation of specific funds that would otherwise be available to pay a judgment. In determining imminent harm, "the trial court may determine that, when violations are shown up to or near the date of trial, the defendant has engaged in a course of conduct and the court may assume that it will continue, absent clear proof to the contrary."

> At the hearing, Lone Star produced evidence that Appellants' outstanding loans were in default with approximately $540,000.00 still owed by them. The evidence also showed that as admitted by Hartwell, the Appellants had significantly reduced the collateral securing the loans by selling cattle, using some of the proceeds to pay other creditors, and depositing the remainder into their personal or business accounts. Welch testified, with documentary support, that such actions violated the loan agreements and security agreements and that the actions were taken without the permission of Lone Star.
>
> Hartwell also admitted that he had refused to pay the proceeds from his most recent sale of cattle to Lone Star and stated that he would not do so until Lone Star renewed his loans. In addition, Welch testified that because of the actions of Appellants, the loans were under-secured. He also testified that the Appellants had a negative $99,000.00 cash flow and that they lacked the resources to repay the loan. Further, since Appellants' sales of the collateral occurred shortly before suit was filed and their refusal to pay the proceeds to Lone Star continued to the date of the hearing, the trial court could reasonably conclude that Lone Star had been harmed by the dissipation of its collateral and that such harm was likely to continue in the future without injunctive relief.

Id. The court of appeals affirmed the temporary injunction.

Some courts focus on the irreparable injury requirement and hold that temporary injunctions preventing the dissipation of assets are erroneous where there is no evidence that the defendant cannot pay a judgment for damages. *See, e.g., Hotze v. Hotze*, No. 01-18-00039-CV, 2018 Tex. App. LEXIS 5386, n.3 (Tex. App.—Houston [1st Dist.] July 17, 2018, no pet.) (reversing injunction preventing dissipation of funds where no evidence that defendants could not pay judgment); *N. Cypress Med. Ctr. Operating Co. v. St. Laurent*, 296 S.W.3d 171, 179-80 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (dissolving temporary injunction when party had not shown that he would suffer an irreparable injury; the evidence did not show that funds were in danger of being lost or depleted such that defendant could not ultimately pay damages); *SRS Prods. Co. v. LG Eng'g Co.*, 994 S.W.2d 380, 386 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (SRS did not show an inadequate remedy at law when "[t]he amount in dispute is the amount that LGE sought to draw under the letter of credit, and is clearly calculable. Furthermore, LGE presented uncontroverted testimony that it is financially secure and capable of repaying the full amount of the letter of credit if it were later required to do so.").

An applicant for a temporary injunction does not have an adequate remedy at law if the non-movant party is insolvent. *In the Estate of Minton*, No. 13-11-00062-CV, 2011 Tex. App. LEXIS 4750 (Tex. App.—Corpus Christi, June 23, 2011, no pet.); *Surko Enters. v. Borg-Warner Acceptance Corp.*, 782 S.W.2d 223, 225 (Tex. App.—Houston [1st Dist.] 1989, no writ). Further, a legal remedy may be considered inadequate when there is a danger that a defendant's funds will be reduced or diverted pending trial. *See Minexa*, 667 S.W.2d at 567. The fact that damages may be subject to the most precise calculation becomes irrelevant if the defendants in a case are permitted to dissipate funds that would otherwise be available to pay a judgment. *Minexa*, 667 S.W.2d at 567-68. *Gatlin v. GXG, Inc.*, No. 05-93-01852-CV, 1994 Tex. App. LEXIS 4047, 1994 WL 137233 (Tex. App.—Dallas Apr. 19, 1994, no writ) (not designated for publication).

Irreparable harm may potentially be shown where the assets are not fungible and may not be recovered if transferred. *Hsin-Chi-Su v. Vantage Drilling Co.*, 474 S.W.3d 284 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (temporary injunction applicant showed that defendant was attempting to place disputed shares in company out of applicant's reach so that they could not be recovered); *Baucum v. Texam Oil Corp.*, 423 S.W.2d 434, 440 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.) (defendant "had set upon a course of conduct to dispose of properties he held and had committed acts respecting the subject of the pending litigation which would render a judgment upon the merits ineffectual").

5. Orders To Deposit Funds Into Court's Registry

A party may seek to have the trial court order a defendant to deposit disputed funds into the registry of the court. The Texas Supreme Court recognized that when the ownership of specific funds is in dispute, and the funds are at risk of "being lost or depleted," the trial court may order the funds deposited into the registry of the court until the ownership issue is resolved. *Castilleja v. Camero*, 414 S.W.2d 431, 433 (Tex. 1967) (holding that trial court had authority to order winning lottery ticket proceeds into registry of court while ownership of funds were determined because evidence was presented that proceeds were at risk of loss or depletion); *Zhao v. XO Energy LLC*, 493 S.W.3d 725, 735 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (affirming pretrial order to deposit funds subject to competing claims into the registry of court).

When there is insufficient evidence presented that "funds are in danger of being 'lost or depleted,'" however, the trial court abuses its discretion by ordering

funds deposited in the registry of the court and mandamus relief from such an order is appropriate. *See e.g., In re Reveille Resources (Texas), Inc.*, 347 S.W.3d 301, 304 (Tex. App.—San Antonio 2011, orig. proceeding) (trial court abused its discretion when there was no evidence of possible depletion of funds and trial court based injunction solely on statement by counsel during hearing rather than evidence); *N. Cypress Med. Ctr.*, 296 S.W.3d 171, 178-79 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding) (trial court abused its discretion when there was no evidence that funds at issue were at risk of being lost or depleted, but only that disputed partnership funds were in same bank account that partnership actively used to fund several business activities); *In re Deponte Invs.*, No. 05-04-01781-CV, 2005 Tex. App. LEXIS 898, 2005 WL 248664, at *2 (Tex. App.—Dallas Feb. 3, 2005, orig. proceeding) (mem. op.) ("[T]he Allens were required to present evidence the revenues in Deponte's possession were in danger of being lost or depleted. They did not do so. We conclude that absent any evidence, the trial court abused its discretion in ordering Deponte to deposit the funds into the registry of the court.").

A trial court abuses its discretion by ordering disputed funds be deposited into the registry of the court without allowing the party resisting the order an opportunity to put forth evidence disputing the validity of the movant's claim. *See In re Noteboom*, 111 S.W.3d 794, 796-97 (Tex. App.—Fort Worth 2003, orig. proceeding) ("[T]he record reflects the trial court was attempting the admirable goal of safeguarding sufficient assets necessary to satisfy any future money award on final judgment of the case; however, by refusing to permit Noteboom the opportunity to introduce evidence concerning the merits of the claims prior to the trial court's setting of the bond amount [to be paid into the registry of the court], the trial court failed to afford Noteboom the procedural due process to which he was entitled.").

There is some debate about whether this type of order is an injunction or some other type of order. *Alexander Dubose Jefferson & Townsend LLP v. Chevron Phillips Chem. Co., L.P.*, 540 S.W.3d 577, 582 (Tex. 2018) (per curiam). In any event, whatever the name, such an order can be proper and protect a plaintiff's recovery.

It should be noted that numerous courts have held that a trial-court order requiring funds—that are the disputed subject of the litigation—to be deposited into the registry of the court is not subject to an interlocutory appeal because the trial court possesses inherent authority to make such an order. *See, e.g., Alexander Dubose Jefferson & Townsend LLP v. Chevron Phillips Chem. Co., L.P.*, No. 16-1018, 2018 Tex. LEXIS 168, 2018 WL 1022475, at *7 (Tex. Feb. 23, 2018) (explaining that "when analyzing orders directing funds deposited into the court's registry of the court pending a final adjudication of ownership, most courts deem these orders as interlocutory and not subject to appeal"); *Structured Capital Res. Corp. v. Arctic Cold Storage, LLC*, 237 S.W.3d 890, 894 (Tex. App.—Tyler 2007, no pet.) ("An order requiring the deposit of funds into the registry of a court cannot be characterized as an appealable temporary injunction."); *Faddoul, Glasheen & Valles, P.C. v. Oaxaca*, 52 S.W.3d 209, 212 (Tex. App.—El Paso 2001, no pet.) (same); *Diana Rivera & Assocs., P.C. v. Calvillo*, 986 S.W.2d 795, 798 (Tex. App.—Corpus Christi 1999, pet. denied) (same).

The rationale of these cases—holding that an order requiring a party to deposit monies into the registry of the court is not subject to an interlocutory appeal—is that because a trial court may, under its inherent authority, order monies that form the basis of the underlying lawsuit deposited into the registry of the court, such an order is not subject to an interlocutory appeal, even when it is included in a document labeled "temporary injunction." *See, e.g., Zhao v. XO Energy LLC*, 493 S.W.3d 725, 736 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (explaining that in exercise of its inherent authority the court may order a party to pay disputed funds into the court's registry "if there is evidence the funds are in danger of being lost or depleted") (internal quotation marks omitted); *In re Reveille Res. (Tex.), Inc.*, 347 S.W.3d 301, 304 (Tex. App.—San Antonio 2011, orig. proceeding). While not reviewable in a statutory interlocutory appeal, a trial court's exercise of its inherent authority to order a party to deposit monies into the registry may be reviewable via an original proceeding. *See, e.g., O'Brien v. Baker*, No. 05-15-00489-CV, 2015 Tex. App. LEXIS 11562, 2015 WL 6859581, at *2-4 (Tex. App.—Dallas Nov. 9, 2015, orig. proceeding) (holding order to pay monies into registry was subject to interlocutory appeal, but consolidating interlocutory appeal with simultaneously filed petition for writ of mandamus before reviewing).

6. Orders To Secure Assets Unrelated To Suit

Texas courts have generally prohibited the use of an injunction to secure the legal remedy of damages by freezing assets unrelated to the subject matter of the suit. *Reyes v. Burrus*, 411 S.W.3d 921 (Tex. App.—El Paso 2013, pet. denied); *Victory Drilling, LLC v. Kaler Energy Corp.*, No. 04-07-00094-CV, 2007 Tex. App. LEXIS 4966, 2007 WL 1828015 (Tex. App.—San Antonio June 27, 2007, no pet.) (mem. op.) (holding that trial court abused discretion in granting temporary injunction to secure legal remedy of damages by freezing assets unrelated to subject matter of suit); *Nowak v. Los Patios Investors, Ltd.*, 898 S.W.2d 9, 11 (Tex. App.---San Antonio 1995, no writ); *Harper v. Powell*, 821 S.W.2d 456, 457 (Tex. App.—Corpus Christi 1992, no writ); *Lane v. Baker*, 601 S.W.2d 143, 145 (Tex. Civ. App.—Austin 1980, no writ); *Frederick Leyland & Co. v. Webster Bros. & Co.*, 283 S.W. 332,

335 (Tex. Civ. App.—Dallas 1926), writ dism'd w.o.j., 115 Tex. 511, 283 S.W. 1071 (1926) (all reversing temporary injunctions freezing assets unrelated to the subject matter of the suit). The United States Supreme Court has also rejected the use of an injunction for this purpose:

> Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him . . . disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence.

De Beers Consol. Mines v. U.S., 325 U.S. 212, 222-23 (1945).

For example, in *Brown v. Coffee Traders, Inc.*, an employer obtained a temporary injunction freezing a former employee's bank account where the employee had embezzled funds from the employer. No. 03-18-00428-CV, 2018 Tex. App. LEXIS 9494 (Tex. App.—Austin November 21, 2018, no pet. history). The court of appeals reversed the injunction, stating:

> The general rule "prohibit[s] an injunction to secure the legal remedy of damages by freezing a defendant's assets that are completely unrelated to the subject matter of the suit." The rule holds even when the alleged misconduct rises to the level of an intentional tort or crime, such as embezzlement, and the defendant is insolvent or likely to be insolvent at the time a judgment is rendered. While Coffee Traders may have a claim to some amount of money in damages from Brown, cash is fungible, and Coffee Traders cannot point to any evidence showing a direct link between Brown's frozen assets, including the cash in her bank accounts, and the allegedly embezzled funds. Although there are exceptions to the general rule, they are inapplicable here. We echo the reasoning of one of our sister courts: "If we were to uphold the injunction in this case, 'it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence.'" Furthermore, as another of our sister courts concluded, "we cannot agree that a plaintiff need show probable right [of recovery] on any cause of action to obtain injunctive relief regarding a defendant's assets . . . . If this were the case, injunctions would usurp the carefully constructed statutes concerning garnishment, attachment, receivership, etc."

Id.

There are exceptions, however, to the general rule. *See, e.g., Deckert v. Indep. Shares Corp.*, 311 U.S. 282, 289 (1940) (party seeking injunction to preserve assets or their proceeds that are subject to a pled equitable remedy such as rescission, constructive trust, or restitution); *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002) (party seeking injunction to enjoin assets that form basis of underlying suit, i.e., right to the asset is basis of suit); *Texas Black Iron, Inc. v. Arawak Energy Int'l, Ltd*., 527 S.W.3d 579, 586 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (affirming injunction where particular drilling equipment sought to be enjoined was basis of contract dispute and there was evidence that defendant was near insolvent); *Khaledi v. H.K. Global Trading, Ltd.*, 126 S.W.3d 273, 278-79 (Tex. App.—San Antonio 2003, no pet.) (party seeking injunction has security interest in asset sought to be enjoined); *Nowak*, 898 S.W.2d at 11 (citing *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 45 (1st Cir. 1986)) (party seeking injunction to enjoin assets specifically set aside for purpose of satisfying potential judgment in underlying suit).

For example, "In some specific circumstances, it is permissible to freeze these type of assets when the defendant is insolvent or likely to be insolvent at the time a judgment is rendered." *Reyes v. Burrus*, 411 S.W.3d at 925. So, if it is likely that the defendant will be insolvent at the time of a judgment, a court does have authority to enter temporary injunctive relief for assets that are not made the basis of the lawsuit. "Insolvent" means: "(A) having generally ceased to pay debts in the ordinary course of business other than as a result of a bona fide dispute; (B) being unable to pay debts as they become due; or (C) being insolvent within the meaning of the federal bankruptcy law." Tex. Bus. & Com. Code Ann. § 1.201(b)(23). Under federal bankruptcy law, insolvent means: "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of-(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and (ii)

property that may be exempted from property of the estate under section 522 of this title [11 USCS § 522]." 11 U.S.C.A. § 101(32)(A).

Moreover, at a temporary injunction stage, the strict rules of insolvency are applied liberally, as a court can grant injunctive relief if a "defendant [is] potentially insolvent or judgment proof." *Tex. Black Iron, Inc. v. Arawak Energy Int'l, Ltd.*, 527 S.W.3d 579 (Tex. App.—Houston [14th Dist.] July 11, 2017, pet. mand. denied) (affirming injunction regarding dissipation of assets). As the *Arawak* court stated:

> TBI does not provide, and we have not located, any case authority that provides, much less strictly requires, analysis of whether a defendant's evidence meets the statutory definition of insolvent in the context of reviewing a temporary injunction. Instead, Texas courts have held temporary injunctions proper where the applicant presented evidence that a defendant was potentially insolvent or judgment proof similar to that presented by Arawak here. *See, e.g.*, *Donaho*, 2008 Tex. App. LEXIS 8783, 2008 WL 4965143, at *4 (statements that "Bank is empty" and "there is a risk of the venture being insolvent"); *Blackthorne*, 61 S.W.3d at 444 ("If the Blackthornes are permitted to transfer the Stock unimpeded by this proceeding, it appears that they become judgment proof."); *Tex. Indus. Gas*, 828 S.W.2d at 533-34 (cash-flow problems); *Surko Enters.*, 782 S.W.2d at 225 (financial distress).

Tex. Black Iron, Inc. v. Arawak Energy Int'l, Ltd., 527 S.W.3d at 588.

Further, it may be permissible to freeze assets unrelated to the subject matter of the suit when the assets would be subject to a pleaded equitable remedy. *Sargeant v. Al Saleh*, 512 S.W.3d 399, 415 (Tex. App.—Corpus Christi 2016, no pet.). *See also Deckert v. Indep. Shares Corp.*, 311 U.S. 282, 289, 61 S. Ct. 229, 85 L. Ed. 189 (1940) (upholding a temporary injunction rendered to restrain the transfer of assets where movant sought equitable relief, including a request for an accounting, appointment of a receiver, an injunction, and restitution); *see also Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 45 (1st Cir.1986) (upholding an injunction where debtor refused to set aside funds to pay breach of contract claim); *Tex. Indus. Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d 529 (Tex. App.—Houston [1st Dist.] 1992, no writ) (concluding that the trial court erred in denying an injunction enforcing a contractual provision pending trial); *Surko Enterprises Inc. v. Borg-Warner*, 782 S.W.2d 223 (Tex. App.—Houston [1st Dist.] 1989, no writ) (upholding an injunction issued to preserve collateral securing a note that the plaintiff sought to collect).

7. Injunctions Related To Fraudulent Transfers

The Texas Uniform Fraudulent Transfer Act may provide a remedy via temporary injunctive relief to counteract a defendant dissipating its assets to become judgment-proof. Tex. Bus. & Com. Code Ann. § 24.001, et seq.; *Rocklon, LLC v. Paris*, No. 09-16-00070-CV, 2016 Tex. App. LEXIS 11393 (Tex. App.—Beaumont October 20, 2016, no pet.). Under TUFTA, the trial court may find substantial likelihood of success on the merits when it is "presented with evidence of intent to defraud the creditor." *Id.* (citing *Tanguy v. Laux*, 259 S.W.3d 851, 858 (Tex. App.—Houston [1st Dist.] 2008, no pet.)). The following discussion is largely from *Sargeant v. Al Saleh*, 512 S.W.3d 399, 415 (Tex. App.—Corpus Christi 2016, no pet.).

The Texas version of the Uniform Fraudulent Conveyance Act, which is known as the Texas Uniform Fraudulent Transfer Act ("TUFTA") is in the Texas Business and Commerce Code. Tex. Bus. & Com. Code Ann. §§ 24.001-.013; *Altus Brands II, LLC v. Alexander*, 435 S.W.3d 432, 441-42 (Tex. App.—Dallas 2014, no pet.); *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 25 (Tex. App.—Tyler 2000, pet. denied). TUFTA was enacted to establish uniformity among the states with respect to fraudulent transfers. Tex. Bus. & Com. Code Ann. § 24.012; *Challenger Gaming Solutions, Inc. v. Earp*, 402 S.W.3d 290, 293 (Tex. App.—Dallas 2013, no pet.). TUFTA is intended to prevent debtors from defrauding creditors by moving assets out of reach. *Altus Brands II, LLC*, 435 S.W.3d at 441; *see, e.g., Challenger Gaming Solutions, Inc.*, 402 S.W.3d at 293; *Arriaga v. Cartmill*, 407 S.W.3d 927, 931 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Yokogawa Corp. of Am. v. Skye Int'l Holdings, Inc.*, 159 S.W.3d 266, 269 (Tex. App.—Dallas 2005, no pet.). "[T]he focus of a [TUFTA] claim is to ensure the satisfaction of a creditor's claim when the elements of a fraudulent transfer are proven." *Challenger Gaming Solutions*, 402 S.W.3d at 298. Accordingly, consistent with its purpose, TUFTA provides a comprehensive statutory scheme through which a creditor may seek recourse for a fraudulent transfer of assets or property. *Altus Brands II, LLC*, 435 S.W.3d at 441; *Tel. Equip. Network, Inc. v. TA/Westchase Place, Ltd.*, 80 S.W.3d 601, 607 (Tex. App.—Houston [1st Dist.] 2002, no pet.). In this regard, TUFTA provides equitable relief. *Altus Brands II, LLC*, 435 S.W.3d at 446; *Arriaga*, 407 S.W.3d at 933.

TUFTA delineates what types of transfers and obligations are fraudulent, enumerates the remedies available to a creditor, prescribes the measure of liability of a transferee, and lists the defenses and protections afforded a transferee. *Altus Brands II, LLC*, 435 S.W.3d at 441; *Challenger Gaming Solutions*, 402 S.W.3d at

294. The judgment creditor has the burden to prove the fraudulent transfer by a preponderance of the evidence. *Altus Brands II, LLC*, 435 S.W.3d at 441; *Doyle v. Kontemporary Builders, Inc.*, 370 S.W.3d 448, 453 (Tex. App.—Dallas 2012, pet. denied). Under TUFTA, the trial court may find substantial likelihood of success on the merits when it is "presented with evidence of intent to defraud the creditor." *Tanguy v. Laux*, 259 S.W.3d 851, 858 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

Actual intent to defraud creditors ordinarily is a fact question. *Qui Phuoc Ho v. Macarthur Ranch, LLC*, 395 S.W.3d 325, 328 (Tex. App.—Dallas 2013, no pet.); *Walker v. Anderson*, 232 S.W.3d 899, 914 (Tex. App.—Dallas 2007, no pet.). However, circumstantial proof may be used to prove fraudulent intent because direct proof is often unavailable. *Qui Phuoc Ho*, 395 S.W.3d at 328; *Doyle*, 370 S.W.3d at 454. Facts and circumstances that may be considered in determining fraudulent intent include a non-exclusive list of "badges of fraud" prescribed by the legislature in section 24.005(b). Tex. Bus. & Com. Code Ann. § 24.005(b); *Qui Phuoc Ho*, 395 S.W.3d at 328. These include, for example, transfer to an insider, suit or threatened suit against the debtor before the transfer, transfer of substantially all of the debtor's assets, the debtor's insolvency at the time of transfer or shortly afterwards, concealment of the transfer, and whether the consideration the debtor received was reasonably equivalent to the asset transferred. Tex. Bus. & Com. Code Ann. § 24.005(b). The presence of several of these factors is sufficient to support a fact finder's reasonable inference of fraudulent intent. *Qui Phuoc Ho*, 395 S.W.3d at 328; *Mladenka v. Mladenka*, 130 S.W.3d 397, 405 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

To be entitled to recovery under TUFTA, a plaintiff must establish that it is a "creditor." Under TUFTA, a "creditor" is "any person who has a claim." Tex. Bus. & Com. Code Ann. § 24.002(4). "Claim" is broadly defined as "a right to payment or property, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured or unsecured." *Id*. § 24.002(3). Section 24.002(12) of TUFTA defines "transfer" as meaning "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset," including "payment of money, release, lease, and creation of a lien or other encumbrance." *Id*. § 24.002(12). Section 24.006(a) states:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Id. § 24.006(a). "Value" is given for a transfer or obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. *Id*. § 24.004(a). A "[r]easonably equivalent value" includes a transfer or obligation that is within the range of values for which the transferor would have sold the asset in an arm's length transaction. Id. § 24.004(d).

"The fundamental remedy for a creditor who establishes a fraudulent transfer is recovery of the property from the person to whom it has been transferred." *Challenger Gaming Solutions, Inc.*, 402 S.W.3d at 294. Section 24.008, titled "Remedies of Creditors," states that a creditor may obtain, "subject to applicable principles of equity and in accordance with applicable rules of civil procedure . . . an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property . . . [or] any other relief the circumstances may require." Tex. Bus. & Com. Code Ann. § 24.008. "This last option is quite broad." *Airflow Houston, Inc. v. Theriot*, 849 S.W.2d 928, 934 (Tex. App.—Houston [1st Dist.] 1993, no writ). Also, a creditor who has obtained a judgment on a claim against the debtor may levy execution on the asset transferred or its proceeds. *Id.; see Hahn v. Love*, 394 S.W.3d 14, 29-30 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

TUFTA provides for both injunctions and attachments. *See* Tex. Bus. & Com. Code § 24.008(a)(2) (attachment); *id*. § 24.008(a)(3)(A) (injunction). A claim for fraudulent transfer under Texas law contemplates the issuance of a preliminary injunction. *Tel. Equip. Network, Inc.*, 80 S.W.3d at 610; *Janvey*, 647 F.3d at 602-03; *Blackthorne v. Bellush*, 61 S.W.3d 439 (Tex. App.—San Antonio 2001, no pet.) (noting that under TUFTA pre-judgment "interim injunctive relief is an available remedy to a fraudulent transfer for which the claimant asserts an equitable interest" to protect the status quo pending trial). Specifically, the claimant may obtain an injunction against further disposition of the asset transferred or of other property. *Id.;* Tex. Bus. & Com. Code Ann. § 24.008(a)(3).

Under TUFTA, the claim can be equitable and need not be matured or reduced to judgment. *Id*. § 24.002(3). Further, the plaintiff's claim need not be against the debtor only, but can also be against the transferee of an asset or the person for whose benefit the transfer was made. *See id*. §§ 24.008, 24.009; *Mack v. Newton*, 737 F.2d 1343, 1361 (5th Cir.1984) (addressing TUFTA's predecessor, the Uniform Fraudulent Conveyance Act).

III. NATURE OF RECEIVERSHIPS

A receiver is an "officer of the court, the medium through which the court acts. He is a disinterested party, the representative and protector of the interests of all persons, including creditors, shareholders and others, in the property in receivership." *Akin, Gump, Strauss, Hauer and Feld, L.L.P. v. E-Court, Inc*., No. 03-02-00714-CV,2003 Tex. App. LEXIS 3966, 2003 WL 21025030 (Tex. App.—Austin May 8, 2003, no pet.) (quoting *Security Trust Co. of Austin v. Lipscomb County*, 142 Tex. 572, 180 S.W.2d 151, 158 (Tex. 1944)). One case has described a receivership as follows:

> A "receiver" is a similarly neutral and uninterested person appointed by the trial court; however, a receiver's role is focused on the protection of the property or funds that are the subject of the case. *Kokernot v. Roos*, 189 S.W. 505, 508 (Tex. Civ. App.—San Antonio 1916, no writ) (role of receiver is to receive and preserve the property or funds at issue in the litigation); see Tex. Civ. Prac. & Rem. Code Ann. §§ 64.001, 64.031-.032 (West 2008). A receiver is a disinterested party who acts as an officer of the court in representing the interests of all persons, including creditors, shareholders, and others, in the property subject to the receivership. *Security Trust Co. of Austin v. Lipscomb County*, 142 Tex. 572, 180 S.W.2d 151, 158 (1944). Subject to the control of the court, a receiver's powers and duties include taking charge and keeping possession of the property, receiving rents, collecting and compromising demands, making transfers of the property, and performing any other act in regard to the property authorized by the court. Tex. Civ. Prac. & Rem. Code Ann. § 64.031; *see also id.* at § 64.033 (West 2008) (receiver may bring suit). Given the scope of a receiver's powers to deal with property, he is required to execute a sufficient bond before assuming the duties of a receiver. *Id*. § 64.023 (West 2008). The appointment of a receiver is recognized as a "harsh, drastic, and extraordinary remedy, to be used cautiously." *Benefield v. State*, 266 S.W.3d 25, 31 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Whether authorized by a particular statute or by equity, a receiver may not be appointed if another lesser remedy exists, either legal or equitable. *Id.; Rowe v. Rowe*, 887 S.W.2d 191, 200 (Tex. App.—Fort Worth 1994, writ denied) (statute permitting appointment of receiver over corporation authorizes receiver only if party seeking relief convinces court that all other legal and equitable remedies are inadequate). Appointment of a receiver is justified only if the evidence shows a threat of serious injury to the applicant's interest in the property. *Benefield*, 266 S.W.3d at 31 (appointment of receiver over the assets and business affairs of a corporation is a radical remedy which should never be applied unless some serious injury is threatened or will result to applicant); *Ritchie v. Rupe*, 339 S.W.3d 275, 285-86 (Tex. App.—Dallas 2011, pet. granted) (receivership to rehabilitate a corporation is a remedy for shareholder oppression, but only as a last resort when less drastic equitable remedies such as a buy-out are inadequate); see Tex. Civ. Prac. & Rem. Code Ann. § 64.001 (property or funds must be in danger of being lost, removed, or materially injured to justify receivership).

Chapa v. Chapa, No. 04-12-00519-CV, 2012 Tex. App. LEXIS 10702, 2012 WL 6728242 (Tex. App.—San Antonio Dec. 28, 2012, no pet.).

Texas statutes or general equity jurisdiction can authorize a receivership. *Sims v. Stegall*, 197 S.W.2d 514, 515 (Tex. Civ. App.—Texarkana 1946, no writ); Tex. Civ. Prac. & Rem. Code § 64.001(a). In equitable proceedings, the application for a receiver must be ancillary to some other ground of recovery. *Hunt v. Merchandise Mart, Inc.*, 391 S.W.2d 141, 145 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.). A party cannot sue solely for an equitable receivership. However, in actions authorized by statute, a party seeking the receivership does not have to have some other independent cause of action. *Sims v. Stegall*, 197 S.W.2d 514, 515 (Tex. Civ. App.—Texarkana 1946, no writ).

Some courts state that a "[r]eceivership is an extraordinarily harsh remedy and one that courts are particularly loathe to utilize." *Hillwood Inv. Props. III, Ltd. v. Radical Mavericks Mgmt., LLC*, No. 05-11-01470-CV, 2014 Tex. App. LEXIS 9348, 2014 WL 4294968, at * 3 (Tex. App.—Dallas Aug. 21, 2014, no pet.) (mem. op.). The burden to show the existence of circumstances justifying the appointment of a receiver rests on the party seeking the appointment. *Id*.

IV. STATUTORY AUTHORITY FOR RECEIVERSHIPS

There are multiple statutes in Texas that allow for receivership relief. The most used statute allowing for receiverships is Texas Civil Practice and Remedies Code Chapter 64 that allows receiverships in specified types of cases and when permitted by the usages of equity. Tex. Civ. Prac. & Rem. Code § 64.001 et seq. There are other statutes that allow receiverships in various areas of law. For example, there are statutes that

allow receiverships for business entities (Tex. Bus. Orgs. Code § 11.403 et seq.), religious congregations (Tex. Civ. Prac. & Rem. Code § 126.001 et seq.), insurers (Tex. Ins. Code Art. 21.28), family law situations (Tex. Fam. Code §§ 6.502(5), 6.709(3)) and mineral interests (Tex. Civ. Prac. & Rem. Code §§ 64.091, 64.092).

A. Texas Civil Practice and Remedies Code

1. Statutory Authority For Creating Receiverships

"Chapter 64 of the Civil Practice and Remedies Code sets forth the circumstances under which a trial court may appoint a receiver." *Perry v. Perry*, 512 S.W.3d 523 (Tex. App.—Houston [1st Dist.] Dec. 13, 2016, no pet.) (citing Tex. Civ. Prac. & Rem. Code Ann. §§ 64.001 et seq.). Section 64.001 provides:

> (a) A court of competent jurisdiction may appoint a receiver: (1) in an action by a vendor to vacate a fraudulent purchase of property; (2) in an action by a creditor to subject any property or fund to his claim; (3) in an action between partners or others jointly owning or interested in any property or fund; (4) in an action by a mortgagee for the foreclosure of the mortgage and sale of the mortgaged property; (5) for a corporation that is insolvent, is in imminent danger of insolvency, has been dissolved, or has forfeited its corporate rights; or (6) in any other case in which a receiver may be appointed under the rules of equity.
>
> (b) Under Subsection (a)(1), (2), or (3), the receiver may be appointed on the application of the plaintiff in the action or another party. The party must have a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured.
>
> (c) Under Subsection (a)(4), the court may appoint a receiver only if:(1) it appears that the mortgaged property is in danger of being lost, removed, or materially injured; or (2) the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt.
>
> (d) A court having family law jurisdiction or a probate court located in the county in which a missing person, as defined by Article 63.001, Code of Criminal Procedure, resides or, if the missing person is not a resident of this state, located in the county in which the majority of the property of a missing person's estate is located may, on the court's own motion or on the application of an interested party, appoint a receiver for the missing person if: (1) it appears that the estate of the missing person is in danger of injury, loss, or waste; and (2) the estate of the missing person is in need of a representative.

Tex. Civ. Prac. & Rem. Code Ann. § 64.001.

Under Subsection (a)(1), (2), or (3), the receiver may be appointed on the application of the plaintiff in the action or another party. *Id*. at § 64.001(b). The party must have a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured. *Id*.

Under Subsection (a)(2), the term "creditor" does not mean any creditor, but a secured creditor. In *Jay & VMK. Corp. v. Lopez*, the court held that the trial court erred in granting a receivership to a buyer seeking to recover earnest money from a corporation because the buyer did not have a security interest in the corporation's property as required by Tex. Civ. Prac. & Rem. Code Ann. § 64.001(a)(2). 572 S.W.3d 698 (Tex. App.—Houston [14th Dist.] Jan. 24, 2019, no pet.). The court stated: "Since this provision was construed in Carter, it has been 'uniformly held that a creditor, to be entitled to a receivership, must be a secured creditor.' A receivership is authorized only as to the specific property or funds to which the lien extends." *Id*.

Section 64.001(a)(3) provides the court may appoint a receiver in an action between parties jointly interested in any property." *Hawkins v. Twin Montana, Inc.*, 810 S.W.2d 441, 444 (Tex. App.—Fort Worth 1991, no writ). Prior to the appointment of a receiver under subsection (a)(3), the trial court must find that the party seeking appointment of the receiver has "a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured." Tex. Civ. Prac. & Rem. Code Ann. § 64.001(b); *In re Estate of Martinez*, NO. 01-18-00217-CV, 2019 Tex. App. LEXIS 2614 (Tex. App.—Houston [1st Dist.] April 2, 2019, no pet.) (reversed receivership in estate case where there was no evidence that property was in danger of being lost, removed, or materially injured). However, the plaintiff does not have to plead or prove that the defendant is insolvent, which is a normal requirement for an equitable receivershijp. *Hawkins v. Twin Montana, Inc*., 810 S.W.2d 441, 444 (Tex. App.—Fort Worth 1991, no writ).

For example, in *In re Estate of Price*, Ray Price, a renowned country music singer and songwriter, died in 2013 and was survived by his wife and his biological son. 528 S.W.3d 591 (Tex. App.—Texarkana 2017, no pet.). Shortly before Price's death, and while he was in the hospital, he transferred most of his assets to his spouse via various deeds and assignment documents. The spouse's sister, who was a secretary, drafted the

various documents. The spouse and son filed competing motions to probate wills purportedly executed by Price, as well as competing will contests. The court appointed a temporary administrator, but almost all of the assets did not belong to the estate due to the last-minute transfers to the spouse. So, the son filed an application to appoint a temporary administrator as receiver over the assets purportedly transferred to the spouse in the month of Price's death. The son alleged that Price did not have the mental capacity to execute the documents. The application for the receiver argued that the spouse had possession and control over all of the contested assets and that she could sell them or "allow them to waste away as she is currently doing." *Id.* The trial court appointed a receiver to take possession of property subject to the will contests. The spouse alleged that Price had capacity to execute the transfer documents, and appealed that order.

The court of appeals cited to Section 64.001(a)(3) of the Texas Civil Practice and Remedies Code that provides that a court may appoint a receiver "in an action between parties jointly interested in any property." *Id*. The court of appeals determined that due to the contest to the transfers, the son had a showing of the requisite interest in the property. The court also determined that the trial court did not abuse its discretion in determining that there was a danger that the property would be lost, removed, or materially injured:

> The trial court heard evidence that Janie had disposed of, and believed she could dispose of, assets subject to the will contests and Clifton's petition to set aside the December 9 documents. In light of the pleadings and evidence presented in this case, we will not disturb the trial court's finding that property Clifton had a probable right or interest in was in danger of being lost, removed, or materially injured.

Id. Therefore, the court of appeals affirmed the appointment of the receiver.

Under Subsection (a)(4), the court may appoint a receiver only if: (1) it appears that the mortgaged property is in danger of being lost, removed, or materially injured; or (2) the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt. Tex. Civ. Prac. & Rem. Code § 64.001(c).

Under Subsection (a)(6), a "court of competent jurisdiction may appoint a receiver" in any case "in which a receiver may be appointed under the rules of equity." Tex. Civ. Prac. & Rem. Code § 64.001(a)(6). Courts have affirmed receivership orders under this provision. *A-Medical Advantage Healthcare Sys., Associated v. Shwarts*, No. 10-18-00050-CV, 2019 Tex. App. LEXIS 11278 (Tex. App.—Waco Dec. 31, 2019); *Pajooh v. Royal W. Invs. LLC*, 518 S.W.3d 557, 2017 Tex. App. LEXIS 2759 (Tex. App.—Houston [1st Dist.] Mar. 30, 2017, no pet.); *In re Estate of Trevino,* 195 S.W.3d 223 (Tex. App.—San Antonio 2006, no pet.); *In re Estate of Herring*, 983 S.W.2d 61 (Tex. App.—Corpus Christi 1998 no pet.), *But see In re Estate of Martinez*, No. 01-18-00217-CV, 2019 Tex. App. LEXIS 2614 (Tex. App.—Houston [1st Dist.] April 2, 2019, no pet.); *Genssler v. Harris County*, 584 S.W.3d 1 (Tex. App.—Houston [1st Dist.] Oct. 7, 2010, no pet.) (equity did not allow trial court to institute a liquidating receivership).

For example, in *Trevino*, the executrix of an estate was the sole beneficiary, and she inherited a bar. 195 S.W.3d at 226. The bar's operator claimed an ownership interest under a handwritten bill of sale. *Id*. The executrix engaged an attorney to recover the property and resolve the operator's ownership claims, and for that representation she agreed to 40% contingency fee. *Id*. When the attorney prevailed in favor of the executrix, he became a 40% owner of the bar, which he contended the executrix was mismanaging. *Id*. at 228. The attorney then petitioned the court for partition by sale and appointment of a receiver, which the court granted. *Id*. On appeal the executrix argued that, in an action between co-owners of property, a receiver may be appointed under section 64.001(a)(3) upon a showing that the property is "in danger of being lost, removed, or materially injured." *Id*. at 231. The court of appeals noted that, under what was then subsection (a)(5), a trial court could appoint a receiver based on the rules of equity. *Id*. The court of appeals observed that "the appointment of a receiver will solve most, if not all, of the vexations and problems confronting the parties on the issue of partition, as well as management of the properties." *Id*. at 231 (quoting *Herring*, 983 S.W.2d at 65). The court of appeals concluded that the court could have appointed a receiver on an equitable basis due to the years of disputes and ongoing litigation about the management of the bar. *Id*.

However, in *Mueller v. Beamalloy, Inc.*, 994 S.W.2d 855 (Tex. App.—Houston [1st Dist.] 1999, no pet.), a court considered an interlocutory appeal from an order appointing a receiver to liquidate a corporation. 994 S.W.2d at 857. Mueller and Wilson jointly owned an electron-beam welding business. *Id*. After about 15 years, Mueller brought a shareholder's derivative suit against Wilson. *Id*. On Wilson's application, which was based on the Business Corporations Act and the "rules of equity" provision of section 64.001, the trial court appointed a receiver to liquidate Beamalloy. *Id*. at 857-58. Mueller appealed. *Id*. at 858. On appeal, the court noted that then section 64.001(a)(5) applied to corporations, but required a showing of insolvency, dissolution, or forfeiture of corporate rights to justify appointment of a receiver. *Id*. at 861. Beamalloy could not satisfy that requirement. *Id.* at 861 The court also

considered the language of the rules-of-equity provision, which was then section 64.001(a)(7) and is currently codified as section 64.001(a)(6). *Id.; see* Tex. Civ. Prac. & Rem. Code § 64.001(a)(6). That provision authorized the appointment of a receiver "in any other case in which a receiver may be appointed under the rules of equity." *See Mueller*, 994 S.W.2d at 861. The court explained: "In authorizing a receiver in any other case, subsection (a)(7) applies to instances beyond those listed" in the other subsections." *Mueller*, 994 S.W.2d at 861. "Given the specific grant of authority to appoint a receiver for a corporation under the circumstances listed in section 64.001(a)(5), the trial court had no authority to appoint a receiver" for Beamalloy under the rules-of-equity provision. *Id. See also In re Estate of Martinez*, No. 01-18-00217-CV, 2019 Tex. App. LEXIS 2614 (Tex. App.—Houston [1st Dist.] April 2, 2019, no pet.).

A court may not appoint a receiver for a corporation, partnership, or individual on the petition of the same corporation, partnership, or individual. Tex. Civ. Prac. & Rem. Code § 64.002(a). A court may appoint a receiver for a corporation on the petition of one or more stockholders of the corporation. *Id*. at § 64.002(b). This section does not prohibit: (1) appointment of a receiver for a partnership in an action arising between partners; or (2) appointment of a receiver over all or part of the marital estate in a suit filed under Title 1 or 5, Family Code. *Id*. at § 64.002(c).

Even though "[a] receiver appointed pursuant to section 64.001(a) and (b) of the Texas Civil Practice and Remedies Code is not required to show that no other adequate remedy exists," "[t]he appointment of a receiver is a harsh, drastic, and extraordinary remedy, which must be used cautiously." *In re Estate of Trevino*, 195 S.W.3d 223, 231 (Tex. App.—San Antonio 2006, no pet.); *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. E-Court, Inc.*, No. 03-02-00714-CV, 2003 Tex. App. LEXIS 3966, 2003 WL 21025030, at *4 (Tex. App.—Austin May 8, 2003, no pet.).

Courts have upheld the appointment of a receiver under this statute. *A-Medical Advantage Healthcare Sys., Associated v. Shwarts*, No. 10-18-00050-CV, 2019 Tex. App. LEXIS 11278 (Tex. App.—Waco Dec. 31, 2019, no pet.*); In re Estate of Trevino*, No. 04-05-00202-CV, 2005 Tex. App. LEXIS 6827 (Tex. App. San Antonio Aug. 24, 2005), op. withdrawn, sub. op., 195 S.W.3d 223, 2006 Tex. App. LEXIS 1201 (Tex. App.—San Antonio Feb. 15, 2006) (danger of business being lost); *Dayton Reavis Corp. v. Rampart Capital Corp.*, 968 S.W.2d 529 (Tex. App.—Waco Apr. 29, 1998, pet. dism'd w.o.j.); *Smith v. Smith*, 681 S.W.2d 793 (Tex. App.—Houston [14th Dist.] Oct. 18, 1984, no writ) (partner's conduct placed partnership property in jeopardy); *Robinson v. Thompson*, 466 S.W.2d 626 (Tex. Civ. App.—Eastland 1971, no writ) (corporation was wasting assets); *Ellman v. Reinarz*, 390 S.W.2d 519 (Tex. Civ. App.—Austin May 5, 1965, pet. dism'd w.o.j.) (company was insolvent).

2. Statutes On The Operation of the Receivership

The Texas Civil Practice and Remedies Code provides details for the operation of a receivership. It should be noted that "Unless inconsistent with this chapter or other general law, the rules of equity govern all matters relating to the appointment, powers, duties, and liabilities of a receiver and to the powers of a court regarding a receiver." Tex. Civ. Prac. & Rem. Code § 64.004. The statute discusses the qualifications, oath, and bond requirement for the receiver. *Id*. at § 64.021-64.023.

It also discusses the general powers and duties of a receiver. For example, a receiver, "subject to the control of the court," may: "(1) take charge and keep possession of property; (2) receive rents; (3) collect and compromise demands; (4) make transfers; and (5) perform other acts in regard to the property as authorized by the court." Tex. Civ. Prac. & Rem. Code § 64.031. "As soon as possible after appointment, a receiver shall return to the appointing court an inventory of all property received." *Id*. at § 64.032. A receiver may bring suits without permission of the court. *Id.* at § 64.033. A receiver may generally invest for interest any funds that he holds. *Id*. at § 64.034.

A receiver shall apply the earnings of property held in receivership to the payment of the following claims in the order listed: (1) court costs of suit; (2) wages of employees due by the receiver; (3) debts owed for materials and supplies purchased by the receiver for the improvement of the property held as receiver; (4) debts due for improvements made during the receivership to the property held as receiver; (5) claims and accounts against the receiver on contracts made by the receiver, personal injury claims and claims for stock against the receiver accruing during the receivership, and judgments rendered against the receiver for personal injuries and for stock killed; and (6) judgments recovered in suits brought before the receiver was appointed. *Id*. at § 64.051; *RSS Rail Signal Sys. Corp. v. Carter Stafford Arnett Hamada & Mockler, PLLC*, 458 S.W.3d 72 (Tex. App.—El Paso Oct. 10, 2014, no pet.).

Parties may sue a receiver in their official capacity. A receiver who holds property in this state may be sued in his official capacity in a court of competent jurisdiction without permission of the appointing court. Tex. Civ. Prac. & Rem. Code § 64.0052. "The discharge of a receiver does not abate a suit against the receiver or affect the right of a party to sue the receiver." *Id*. The court that appointed a receiver shall order any judgment against the receiver to be paid from funds held by the receiver. *Id*. at § 64.053. Further persons receiving receivership property can be liable for the receivership debts. *Id*. at § 64.056.

There is a difference between suing the receiver in its official capacity, where the judgement is paid from the receivership estate, and suing the receiver in its individual capacity. In *Glasstex, Inc. v. Arch Aluminum & Glass Co*., the court dismissed certain claims against a receiver, individually, due to judicial immunity. No. 13-07-00483-CV, 2016 Tex. App. LEXIS 1869 (Tex. App.—Corpus Christi Feb. 25, 2016). The court stated:

> [A] receiver who holds property in this state may be sued in his official capacity in a court of competent jurisdiction without permission of the appointing court, and a suit against a receiver may be brought where the person whose property is in receivership resides. *See id*. § 64.052(a)-(b) (West, Westlaw through 2015 R.S.). However, while some suits against receivers are permitted, this suit is not. *Compare Alpert v. Gerstner*, 232 S.W.3d 117, 118 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (recognizing derived judicial immunity of court-appointing receivers but permitting a suit against a court-appointed receiver for breach of fiduciary duties) with *Ramirez v. Burnside & Rishebarger, L.L.C.*, No. 04-04-00160-CV, 2005 Tex. App. LEXIS 6065, 2005 WL 1812595, at *2 (Tex. App.—San Antonio Aug. 3, 2005, no pet.) (mem. op.) (affirming dismissal of action against court-appointed receiver under the derived judicial immunity doctrine).
>
> Glasstex's pleadings assert three causes of action against Grissom: (1) wrongful collection, (2) conversion, and (3) abuse of process. Each of these causes of actions relate to Grissom's actions as an agent of the court pursuant to the Montgomery County trial court's turnover order and appointment of Grissom as receiver. When a receiver acts as an arm of the court and the suit is based on actions taken within the scope of the receiver's authority, as in this case, derived judicial immunity shields the court-appointed receiver. *See Halsey*, 87 S.W.3d at 554; *see also Rehabworks, LLC v. Flanagan*, No. 03-07-00552-CV, 2009 Tex. App. LEXIS 1394, 2009 WL 483207, at *4 (Tex. App.—Austin Feb. 26, 2009, pet. denied) (mem. op.). When immunity from suit exists, as in this case with regard to Grissom acting as a court-appointed receiver, the trial court is deprived of subject-matter jurisdiction. *See Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006).

Id. *See also Davis v. West*, 317 S.W.3d 301, 2009 Tex. App. LEXIS 9921 (Tex. App.—Houston [1st Dist.] Dec. 31, 2009, no pet.); *Rehabworks, LLC v. Flanagan*, No. 03-07-00552-CV, 2009 Tex. App. LEXIS 1394 (Tex. App.—Austin Feb. 26, 2009).

The statute also provides detailed provisions for receiverships over corporations (Tex. Civ. Prac. & Rem. Code §§ 64.071 — 64.090), certain mineral interests (§§ 64.091 — 64.100), and certain missing persons (*Id*. at §§64.101 — 64.108).

B. Texas Business Organizations Code

1. History

In 1955, the Texas Legislature created Texas Corporations Act art. 7.05, which provided for receiverships. *See* Act of Mar. 30, 1955, 54th Leg., R.S., ch. 64, art. 7.05, 1955 Tex. Gen. Laws 239, 290-91, amended by Act of May 3, 1961, 57th Leg., R.S., ch. 169, 1, 1961 Tex. Gen. Laws, 319, 319 (formerly Tex. Bus. Corp. Act art. 7.05). That statute was recodified in 2010 into Texas Organizations Code. Act of May 13, 2003, 78th Leg., R.S., ch. 182, § 2, 2003 Tex. Gen. Laws 267 (current version at Tex. Bus. Orgs. Code § 11.404). See Act of May 13, 2003, 82nd Leg., R.S., ch. 182, § 1, 2003 Tex. Gen. Laws 267. For the effective date of the new statute for various receivership actions see Texas Business Organizations Code Sections 402.001-.005.

2. Domestic Entities Must Follow Requirements of Code

"A receiver may be appointed for a domestic entity or for a domestic entity's property or business only as provided for and on the conditions set forth in this code." Tex. Bus. Orgs. Code § 11.401. *Spiritas v. Davidoff*, 459 S.W.3d 224 (Tex. App.—Dallas Feb. 27, 2015, no pet.). "Domestic entity" is defined for purposes of business organizations code as "an organization formed under or the internal affairs of which are governed by this code." Tex. Bus. Orgs. Code § 1.002(18). In *Spiritas v. Davidoff*, the court noted that: "SRE is a Texas limited liability partnership and, according to the parties, JSLC is either a Texas corporation or a 'Texas limited liability company' [, and] [t]herefore, we conclude SRE and JSLC are domestic entities." 459 S.W.3d 224, 235 (Tex. App.—Dallas Feb. 27, 2015, no pet.). The court, therefore, held that: "Accordingly, a receiver may be appointed for SRE and JSLC or their property or business 'only as provided for and on the conditions set forth in" the business organizations code.'" *Id*.

3. Jurisdiction To Appoint Receiver

Regarding jurisdiction, the Business Organizations Code provides:

> (a) A court that has subject matter jurisdiction over specific property of a domestic or foreign

> entity that is located in this state and is involved in litigation has jurisdiction to appoint a receiver for that property as provided by Section 11.403.
>
> (b) A district court in the county in which the registered office or principal place of business of a domestic entity is located has jurisdiction to: (1) appoint a receiver for the property and business of a domestic entity for the purpose of rehabilitating the entity as provided by Section 11.404; or (2) order the liquidation of the property and business of a domestic entity and appoint a receiver to effect that liquidation as provided by Section 11.405.

Tex. Bus. Orgs. Code §11.402.

4. Appointment of Receiver For Specific Property

The Texas Business Organizations Code provides that court can issue a receivership for specific property held by a domestic or foreign entity as follows.

> (a) Subject to Subsection (b), and on the application of a person whose right to or interest in any property or fund or the proceeds from the property or fund is probable, a court that has jurisdiction over specific property of a domestic or foreign entity may appoint a receiver in an action: (1) by a vendor to vacate a fraudulent purchase of the property; (2) by a creditor to subject the property or fund to the creditor's claim; (3) between partners or others jointly owning or interested in the property or fund; (4) by a mortgagee of the property for the foreclosure of the mortgage and sale of the property, when: (A) it appears that the mortgaged property is in danger of being lost, removed, or materially injured; or (B) it appears that the mortgage is in default and that the property is probably insufficient to discharge the mortgage debt; or (5) in which receivers for specific property have been previously appointed by courts of equity.
>
> (b) A court may appoint a receiver for the property or fund under Subsection (a) only if: (1) with respect to an action brought under Subsection (a)(1), (2), or (3), it is shown that the property or fund is in danger of being lost, removed, or materially injured; (2) circumstances exist that are considered by the court to necessitate the appointment of a receiver to conserve the property or fund and avoid damage to interested parties; (3) all other requirements of law are complied with; and (4) the court determines that other available legal and equitable remedies are inadequate.
>
> (c) The court appointing a receiver under this section has and shall retain exclusive jurisdiction over the specific property placed in receivership. The court shall determine the rights of the parties in the property or its proceeds.
>
> (d) If the condition necessitating the appointment of a receiver under this section is remedied, the receivership shall be terminated immediately, and the receiver shall redeliver to the domestic entity all of the property remaining in receivership.

Tex. Bus. Orgs. Code §11.403.

For example, a trial court did not abuse its discretion in appointing a receiver to take control of property that a plaintiff believed secured a note because the record supported the trial court's findings that the plaintiff was a creditor and had a probable interest in or right to the property, and the record supported the finding that the property was in danger of being lost, removed, or materially injured. *Dayton Reavis Corp. v. Rampart Capital Corp.*, 968 S.W.2d 529 (Tex. App.—Waco 1998, pet. dism'd w.o.j.).

In *Spiritas v. Davidoff*, the court held that a receivership order could not be supported under Section 11.403 as the trial court did not appoint the receiver for "specific property." 459 S.W.3d 224, 235 (Tex. App.—Dallas Feb. 27, 2015, no pet.).

5. Appointment of Receiver to Rehabilitate Domestic Entity

The Texas Business Organizations Code provides that court can issue a receivership to rehabilitate a domestic as follows:

> (a) Subject to Subsection (b), a court that has jurisdiction over the property and business of a domestic entity under Section 11.402(b) may appoint a receiver for the entity's property and business if: (1) in an action by an owner or member of the domestic entity, it is established that: (A) the entity is insolvent or in imminent danger of insolvency; (B) the governing persons of the entity are deadlocked in the management of the entity's affairs, the owners or members of the entity are unable to break the deadlock, and irreparable injury to the entity is being suffered or is threatened because of the deadlock; (C) the actions of the governing persons of the entity are illegal, oppressive, or fraudulent; (D) the property of the entity is

> being misapplied or wasted; or (E) with respect to a for-profit corporation, the shareholders of the entity are deadlocked in voting power and have failed, for a period of at least two years, to elect successors to the governing persons of the entity whose terms have expired or would have expired on the election and qualification of their successors; (2) in an action by a creditor of the domestic entity, it is established that: (A) the entity is insolvent, the claim of the creditor has been reduced to judgment, and an execution on the judgment was returned unsatisfied; or (B) the entity is insolvent and has admitted in writing that the claim of the creditor is due and owing; or (3) in an action other than an action described by Subdivision (1) or (2), courts of equity have traditionally appointed a receiver.
>
> (b) A court may appoint a receiver under Subsection (a) only if: (1) circumstances exist that are considered by the court to necessitate the appointment of a receiver to conserve the property and business of the domestic entity and avoid damage to interested parties; (2) all other requirements of law are complied with; and (3) the court determines that all other available legal and equitable remedies, including the appointment of a receiver for specific property of the domestic entity under Section 11.402(a), are inadequate.
>
> (c) If the condition necessitating the appointment of a receiver under this section is remedied, the receivership shall be terminated immediately, the management of the domestic entity shall be restored to its managerial officials, and the receiver shall redeliver to the domestic entity all of its property remaining in receivership.

Tex. Bus. Orgs. Code §11.404.

Section 11.404 is not limited to closely held corporations. *Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014). The Legislature has adopted a single standard for rehabilitative receivership based on oppressive actions that applies to all corporations (and, under the current statute, any "domestic entity") without regard to the number of its shareholders or the marketability of its shares." *Id*.

One of the more common grounds under this statute is for "oppressive" conduct. The Texas Supreme Court stated:

> Dictionary definitions of "oppression" include "[t]he act or an instance of unjustly exercising authority or power," "[c]oercion to enter into an illegal contract," and—reflective of case law addressing claims like Rupe's claim in this case—"[u]nfair treatment of minority shareholders (esp. in a close corporation) by the directors or those in control of the corporation." Black's Law Dictionary 1203 (9th ed. 2009). As these definitions and the Legislature's other uses of the term demonstrate, "oppressive" is a broad term that can mean different things in different contexts. Under the other statutes, a government regulation, a subpoena, the amount of bail, the use of military or official authority, a franchise agreement, and a debt collector's actions can all be "oppressive." Generally, these statutes indicate that "oppressive" actions involve an abuse of power that harms the rights or interests of another person or persons and disserves the purpose for which the power is authorized.

Ritchie v. Rupe, 443 S.W.3d 856 (Tex. 2014). The Court held that directors or managers engage in oppressive actions when they abuse their authority over the corporation with the intent to harm shareholder interests, in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the corporation (all decisions holding to the contrary are disapproved). *Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014). Absent such evidence, directors do not act oppressively in refusing to meet with potential buyers of a minority shareholder's stock. *Id*.

In a case involving the oppressive conduct of a majority shareholder, the Texas Supreme Court held that Texas law did not authorize a buy-out order as a remedy; a claim for shareholder oppression was only available through a statute, and the only remedy available under that statute was a rehabilitative receivership. *Cardiac Perfusion Servs. v. Hughes*, 436 S.W.3d 790 (Tex. 2014). The Court held that a minority shareholder in a closely held corporation could have recovered equitable relief through a derivative action for breach of fiduciary duties, and a remand was appropriate in the interest of justice to determine whether the minority shareholder was able to pursue such a claim. *Id*. *See also Mandel v. Thrasher (In re Mandel)*, 578 Fed. Appx. 376, 2014 U.S. App. LEXIS 15709 (5th Cir. Tex. 2014) (Bankruptcy court should not have awarded plaintiffs compensatory damages on the shareholder oppression claim because the Supreme Court of Texas made clear that Tex. Bus. Orgs. Code Ann. § 11.404 creates a single cause of action with a single remedy and that remedy is not the award of compensatory damages but the appointment of a rehabilitative receiver.).

In *Spiritas v. Davidoff*, the court held that the receiver under Section 11.404(a)(1)(B) was not possible

as there was not sufficient evidence of irreparable harm. 459 S.W.3d 224 (Tex. App.—Dallas Feb. 27, 2015, no pet.).

In Xr-5, LP v. Margolis, the court affirmed in part and reversed in a part an order appointing a receiver under Section 11.404. No. 02-10-00290-CV, 2011 Tex. App. LEXIS 2181 (Tex. App.—Fort Worth March 24, 2011, no pet.). Regarding the entity, the court affirmed, holding: "The evidence shows ongoing mismanagement of XR-5's funds and business affairs, the existence of J&M's lien (though not specified in detail), J&M's pending lawsuit against XR-5 for repossession of a pump and monies owed, and Express's lien against XR-5 for $28,212.85." *Id*. Regarding a property's owner, the court reversed, holding: "Appellees' evidence—the three affidavits—fails to show that the land was in imminent danger of foreclosure and that a receivership over Skull Creek was necessary to protect Appellees' interest in the well." *Id*.

In *Fortenberry v. Cavanaugh*, the court reversed a rehabilitative receivership whre there were other adequate remedies. No. 03-04-00816-CV, 2005 Tex. App. LEXIS 4665, 2005 WL 1412103 (Tex. App.—Austin June 16, 2005, no pet.).

In *Robinson v. Thompson*, there was ample evidence showing a waste and misapplication of the assets of the corporation that supported a receivership order. 466 S.W.2d 626 (Tex. Civ. App.—Eastland 1971, no writ). The evidence shows that the president of the corporation and other salaried personnel who were receiving salaries monthly in advance were performing no worthwhile work for the corporation, and that actually nothing was being done for the benefit of the corporation; that all of the assets of the corporation with the exception of its office furniture and a small amount of oil field equipment have been disposed of; that the corporation was spending about $1,100 per month and had no income, and that the operating budget would have completely dissipated current assets of the corporation within a couple of months; that the corporation has no properties to develop, no money with which to develop them, and nothing in the way of assets in Australia except some office furniture. *Id*. There was ample evidence in support of the finding that the president of the corporation was conducting ruinous business policies which would result in insolvency if continued. *Id*.

In *Citizens Bldg., Inc. v. Azios*, the court affirmed a receivership order. 590 S.W.2d 569, 572 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.). The evidence showed that the corporation had paid no rent under its lease with the Trust, that there were disputes among the directors as to what debts the corporation owed, there were disputes as to the rightful president, bookkeeper, collection agent and official depository of the corporation. *Id*. This evidence when considered together with the evidence of the personal animosity existing between the owners, would support a finding by the court that the corporation was in imminent danger of insolvency. *Id*. Even though the obligations of the corporation were being satisfied by the shareholders in some instances, the obligations remain those of the corporation. The ramifications of the failure of the corporation to meet its obligations were apparent to the trial court. *Id*.

In *Alert Synteks, Inc. v. Jerry Spencer, L.P.*, the court held that the trial court erred in entering a receivership order:

> To iterate, among the requirements that must be met before a trial court can appoint a receiver under Section 7.04 is that the trial court determine that other remedies available either at law or in equity are inadequate. See TEX. BUS. CORP. ACT § 7.04(A); *see also Associated Bankers Credit Co. v. Meis*, 456 S.W.2d 744, 750 (Tex. Civ. App.-Corpus Christi 1970, no writ) (under Section 7.04, a receiver will not be appointed if the status of the property can be maintained and the rights of the applicant protected pending a hearing by the issuance of a restraining order or temporary injunction, or by any remedy less drastic than a receivership).
>
> In the case at hand, Spencer offered no evidence at the hearing on its motion to appoint a receiver to support the trial court's finding that other remedies available either at law or in equity were inadequate. No evidence of record supports that other methods which could potentially be employed to trace the missing funds, such as traditional discovery, had been attempted and failed or were otherwise unavailable. In fact, there is no indication in the record that any discovery had been attempted at the time the trial court granted Spencer's motion. Moreover, the record is silent as to reasons why injunctive relief could not be employed to preserve assets or why monetary damages would not provide an adequate remedy. We hold that by granting Spencer's motion to appoint a receiver where there was no evidence supporting its finding that other remedies available either at law or in equity were inadequate, the trial court abused its discretion.

151 W.3d 246, 253(Tex. App.—Tyler 2004, no pet.).

6. Appointment of Receiver to Liquidate Domestic Entity

The Texas Business Organizations Code provides that court can issue a receivership to liquidate a domestic as follows:

> (a) Subject to Subsection (b), a court that has jurisdiction over the property and business of a domestic entity under Section 11.402(b) may order the liquidation of the property and business of the domestic entity and may appoint a receiver to effect the liquidation: (1) when an action has been filed by the attorney general under this chapter to terminate the existence of the entity and it is established that liquidation of the entity's business and affairs should precede the entry of a decree of termination; (2) on application of the entity to have its liquidation continued under the supervision of the court; (3) if the entity is in receivership and the court does not find that any plan presented before the first anniversary of the date the receiver was appointed is feasible for remedying the condition requiring appointment of the receiver; (4) on application of a creditor of the entity if it is established that irreparable damage will ensue to the unsecured creditors of the domestic entity as a class, generally, unless there is an immediate liquidation of the property of the domestic entity; or (5) on application of a member or director of a nonprofit corporation or cooperative association and it appears the entity is unable to carry out its purposes.
>
> (b) A court may order a liquidation and appoint a receiver under Subsection (a) only if: (1) the circumstances demand liquidation to avoid damage to interested persons; (2) all other requirements of law are complied with; and (3) the court determines that all other available legal and equitable remedies, including the appointment of a receiver for specific property of the domestic entity and appointment of a receiver to rehabilitate the domestic entity, are inadequate.
>
> (c) If the condition necessitating the appointment of a receiver under this section is remedied, the receivership shall be terminated immediately, the management of the domestic entity shall be restored to its managerial officials, and the receiver shall redeliver to the domestic entity all of its property remaining in receivership.

Tex. Bus. Orgs. Code §11.405.

Trial court's order appointing a receiver for a corporation's assets in order to determine whether to liquidate was affirmed because the appointment statute was not unconstitutional and did not violate the trial court's equity jurisdiction. *Aubin v. Territorial Mortg. Co.*, 640 S.W.2d 737, 1982 Tex. App. LEXIS 4971 (Tex. App.—Houston [14th Dist.] Aug. 19, 1982, no writ).

Before a trial court can order a liquidating receiver, the applicant must plead and prove the right to obtain that relief. In one case, the trial court's order liquidating a corporation lacked statutory authority because there was no application by a creditor, no action by the Attorney General, and the corporation did not request dissolution. *Kaspar v. Thorne*, 755 S.W.2d 151 (Tex. App.—Dallas 1988, no writ).

In another case, the court affirmed the order where the order winding up a joint venture did not violate Texas Business Organizations Code Section 152.701(1) because (1) the statute did not require the joint venture's continuation pending the completion of executory contracts, (2) the order took the joint venture's early lease termination liability, (3) nothing showed a wind-up representative would gain personally, and (4) Tex. Bus. Orgs. Code Ann. § 11.405(b)(3) did not apply. *CBIF Ltd. P'ship v. TGI Friday's Inc.*, No. 05-15-00157-CV, 2016 Tex. App. LEXIS 12844 (Tex. App.—Dallas Dec. 5, 2016), *op. withdrawn, sub. op., vacated*, No. 05-15-00157-CV, 2017 Tex. App. LEXIS 3605 (Tex. App.—Dallas Apr. 21, 2017, no pet.).

In *Spiritas v. Davidoff*, the court held that an order appointing a receiver was not supported by Section 11.405 as there was not sufficient evidence of irreparable damage. 459 S.W.3d 224, 235 (Tex. App.—Dallas Feb. 27, 2015, no pet.). The court stated:

> We concluded above the record does not show that at the time of the order in question, the trial court had before it any evidence of an "irreparable injury" being "suffered" or "threatened." See id. § 11.404(a)(1)(B). The parties do not address whether "irreparable damage" is distinguishable from "irreparable injury" and we have found no authority to support any difference between those terms. *Cf. Fite v. Emtel, Inc.*, No. 01-07-00273-CV, 2008 Tex. App. LEXIS 7343, 2008 WL 4427676, at *5 (Tex. App.—Houston [1st Dist.] Oct. 2, 2008, pet. denied) (mem. op.) (using terms "irreparable injury" and "irreparable damage" without distinction in analysis of whether evidence supported appointment of receiver under predecessor to section 11.404). Accordingly, we conclude the record does not show any evidence, at the time of the order in question, of "irreparable damage" that "will ensue."

Id.

7. Other Provisions

The Texas Business Organizations Code provides for the qualifications, powers, and duties of receivers as follows:

> (a) A receiver appointed under this chapter: (1) must be an individual citizen of the United States or an entity authorized to act as receiver; (2) shall give a bond in the amount required by the court and with any sureties as may be required by the court; (3) may sue and be sued in the receiver's name in any court; (4) has the powers and duties provided by other laws applicable to receivers; and (5) has the powers and duties that are stated in the order appointing the receiver or that the appointing court: (A) considers appropriate to accomplish the objectives for which the receiver was appointed; and (B) may increase or diminish at any time during the proceedings.
>
> (b) To be appointed a receiver under this chapter, a foreign entity must be registered to transact business in this state.

Tex. Bus. Orgs. Code §11.406.

The Texas Business Organizations Code provides for a court-ordered filing of claims as follows:

> (a) In a proceeding involving a receivership of the property or business of a domestic entity, the court may require all claimants of the domestic entity to file with the clerk of the court or the receiver, in the form provided by the court, proof of their respective claims under oath.
>
> (b) A court that orders the filing of claims under Subsection (a) shall: (1) set a date, which may not be earlier than four months after the date of the order, as the last day for the filing of those claims; and (2) prescribe the notice that shall be given to claimants of the date set under Subdivision (1).
>
> (c) Before the expiration of the period under Subsection (b) for the filing of claims, a court may extend the period for the filing of claims to a later date.
>
> (d) A court may bar a claimant who fails to file a proof of claim during the period authorized by the court from participating in the distribution of the property of the domestic entity unless the claimant presents to the court a justifiable excuse for its delay in filing. A court may not order or effect a discharge of a claim of the claimant described by this subsection.

Tex. Bus. Orgs. Code §11.407.

Sec. 11.408. Supervising Court; Jurisdiction; Authority.

> (a) A court supervising a receivership under this subchapter may, from time to time:
>
> (1) make allowances to a receiver or attorney in the proceeding; and
>
> (2) direct the payment of a receiver or attorney from the property of the domestic entity that is within the scope of the receivership or the proceeds of any sale or disposition of that property.
>
> (b) A court that appoints a receiver under this subchapter for the property or business of a domestic entity has exclusive jurisdiction over the domestic entity and all of its property, regardless of where the property is located.

Tex. Bus. Orgs. Code §11.408.

Sec. 11.409. Ancillary Receiverships of Foreign Entities.

> (a) Notwithstanding any provision of this code to the contrary, a district court in the county in which the registered office of a foreign entity doing business in this state is located has jurisdiction to appoint an ancillary receiver for the property and business of that entity when the court determines that circumstances exist to require the appointment of an ancillary receiver.
>
> (b) A receiver appointed under Subsection (a) serves ancillary to a receiver acting under orders of an out-of-state court that has jurisdiction to appoint a receiver for the entity.

Tex. Bus. Orgs. Code §11.409.

Sec. 11.410. Receivership for All Property and Business of Foreign Entity.

> (a) A district court may appoint a receiver for all of the property, in and outside this state, of a foreign entity doing business in this state and its business if the court determines, in accordance with the ordinary usages of equity, that circumstances exist that necessitate the

> appointment of a receiver even if a receiver has not been appointed by another court.
>
> (b) The appointing court shall convert a receivership created under Subsection (a) into an ancillary receivership if the appointing court determines an ancillary receivership is appropriate because a court in another state has ordered a receivership of all property and business of the entity.

Tex. Bus. Orgs. Code §11.410.

Sec. 11.411. Governing Persons and Owners Not Necessary Parties Defendant.

> Governing persons and owners or members of a domestic entity are not necessary parties to an action for a receivership or liquidation of the property and business of a domestic entity unless relief is sought against those persons individually.

Tex. Bus. Orgs. Code §11.411.

Sec. 11.412. Decree of Involuntary Termination.

In an action in which the court has ordered the liquidation of the property and business of a domestic entity in accordance with other provisions of this code, the court shall enter a decree terminating the existence of the entity:

> (1) when the costs and expenses of the action and all obligations and liabilities of the domestic entity have been paid and discharged or adequately provided for and all of the entity's remaining property has been distributed to its owners and members; or
>
> (2) if the entity's property is not sufficient to discharge the costs and other expenses of the action and all obligations and liabilities of the entity, when all the property of the entity has been applied toward their payment.

Tex. Bus. Orgs. Code §11.412.

C. Texas Property Code (Trusts)

The Texas Property Code expressly provides for a receivership as a remedy for an actual or suspected breach of trust. Section 114.008 provides in part:

> (a) To remedy a breach of trust that has occurred or might occur, the court may: … (5) appoint a receiver to take possession of the trust property and administer the trust; (6) suspend the trustee; (7) remove the trustee as provided under Section 113.082; … (10) order any other appropriate relief.

Tex. Prop. Code § 114.008; *Estate of Hoskins*, 501 S.W.3d 295, 301(Tex. App.—Corpus Christi 2016, no pet.).

For example, in *Estate of Benson*, a beneficiary of a trust sought to remove the trustee, her father, for allegedly violating his fiduciary duties in administering the trust assets. No. 04-15-00087-CV, 2015 Tex. App. LEXIS 9477 (Tex. App.—San Antonio Sept. 9, 2015, pet. dism. by agr.). The trustee's relationship with the beneficiary and her adult children (who were remainder beneficiaries under the trust) became strained in December of 2014, when, according to the beneficiary, the trustee began exhibiting troubling behavior with them, as well as other business associates involved in managing trust assets. In a two-day evidentiary hearing, the beneficiary presented evidence that her father had cut off contact with her, banned her and her children from the trust's assets' facilities, and made a substantial and abrupt withdrawal from Lone Star Capital Bank, which the trust owned a 97% interest in and which placed the bank in an urgent situation. The beneficiary also presented evidence that the trustee had secretly relocated the office of the trust's bookkeeper to the trustee's condominium without telling anyone where she was going. Although the trustee himself did not testify at the hearing, he presented evidence that his relationship with the beneficiary was strained and that he no longer wanted any contact with them.

Following the hearing, the trial court entered an order appointing two temporary co-receivers to take control of the trust and the estate that created the trust, and further authorized the co-receivers to manage the business and financial affairs of the trust and essentially perform any actions necessary to preserve the trust's value. A few days later, the court issued a temporary injunction enjoining the trustee from taking any action related to the trust.

The court of appeals rejected the trustee's challenges to the appointment of temporary co-receivers and affirmed that part of the trial court's order. The court determined that the trial court had some evidence that there was a breach of trust to support its decision to appoint co-receivers, relying on the evidence presented at the temporary injunction hearing. The trustee not only had a duty to exercise the care and judgment that he would exercise when managing his own affairs, but also a duty to fully disclose any material facts that *might* affect the beneficiary's rights. Rejecting the trustee's arguments that appointment of co-receivers could not be defended under requirements of equity, the court noted that the beneficiary had sought receivers under section 114.008(a)(5) of the Texas Property Code, not under equitable grounds. Under the statute, a movant need not prove the elements of equity; thus, the beneficiary in this case was not required to produce evidence of irreparable harm or lack of another remedy.

The court of appeals's holding that the requirements of equity need not be satisfied for receivership applications under section 114.008 of the Texas Trust Code appears to be an issue of first impression. In another recent case involving a receivership appointment over trust assets, *Elliott v. Weatherman*, the court recognized the Texas Trust Code as providing separate authority for receivership appointments but held that even if a specific statutory provision authorized a receivership, "a trial court should not appoint a receiver if another remedy exists at law or in equity that is adequate and complete." 396 S.W.3d 224, 228 (Tex. App.—Austin 2013, no pet.) (holding trial court abused its discretion in appointing a receiver over the property and citing cases not involving receiverships over trust property).

Under this provision, a court does not have to grant a receiver all powers and may limit those powers. In *In re Estate of Hoskins*, the appellate court held that the trial court's appointing of a receiver to create a report did not require a finding that all other measures would be inadequate. 501 S.W.3d 295 (Tex. App.—Corpus Christi Sept. 8, 2016, no pet.). The court held that there was evidence of a breach of trust, and the order did not grant the duties and powers ordinarily conferred upon a receiver but instead resembled appointing an auditor. *Id*.

In *Elliott v. Weatherman*, the appellate court held that the trial court abused its discretion in appointing a receiver over trust assets because the evidence was insufficient to justify the appointment of a receiver without notice to the trustee and the opportunity to be heard. 396 S.W.3d 224 (Tex. App.—Austin Feb. 8, 2013, no pet.).

In *In re Estate of Herring*, the trial court issued an order to an estate administrator to sell some of the estate's community property so that the proceeds could be partitioned among the family members. 983 S.W.2d 61, 65 (Tex. App.—Corpus Christi 1998, no pet.). After the administrator failed to carry out the order, the administrator asked the court to appoint a receiver to assist him in his duties. *See id*. The appellate court upheld the trial court's appointment of a receiver with the bona fide authority to control matters of the estate. *Id*. It saw no harm or harshness in appointing a receiver to work alongside the administrator "to take an action which [the administrator] had full authority to take on his own . . . ." *Id*. The court reasoned:

> the past, this Court approved of the appointment of a receiver to partition property within an estate where the heirs cannot agree, noting that "the appointment of a receiver will solve most, if not all, of the vexations and problems confronting the parties on the issue of partition, as well as management of the properties. . . ."

Id. (quoting *Gonzalez v. Gonzalez*, 469 S.W.2d 624, 632 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.)).

D. Equity

Rules of equity govern all matters relating to the appointment, powers, duties, and liabilities of a receiver, and to the powers of a court regarding receivers, to the extent that they are not inconsistent with applicable statutory provisions or with the general laws of the state. Tex. Civ. Prac. & Rem. Code Ann. § 64.004. Where, however, a receivership is sought under one of the statutory provisions authorizing the appointment of a receiver, the right to the remedy is legal and determinable primarily by the statute rather than by rules of equity. *Batchelor v. Pacific Finance Corp.*, 202 S.W.2d 857 (Tex. Civ. App.—Dallas 1947, no writ). Questions such as the adequacy of some other remedy, the existence of a less drastic remedy in equity, and the insolvency of the defendant are not controlling with reference to the statutory right to an appointment. *Friedman Oil Corporation v. Brown*, 50 S.W.2d 471 (Tex. Civ. App.—Texarkana 1932); *Hunt v. State*, 48 S.W.2d 466 (Tex. Civ. App.—Austin 1932); *Temple State Bank v. Mansfield*, 215 S.W. 154 (Tex. Civ. App.—Galveston 1919, writ dismissed w.o.j.).

Regarding equity in general, Texas Jurisprudence states:

> The appointment of a receiver on equitable grounds may be obtained in suits for the cancellation of an instrument, or for specific performance, as well as in actions involving title to real property. A receiver may also be appointed to conserve the assets of an unincorporated association. Conduct in the nature of fraud, and persistence in the taking of undue advantage with respect to the use and operation of property of a special character, such as oil lands, will also afford equitable ground for the appointment of a receiver where damage and loss result, but there must be some equitable ground to justify the appointment of a receiver.

64 Tex. Jur. 3rd, Receivers, § 43.

Regarding trust property, Texas Jurisprudence states:

> Under some circumstances, a court of equity will appoint a receiver of trust property in the hands of a trustee or of anyone that may be in possession of the property. A court will not generally interfere with the interests or rights of a trustee in the absence of a showing of abuse or danger of abuse of the trust fund or unless there is danger of loss or injury if the

> property remains in the trustee's possession. A receiver may be appointed where the trustees omit to act, repudiate their trust, or refuse to act. A receiver may also be appointed on a showing of the insolvency of a trustee where receivership is necessary to protect the trust fund or where the trustee has allowed trust property to be wasted by a trespasser. Similarly, where a debtor conveys property to a trustee with directions to sell it and pay certain debts, an unsecured creditor may have a receiver appointed. A receivership may also be ordered for the purpose of winding up the affairs of a common law trust n8Link to the text of the note and on the failure of a trust
> 64 Tex. Jur. 3rd, Receivers, § 45.

In equity, an applicant should show a right to, or interest in, the property or fund in litigation or show at least a probable right or interest in either. *Continental Homes Co. v. Hilltown Property Owners Ass'n, Inc*., 529 S.W.2d 293 (Tex. Civ. App.—Fort Worth 1975); *Pelton v. First Nat. Bank of Angleton*, 400 S.W.2d 398 (Tex. Civ. App.—Houston 1966, no writ); *Wadsworth v. Cole*, 265 S.W.2d 628 (Tex. Civ. App.—El Paso 1954). An applicant must show that the property or fund in litigation is in danger of being lost, removed, or materially injured. *B & W Cattle Co. v. First Nat. Bank of Hereford*, 692 S.W.2d 946 (Tex. App.—Amarillo 1985); *Smith v. Smith*, 681 S.W.2d 793 (Tex. App.—Houston [14th Dist.] 1984, no writ); *Rubin v. Gilmore*, 561 S.W.2d 231 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). An applicant must show that there is some advantage from the appointment as equity does not do vain thing. *Grandfalls Mut. Irr. Co. v. White*, 62 Tex. Civ. App. 182, 131 S.W. 233 (1910); *Simpson v. Alexander*, 188 S.W. 285 (Tex. Civ. App.—Austin 1916); *Bounds v. Stephenson*, 187 S.W. 1031 (Tex. Civ. App.—Dallas 1916 writ ref'd).

An applicant must show that another remedy does not exist at law or in equity. *Trevino v. Starr County*, 660 S.W.2d 140 (Tex. App.—San Antonio 1983, writ dism); *Robinson v. Thompson*, 466 S.W.2d 626 (Tex. Civ. App.—Eastland 1971, no writ); *Pfeiffer v. Pfeiffer*, 394 S.W.2d 679 (Tex. Civ. App.—Houston 1965, writ dism.). Otherwise stated, an applicant must show that there is a necessity for the receivership in order to have an equitable receivership. *Pouya v. Zapa Interests, Inc*., No. 03-07-00059-CV, 2007 Tex. App. LEXIS 7243, 2007 WL 2462001 (Tex. App.—Austin Aug. 13, 2007, no pet.); *Whitson Co. v. Bluff Creek Oil Co.*, 256 S.W.2d 1012, 1015 (Tex. Civ. App.—Fort Worth 1953, writ dism'd w.o.j.).

In equity, the claim for a receiver must be ancillary to an independent cause of action. *Pelton v. First Nat'l Bank of Angleton*, 400 S.W.2d 398, 401 (Tex. Civ. App.—Houston 1966, no writ). A party cannot solely seek an equitable receiverhip.

Although insolvency of the owner or the one in possession of a fund or property in controversy is usually an important element bearing on the necessity and propriety of appointing a receiver, not every case of receivership according to the usage of the court of equity depends on a showing of insolvency. *Dillingham v. Putnam*, 109 Tex. 1, 14 S.W. 303 (1890); *Duncan v. Thompson*, 25 S.W.2d 634 (Tex. Civ. App.—Dallas 1930); *Rische v. Rische*, 46 Tex. Civ. App. 23, 101 S.W. 849 (1907, writ dism.); *Richardson v. McCloskey*, 228 S.W. 323 (Tex. Civ. App.—Austin 1920, writ dismissed w.o.j.).

E. Contractual Agreement For A Receiver

A contractual provision whereby a borrower agrees to the appointment of a receiver for the collateral upon a default may be enforceable, but at minimum is beneficial. There are no Texas cases specifically enforcing a contractual provision whereby the borrower consents to the appointment of a receiver for the borrower or for any property of the borrower. However, in *Riverside Properties v. Teachers Ins. & Annuity Ass'n.*, the trial court appointed a receiver for an apartment complex and directed the receiver to collect rents and make payments to the mortgagee on a secured note pending the mortgagee's suit for judicial foreclosure based in part on a contractual provision. 590 S.W.2d 736 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ). On appeal, the borrower claimed that there was no evidence that the property was in danger of being lost, removed or materially injured or that the property was insufficient to discharge the mortgage debt, and the borrower claimed that the trial court erred in enforcing the provision in the deed of trust which provided in part as follows:

> The holder of said note, in any action to foreclose this deed of trust, shall be entitled to the appointment of a receiver of the rents and profits of the herein described premises as a matter of right, and without notice, with the power to collect rents, issues and profits of said premises, due and coming due during the pendency of such foreclosure suit, without regard to the value of the premises or the solvency of any person or persons liable for the payment of the indebtedness involved in said suit. The Grantor for itself and any subsequent owner hereby waives any and all defenses to the application for a Receiver as above and hereby specifically consents to such appointment without notice, but nothing herein contained is to be construed or to deprive the holder of the lien of any other

> right, remedy or privilege it may now have under the law to have a Receiver appointed.

Id. at 737.

The court in *Riverside Properties* first recognized there were no Texas cases dealing directly with the enforceability of such a provision, and the court then noted that there was no claim made by the creditor that the property was insufficient to discharge the mortgage debt. Although the court concluded that it was not bound by the provision to appoint a receiver, the court held that "[t]he agreement and the deed of trust, that the appointed receiver was an appropriate step in the case of default, is evidentiary weight, and was appropriately considered by the trial court." *Id*. at 738. The court further stated that the provision "is not binding on the court but is one of the equities to be considered" and "[t]he parties entered into an unambiguous writing defining the consequence of default" and "[t]he courts must look to that writing as the expression of the parties' intention." *Id*.

In *Capital Funding, LLC v TLTX Holdings, LLC*, the court rejected an argument that a contractual clause *required* a court to appoint a receiver. No. 2:20-CV-5-Z, 2020 U.S. Dist. LEXIS 9066, 2020 WL 264106 (N.D. Tex. January 17, 2020). The court stated:

> Regarding the second argument, Riverside by no means requires courts to appoint a receiver when there is a receivership clause in a deed of trust. It only requires that they take the clause into account in determining whether to appoint a receiver and states that it is not inappropriate if they decide to do so. But, as noted earlier, whether to appoint a receiver remains within a court's discretion.

Id.

In *U.S. Bank v. Nat'l Ass'n v. Grayson Hospitality, Inc*., the court held:

> The Court is cognizant of the fact that Defendants contractually agreed to a receivership in the event of default. Such a recital is not binding on the Court but is one of the equities to be considered. *See Riverside Props. v. Teachers Ins. & Annuity Ass'n of Am.*, 590 S.W.2d 736, 738 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ). Therefore, a contractual obligation made knowingly weighs in favor of granting the receivership.

No. 4:14CV570, 2014 U.S. Dist. LEXIS 176249, 2014 WL 7272842 (E.D. Tex. Dec. 22, 2014). *See also Bank of Am. v. Quick-Way Foods of Dallas, Inc.*, No. 3:10-CV-1932-L, 2011 U.S. Dist. LEXIS 81262 (N.D. Tex. July 25, 2011) ("Further, the court's decision to appoint a receiver is bolstered by the parties' agreement to appoint a receiver in the event of default."); *New York Life Ins. Co. v. Watt West Inv. Corp*., 755 F. Supp. 287, 292 (E.D. Calif. 1991) (fact that the parties agreed to the appointment of a receiver in a deed of trust is entitled to great weight when the court exercises its discretion to determine whether to appoint a receiver).

Other jurisdictions generally hold that a mortgage provision for the appointment of a receiver does not entitle the mortgagee to a receiver as a matter of right. *Barclays Bank, P.L.C. v. Davidson Ave. Assocs.*, 274 N.J.Super. 519, 523-24, 644 A.2d 685 (App. Div.1994); *Dart v. Western Sav. & Loan Ass'n*, 103 Ariz. 170, 438 P.2d 407, 410 (1968); *Davis v. Seay*, 247 Ark. 396, 445 S.W.2d 885, 886 (1969); *Stadium Realty Corp. v. Dill*, 233 Ind. 378, 119 N.E.2d 893, 894 (1954); *W.I.M. Corp. v. Cipulo*, 216 A.D. 46, 214 N.Y.S. 718, 723-24 (1926); *cf. Smith v. Du Puis*, 117 Fla. 222, 157 So. 491, 493 (1934) (mortgage stipulation for appointment of a receiver upon defendant's default shifts burden of proof to mortgagor to show that mortgaged property, exclusive of rents and profits, is ample security for the debt).

Based on *Riverside Properties*, at minimum a court should give weight to a contractual provision providing for the appointment of a receiver. Such a provision should not merely provide consent to the appointment but address the specific elements and requirements of a receivership (i.e., the parties agree that it shall not be necessary for creditor to establish that the property is insufficient to discharge the debt or is in danger of being lost, removed, or materially injured and borrower waives any argument, defense, or claim that creditor must establish that the property is insufficient to satisfy the debt or is in danger of being lost, removed, or materially injured).

V. AVENUES TO DISCOVER FACTS TO SUPPORT APPLICATION FOR INJUNCTIVE RELIEF

A. Motion To Expedite Discovery

A plaintiff may need discovery from the defendant to help prove its claims. However, under normal discovery practice, discovery cannot be initiated soon enough for the plaintiff to receive responses in time to use them in support of an application for temporary injunctive relief. Accordingly, along with the filing of the application, the plaintiff should consider filing a motion for expedited discovery. Texas Rule of Civil Procedure 191.1 provides that "the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by agreement of the parties or by court order for good cause." Tex. R. Civ. P. 191.1. As the court in *In re Home State County Mutual Insurance Co.* stated: "The discovery rules provide the only permissible forms of discovery. However, a court

may order, or the parties may agree to, discovery methods other than those provided in the discovery rules." No. 12-06-00144-CV, 2006 Tex. App. LEXIS 9919 (Tex. App.—Tyler November 15, 2006, orig. proc.). *See also Estate of Hunt v. St. Paul Fire & Marine Ins. Co.*, No. 04-05-00334-CV, 2006 Tex. App. LEXIS 3087 (Tex. App.—San Antonio April 19, 2006, pet. denied).

Although not in the context of a temporary injunction, one court has held that it was harmful error to deny a motion to expedite discovery. In *Collins v. Cleme Manor Apartments*, Cleme Manor filed complaint in JP court for forcible detainer against Collins. 37 S.W.3d 527 (Tex. App.—Texarkana 2001, no pet.). After JP court ruled against her on July 21, 1999, Collins filed appeal with the county court on July 26. On August 17, Collins sent discovery requests to Cleme Manor (due 30 days later). On August 18, county court set the trial for August 30 (20 days before Cleme Manor's responses were due). Collins filed a Motion for Continuance and a "Motion to Shorten Time to Answer Discovery," which the county court denied. On appeal, the Texarkana court held the trial court abused its discretion by denying Collins' motion to expedite. The court stated: "The Texas Supreme Court has commented on the importance of the discovery process to the administration of justice, saying that it makes 'a trial less of a game of blind man's bluff and more a fair contest with the issues and facts disclosed to the fullest practicable extent.'" *Id*. at 532 (citing *State v. Lowry*, 802 S.W.2d 669, 671 (Tex. 1991) (orig. proceeding) (quoting *United States v. Procter & Gamble Co*., 356 U.S. 677, 682 (1958))). The Texarkana court held that the county court had denied Collins's motion "in total disregard of her right to discovery," which was an abuse of discretion. *See id*. at 533.

A court has ruled that a trial court did not abuse its discretion in granting a motion to expedite discovery in the course of a temporary restraining order. *In re Nat'l Lloyds Ins. Co.*, No. 13-15-00390-CV, 2015 Tex. App. LEXIS 11299 (Tex. App.—Corpus Christi November 3, 2015, original proceeding). The court noted that parties frequently seek, and trial courts order, expedited discovery in the course of proceedings pertaining to temporary restraining orders. *Id*. (citing *In re Tex. Health Res.*, No. 05-15-00813-CV, 472 S.W.3d 895, 2015 Tex. App. LEXIS 8988, 2015 WL 5029272, at *2 (Tex. App.—Dallas Aug. 26, 2015, orig. proceeding) ("The trial court ordered that the discovery take place before the expiration of the temporary restraining order."); *In re MetroPCS Commc'ns, Inc.*, 391 S.W.3d 329, 332 (Tex. App.—Dallas 2013, orig. proceeding) ("On November 5, 2012, Golovoy filed a 'Motion for a Temporary Restraining Order and an Order Compelling Expedited Discovery.'"); *In re Meyer*, No. 14-14-00833-CV, 2014 Tex. App. LEXIS 11750, 2014 WL 5465621, at *1 (Tex. App.—Houston [14th Dist.] Oct. 24, 2014, orig. proceeding) (mem. op. per curiam) ("On October 14, 2014, Gulfstream filed an original petition, application for temporary restraining order, application for temporary injunction, and motion for expedited discovery against relators in the trial court."); *Miga v. Jensen*, No. 02-11-00074-CV, 2012 Tex. App. LEXIS 1911, 2012 WL 745329, at *2 (Tex. App.—Fort Worth Mar. 8, 2012, no pet.) (mem. op.) ("Ten days later, Jensen filed with the trial court an application for a temporary restraining order, injunction, and expedited discovery.")). The court held that the trial court did not abuse its discretion in ordering production within two days as the trial court had discretion to schedule discovery and may shorten or lengthen the time for making a response for good cause. *Id*. (citing *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 943 (Tex. 1998) (orig. proceeding); *In re Exmark Mfg. Co., Inc.*, 299 S.W.3d 519, 532-33 (Tex. App.—Corpus Christi 2009, orig. proceeding)).

Rule 191.1 requires a showing of good cause for a court to alter the normal discovery rules. Good cause exists where a hearing will be held before the due date for discovery responses. The plaintiff should allege that it must engage in expedited discovery to fully prepare for the evidentiary burden that the plaintiff must carry at the hearing. The plaintiff should explain the need before the hearing, and before a deposition, for responses to requests for disclosure, requests for production (with actual documents, not just "will produce" language), and interrogatories. The plaintiff should request the court to order that the responses are due a certain number of days after service of the order granting the motion to expedite. The actual discovery requests should be attached to the motion, and served with the motion on the defendant. The plaintiff should request in the motion that the court order the defendant or its representative appear for a deposition within a certain number of days after it produces the responses to written discovery. Obviously, this should all be done before the hearing. The motion with discovery attached thereto should be served on the defendant with the citation, and application.

When a defendant is served with an order requiring expedited discovery, the defendant has more than a few things to do: retain an attorney, meet with the attorney, investigate defenses, obtain responsive documents, obtain other responsive information, prepare an answer, etc. Due to this amount of activity, it is not uncommon for the defendant and plaintiff to agree to a temporary restraining order or other similar order to enable the parties time to respond to discovery and set mutually agreeable deposition dates. The defendant should request that the expedited discovery order be a two-way street. In the unlikely event that a plaintiff would deny such a request, the defendant an always file an emergency motion to expedite discovery as well.

VI. PROCEDURAL ISSUES

A. Right to Remove

A party should not waive a right to remove a case to federal court by defending against or seeking a receivership in state court. *Cognetx, Inc. v. Haughton*, No. 10-2293, 2010 U.S. Dist. LEXIS 88183, 2010 WL 3370761 (E.D. Pa. Aug. 26, 2010). For example, in Texas, participation in temporary injunctive relief hearings in state court does not waive a defendant's right to remove the case to federal court. *Xtria, LLC v. Int'l Ins. All., Inc.*, No. 3:09-CV-2228-G, 2009 U.S. Dist. LEXIS 115588, at *12-13 (N.D. Tex. 2009). The *Xtria* court stated:

> Xtria next argues that IIAI waived its right to remove this case by contesting the TRO in state court. It is true that a defendant can waive its right to remove by taking actions in the state court that manifest an intention to litigate the merits of the claim, but a "waiver of the right to remove must be clear and unequivocal; the right to removal is not lost by participating in state court proceedings short of seeking an adjudication on the merits." *Tedford v. Warner-Lambert Company*, 327 F.3d 423, 428 (5th Cir. 2003). The only conduct on which Xtria relies to establish waiver is IIAI's "appearances and defense against [the plaintiff's] motion for a temporary restraining order and temporary injunction [in state court]. But defending against such motions does not of itself constitute a waiver of the right to remove." *Titan Aviation, LLC v. Key Equipment Finance, Inc*., 2006 U.S. Dist. LEXIS 77963, 2006 WL 3040923, at *4 (N.D. Tex. Oct. 26, 2006) (Fitzwater, J.) (citations omitted). Therefore, the court finds that IIAI did not waive its right to remove this case.

Id. *See George-Baunchand v. Wells Fargo Home Mortgage, Inc.*, CIV A. No. H-10-3828,2010 U.S. Dist. LEXIS 132016, 2010 WL 5173004, at *2 (S.D. Tex. Dec. 14, 2010) (filing motion to dissolve injunction did not waive right to remove case).

B. Jurisdiction and Venue

In order to properly appoint a receiver, the court must have jurisdiction of the subject matter involved. *Lubbock Oil Refining Co. v. Bourn*, 96 S.W.2d 569, 571–572 (Tex. Civ. App.—Amarillo 1936, no writ). Normally, state district courts have general jurisdiction and can award receivership relief. The district courts are constitutional courts of general jurisdiction. Tex. Const. Art. 5 §§ 1, 8; Tex. Gov't Code Ann. §§ 24.007, 24.008. A district court has "exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body." Tex. Const. Art. 5 § 8; *Subaru of America v. David McDavid Nissan*, 84 S.W.3d 212, 220 (Tex. 2002) (courts of general jurisdiction are presumed to have subject matter jurisdiction unless contrary showing is made). An applicant must bring an application for a receiver that is ancillary to an underlying suit in the court where the primary case is pending. *Greenland v. Pryor*, 360 S.W.2d 423, 425 (Tex. Civ. App.—San Antonio 1962, no writ).

The Texas Business Organizations Code states that "a district court in the county in which the registered office or principal place of business of a domestic entity is located" has jurisdiction to appoint a receiver. Tex. Bus. Orgs. Code § 11.402(b). A court that appoints a receiver under this subchapter for the property or business of a domestic entity has exclusive jurisdiction over the domestic entity and all of its property, regardless of where the property is located. Tex. Bus. Orgs. Code § 11.408.

There is no venue statute that directly addresses receivership actions (unlike the statute addressing injunctions), and the normal rules of venue apply. *Pratt v. Amrex, Inc*., 354 S.W.3d 502, 504–505 (Tex. App.—San Antonio 2011, pet. denied). However, under the Texas Civil Practice and Remedies Code, an action to appoint a receiver for a corporation with property in Texas must be brought in the county in which the principal office of the corporation is located. Tex. Civ. Prac. & Rem. Code § 64.071.

C. Pleadings

There is no statutory requirement for what is necessary to properly raise a request for a pre-trial receivership in a pleading, however, some courts hold that a pleading is necessary. *Harlen v. Pfeffer*, 693 S.W.2d 543, 547 (Tex. App.—San Antonio 1985, no writ) (reversing judgment for receiver for lack of supporting pleadings); *but see Greater Fort Worth v. Mims*, 574 S.W.2d 870, 871 (Tex. Civ. App.—Fort Worth 1978, writ dism'd) (affirming receivership order in action solely for injunctive relief); *B & W Cattle Co. v. First Nat'l Bank*, 692 S.W.2d 946, 949 (Tex. App.—Amarillo 1985, no writ). A careful applicant will allege in the petition an underlying cause of action, the facts necessary to support receivership relief, the grounds upon which the receivership is sought, the specific relief sought in the receivership order, the specific property subject to the receivership, the powers and duties that the receiver will have, and the willingness to post the required bond.

Further, if the applicant is going to seek ex parte emergency relief, the applicant should plead the facts that support such an emergency application and that other remedies, such as an injunction, are not adequate.

Associated Bankers Credit Co. v. Meis, 456 S.W.2d 744, 750 (Tex. Civ. App.—Corpus Christi 1970, no writ); *Morris v. North Fort Worth State Bank*, 300 S.W.2d 314, 315 (Tex. Civ. App.—Fort Worth 1957, no writ).

There is some authority for the proposition that an oral request for receivership could be construed as a sufficient "application" to appoint a receiver. *See O & G Carriers, Inc. v. Smith Energy 1986-A P'ship*, 826 S.W.2d 703, 707 n.2 (Tex. App.—Houston [1st Dist.] 1992, no writ). However, one court held that where the petition did not allege claim for a receivership, an oral request at the end of the hearing was not sufficient to provide adequate notice. *Elliott v. Weatherman*, 396 S.W.3d 224, 2013 Tex. App. LEXIS 1301 (Tex. App.—Austin 2013, no pet.); *Rusk v. Rusk*, 5 S.W.3d 299, 307 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (the trial court abused its discretion by appointing the receiver where the applicant failed to plead for a receivership until the final argument of her counsel, who filed a hand-written trial amendment that the court accepted, and holding that the trial court abused its discretion by allowing that trial amendment).

Defects in pleadings may be waived. *Lauraine v. First Nat'l Bank of Whitney*, 204 S.W. 1022, 1025 (Tex. Civ. App.—Galveston 1918. no writ) ("Mere defects in the petition upon which the receiver was appointed would not render the receivership proceedings void."). Moreover, at least one court has held that trial by consent can apply for a receivership:

> If issues not included in pleadings are tried by express or implied consent of the other party, however, those issues are to be treated as if they were pleaded, and failure to amend the pleadings to conform to issues tried by consent does not affect the result of the trial. We have already discussed how both sides introduced—without objection—evidence going to equitable issues that were not raised in the pleadings. It would thus not have been unreasonable for the district court to have concluded that an equitable receivership was tried by consent.

Pouya v. Zapa Interests, Inc., No. 03-07-00059-CV, 2007 Tex. App. LEXIS 7243, 2007 WL 2462001 (Tex. App.—Austin Aug. 13, 2007, no pet.).

A receivership application does not generally have to be sworn or verified. *O & G Carriers, Inc. v. Smith Energy 1986-A Partnership*, 826 S.W.2d 703, 1992 Tex. App. LEXIS 612 (Tex. App.—Houston [1st Dist.] Feb. 27, 1992, no writ). In *B & W Cattle Co.*, the appellate court held that the Texas Civil Practice and Remedies Code requires a sworn written application only for an ex parte appointment of a receiver. 692 S.W.2d 946 at 951 (Tex. App.—Amarillo 1985, no writ); *Hunt v. State*, 48 S.W.2d 466, 469 (Tex. Civ. App.—Austin 1932, no writ).

However, there are benefits to having a verified application. A court can consider verified pleadings as evidence to support a receivership. *Carroll v. Carroll*, 464 S.W.2d 440 (Tex. Civ. App.—Amarillo 1971, writ dism'd); *Friedman Oil Corp. v. Brown*, 50 S.W. 2d 471 (Tex. Civ. App.—Texarkana 1932, no writ); *Ellis v. Filgo*, 185 S.W. 2d 739 (Tex. Civ. App.—Dallas 1945, no writ). The *Carroll* court stated: "A verified pleading for receivership, which in the instant case had incorporated all of the allegations set out in Plaintiffs' First Amended Petition, along with the additional grounds above mentioned, may all be considered by the court as evidence and taken as competent to determine if the receivership and proposed sale thereunder was authorized." 464 S.W.2d at 447. *But see Fradelis Frozen Food Corp. v. Gamble*, 326 S.W.2d 293, 294 (Tex. Civ. App.—San Antonio 1959, no writ) (if defendant files sworn denial, plaintiff has burden of proof to establish allegations in petition by preponderance of evidence).

D. Parties

In an application for a receivership, all persons or entities over whose properties a receiver is to be appointed are parties needed for just adjudication of the proceeding. *Associated Bankers Credit Co. v. Meis*, 456 S.W.2d 744, 747 (Tex. Civ. App.—Corpus Christi 1970, no writ). Governing persons and owners or members of a domestic entity are not necessary parties to an action for a receivership unless relief is sought against those persons individually. Tex. Bus. Orgs. Code § 11.411.

E. Notice

A court should not grant a receiver ex parte unless the applicant shows an urgent and imperious necessity that justifies the immediate appointment of a receiver and that the property and rights of interested parties cannot be protected by other less dramatic means. *Associated Bankers Credit Co. v. Meis*, 456 S.W.2d 744, 750 (Tex. App.—Corpus Christi 1970, no writ). No receiver may be appointed without notice to take charge of the property which is fixed or immovable. Tex. R. Civ. P. 695. Texas Rule of Civil Procedure 695 states:

> Except where otherwise provided by statute, no receiver shall be appointed without notice to take charge of property which is fixed and immovable. When an application for appointment of a receiver to take possession of property of this type is filed, the judge or court shall set the same down for hearing and notice of such hearing shall be given to the adverse party by serving notice thereof not less than three days prior to such hearing. If the order finds that the defendant is a

> nonresident or that his whereabouts is unknown, the notice may be served by affixing the same in a conspicuous manner and place upon the property or if that is impracticable it may be served in such other manner as the court or judge may require.

Tex. R. Civ. P. 695.

A trial court abused its discretion by appointing a receiver in a probate matter where an executor was not given notice, and the property in question was already under the management of a fiduciary. *Krumnow v. Krumnow*, 174 S.W.3d 820, 2005 Tex. App. LEXIS 7027 (Tex. App.—Waco 2005); *Elliott v. Weatherman*, 396 S.W.3d 224, 2013 Tex. App. LEXIS 1301 (Tex. App.—Austin 2013, no pet.).

A defendant that wants to raise a lack of notice as an appellate point should be sure to preserve that issue in the trial court. The law presumes a trial court hears a case only after proper notice to the parties. *Davis v. Davis*, No. 05-12-00257-CV, 2013 Tex. App. LEXIS 5525, 2013 WL 1896194 (Tex. App.—Dallas May 6, 2013, no pet.) (mem. op). *Hanners v. State Bar of Tex.*, 860 S.W.2d 903, 908 (Tex. App.—Dallas 1993, no writ.). To overcome this presumption, the appellant must affirmatively show lack of notice. *Id.* This burden is not discharged by mere allegations in a motion for new trial, unsupported by affidavits or other competent evidence, that proper notice was not received. *Id.* In the *Davis* case, the appellant claimed the trial court abused its discretion in ordering a receiver to be appointed without notice, but the appellant did not file a new trial motion or any other motion supported by evidence, and instead he relied on the silent record and made bare assertions in his brief. 2013 Tex. App. LEXIS 5525. The court of appeals held that the appellant did not affirmatively show that he did not receive notice, he did not overcome the presumption of proper notice. *Id.*

Of course, the defendant is an "adverse party" entitled to notice. *Couch Mortgage Co. v. Roberts*, 544 S.W.2d 944, 945–946 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ dism'd). And additional courts have held that secured creditors who have liens on the property to be placed in receivership are also entitled to notice. *See, e.g., Independent Am. Sav. v. Preston* 117, 753 S.W.2d 749, 750 (Tex. App.—Dallas 1988, no writ); *North Side Bank v. Wachendorfer*, 585 S.W.2d 789, 791 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

F. Answer

A defendant or other interested party does not have to file an answer to appear and argue against the appointment of a receiver. However, if the defendant files a sworn answer, this may place the burden on the applicant to present evidence to support its application such that the applicant cannot rely on a sworn or verified application. *Fradelis Frozen Food Corp. v. Gamble*, 326 S.W.2d 293, 294 (Tex. Civ. App.—San Antonio 1959, no writ). Therefore, a defendant should generally file a sworn denial of facts in opposition to an application.

A defendant may want to preserve the right to object to personal jurisdiction or venue in answering the suit. A special appearance permits a nonresident defendant to object to personal jurisdiction in a Texas court. Tex. R. Civ. P. 120a; *Boyd v. Kobierowski*, 283 S.W.3d 19, 21 (Tex. App.—San Antonio 2009, no pet.). A nonresident defendant may be subject to personal jurisdiction in a Texas court if that defendant enters a general appearance. *Boyd*, 283 S.W.3d at 21 (citing Tex. R. Civ. P. 120a; *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 201 (Tex. 1985) (per curiam)). "A general appearance entered before a special appearance waives any special appearance complaint." *Boyd*, 283 S.W.3d at 21 (citing *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 304-05 (Tex. 2004) (per curiam)). "[A] party enters a general appearance when it (1) invokes the judgment of the court on any question other than the court's jurisdiction, (2) recognizes by its acts that an action is properly pending, or (3) seeks affirmative action from the court." *Exito*, 142 S.W.3d at 304; *Dawson-Austin v. Austin*, 968 S.W.2d 319, 322 (Tex. 1998). *See, e.g., Liberty Enters., Inc. v. Moore Transp. Co.*, 690 S.W.2d 570, 571-72 (Tex. 1985) (defendant waived special appearance by filing motion for new trial and agreeing to reinstate cause of action); *Phoenix Fireworks, Mfg. v. DM Plastics*, No. 04-98-00209-CV, 1998 Tex. App. LEXIS 7395, 1998 WL 354927, at *2 (Tex. App.—San Antonio, June 30, 1998, no pet.) (not designated for publication) (same). A party must strictly comply with rule 120a to avoid making a general appearance. *Dawson-Austin v. Austin*, 920 S.W.2d 776, 783 (Tex. App.—Dallas 1996, no writ); *Morris v. Morris*, 894 S.W.2d 859, 862 (Tex. App.—Fort Worth 1995, no writ).

Texas courts have recognized that appearing in matters ancillary and prior to the main suit does not constitute a general appearance in the main suit and will not waive a plea to the jurisdiction or special appearance. *See, e.g., In re M.G.M*, 163 S.W.3d 191, 200-01 (Tex. App.—Beaumont 2005, no pet.); *Valsangiacomo v. Americana Juice Import*, 35 S.W.3d 201 (Tex. App.—Corpus Christi 2000, no pet.); *Turner v. Turner*, No. 14-98-00510-CV, 1999 Tex. App. LEXIS 491, 1999 WL 33659, at *3 (Tex. App.—Houston [14th Dist.], Jan. 28, 1999, no pet.) (holding attorney's presence at temporary restraining order hearing did not constitute general appearance because hearing related to ancillary matter); *Cleaver v. George Staton Co., Inc.*, 908 S.W.2d 468, 470 (Tex. App.—Tyler 1995, writ denied) (concluding that where wife's counsel offered observations relevant to questions involving the merits of her husband's trust suit, to which the wife was a necessary party, but did not seek relief on

issues pending before the court, was not a general appearance); *Smith v. Amarillo Hosp. Dist*., 672 S.W.2d 615, 617 (Tex. App.—Amarillo 1984, no writ) (holding that where party, who was not served, sat at counsel's table at the court's request, but did not file any pleadings, take any affirmative action, or participate in the trial, was not a general appearance); *Perkola v. Koelling & Assocs., Inc*., 601 S.W.2d 110, 111-12 (Tex. Civ. App.—Dallas 1980, writ dism'd) (holding defendant did not waive his plea by contesting interlocutory temporary injunction); *Green v. Green*, 424 S.W.2d 479, 481 (Tex. Civ. App.—Tyler 1968, no writ). *See also Alliant Group, L.P. v. Feingold*, 2009 U.S. Dist. LEXIS 34730 (S.D. Tex. Apr. 24, 2009) (party did not waive objection to personal jurisdiction by appearing at temporary restraining order hearing in Texas state court before removal).

G. Burden of Proof

The burden to show the existence of circumstances justifying the appointment of a receiver rests on the party seeking the appointment. *Estate of Hoskins*, 501 S.W.3d 295 (Tex. App.—Corpus Christi 2016, no pet.); *Spiritas*, 459 S.W.3d at 232; *Elliott v. Weatherman*, 396 S.W.3d 224, 230 (Tex. App.—Austin 2013, no pet.); *Benefield v. State*, 266 S.W.3d 25, 32 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Fortenberry v. Cavanaugh*, No. 03-04-00816-CV, 2005 Tex. App. LEXIS 4665, 2005 WL 1412103, at *3 (Tex. App.—Austin June 16, 2005, no pet.) (mem. op.) (construing section 11.404's predecessor statute to place burden of proof on receivership applicant). If the applicant does not provide any evidence to support the application, the trial court errs in granting the application. *Chapa v. Chapa*, No. 04-12-00519-CV, 2012 Tex. App. LEXIS 10702 (Tex. App.—San Antonio Dec. 28, 2012, no pet.); *Fradelis Frozen Food Corp. v. Gamble*, 326 S.W.2d 293, 294 (Tex. Civ. App.—San Antonio 1959, no writ). In *Chapa v. Chapa*, the court held that the trial court erred in awarding receivership relief where the applicant did not present sufficient evidence:

> There is no evidence in the record, whether in the form of testimony, affidavits, documents, or other evidence, to support the findings necessary for appointment of a receiver for Chapco. The record shows the trial court based its order solely on arguments of counsel, and received no evidence in any form before entering its August 8, 2012 order. As an extraordinary remedy, appointment of a receiver must be based on evidence showing an immediate risk of harm, and that there is no other lesser remedy at law or in equity. Tex. Bus. Orgs. Code Ann. § 11.404(b). When there is no evidence to support the need for a receiver, the court abuses its discretion. *Benefield*, 266 S.W.3d at 31. Here, there is no evidence in the record to support a finding on any of the grounds for a receiver pled by Chapa, Jr. *See* Tex. Bus. Orgs. Code Ann. § 11.404(a)(1). Therefore, the trial court abused its discretion in appointing a receiver over Chapco in section 4 of the order. *See Genssler*, 2010 Tex. App. LEXIS 8170, 2010 WL 3928550, at *5-6 (holding court abused its discretion in appointing receiver over individual's personal assets where there was no evidence that individual used business entity as alter ego). Accordingly, we vacate section 4 of the order.

No. 04-12-00519-CV, 2012 Tex. App. LEXIS 10702 (Tex. App.—San Antonio Dec. 28, 2012, no pet.).

H. Hearing

A trial court should hold a hearing where the applicant and contestant have opportunities to present evidence. There is no right to jury trial in any proceeding concerning a receivership. *Unit 82 Joint Venture v. Int'l Commer. Bank of China*, 460 S.W.3d 616, 623 (Tex. App.—El Paso 2014, pet. denied). An applicant may offer testimony, affidavits, documents, tangible objects, or other evidence to support the findings necessary for appointment of a receiver. *In re Estate of Martinez*, NO. 01-18-00217-CV, 2019 Tex. App. LEXIS 2614 (Tex. App.—Houston [1st Dist.] April 2, 2019, no pet.); *Xr-5, LP v. Margolis*, No. 02-10-00290-CV, 2011 Tex. App. LEXIS 2181 (Tex. App.—Fort Worth March 24, 2011, no pet.); *Chapa v. Chapa*, No. 04-12-00519-CV, 2012 Tex. App. LEXIS 10702 (Tex. App.—San Antonio Dec. 28, 2012, no pet.).

Once again, a court can consider verified pleading as evidence to support a receivership. *Carroll v. Carroll*, 464 S.W.2d 440 (Tex. Civ. App.—Amarillo 1971, writ dism'd); *Friedman Oil Corp. v. Brown*, 50 S.W. 2d 471 (Tex. Civ. App.—Texarkana 1932, no writ); *Ellis v. Filgo*, 185 S.W. 2d 739 (Tex. Civ. App.—Dallas 1945, no writ). The *Carroll* court stated: "A verified pleading for receivership, which in the instant case had incorporated all of the allegations set out in Plaintiffs' First Amended Petition, along with the additional grounds above mentioned, may all be considered by the court as evidence and taken as competent to determine if the receivership and proposed sale thereunder was authorized." 464 S.W.2d at 447. *But see Fradelis Frozen Food Corp. v. Gamble*, 326 S.W.2d 293, 294 (Tex. Civ. App.—San Antonio 1959, no writ) (if defendant files sworn denial, plaintiff has burden of proof to establish allegations in petition by preponderance of evidence).

A court may not consider as evidence statements in unverified pleadings, motions, or attorney arguments. *In re Estate of Martinez*, No. 01-18-00217-CV, 2019 Tex.

App. LEXIS 2614 (Tex. App.—Houston [1st Dist.] April 2, 2019, no pet.). A court may not take judicial notice of facts learned over the course of the ligation. *Id.* "Testimony from a prior hearing or trial may be considered in a subsequent proceeding when the transcript of that testimony is 'properly authenticated and entered into evidence.'" *Id*. Regarding judicial notice, the *Martinez* court stated:

> A trial court "may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Tex. R. Evid. 201(b). A trial court may take judicial notice of its own file, but such judicial notice is limited to acknowledgement of the existence of the documents in the court's file. *Perez v. Williams*, 474 S.W.3d 408, 419 (Tex. App.—Houston [1st Dist.] 2015, no pet.). The "trial court may not take judicial notice of the truth of factual statements and allegations contained in the pleadings, affidavits, or other documents in the file." *Guyton v. Monteau*, 332 S.W.3d 687, 693 (Tex. App.—Houston [14th Dist.] 2011, no pet.). "When evidence is the subject of improper judicial notice, it amounts to no evidence." *Id*.

Id.

In *Xr-5, LP v. Margolis*, the court affirmed in part and reversed in a part an order appointing a receiver. No. 02-10-00290-CV, 2011 Tex. App. LEXIS 2181 (Tex. App.—Fort Worth March 24, 2011, no pet.). The court found there was no evidence regarding a property owner and cited to *Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995) with the parenthetical: "stating that pleadings, even if sworn or verified, are not generally competent evidence to prove the facts alleged in them." *Id*. This would seem to indicate that the court did not agree that statements in verified pleadings could be considered evidence.

In *Estate of Hoskins*, the court affirmed a receivership order and stated: "an appellate court may presume that a trial court took judicial notice of its own records in the same case. This is true even though the trial court was not asked to do so and did not formally announce that it had done so. A trial judge judicially knows what has previously taken place in the case on trial." 501 S.W.3d 295 (Tex. App.—Corpus Christi 2016, no pet.).

The notice required implies the opportunity to be heard and to present evidence on the involved issue or issues of fact. *Oertel v. Gulf States Abrasive Mfg. Inc.*, 429 S.W.2d 623 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ). The trial court can impose reasonable limits on the parties' presentation of evidence in the hearing. *Communication, Ltd. v. Guy Brown Fire & Safety, Inc.*, No. 02-17-00330-CV, 2018 Tex. App. LEXIS 2055, *25 (Tex. App.—Fort Worth March 22, 2018, no pet.); *RRE VIP Borrower, LLC v. Leisure Life Senior Apartment Hous., Ltd.*, No. 14-09-00923-CV, 2011 Tex. App. LEXIS 3304, 2011 WL 1643275, at *2 (Tex. App.—Houston [14th Dist.] May 3, 2011, no pet.); *Elliott v. Lewis*, 792 S.W.2d 853, 855 (Tex. App.—Dallas 1990, no writ); *Reading & Bates Constr. Co. v. O'Donnell*, 627 S.W.2d 239, 244 (Tex. App—Corpus Christi 1982, writ ref'd n.r.e.). However, the trial court cannot deny a party a right to be heard. *City of Houston v. Houston Lighting & Power Co*., 530 S.W.2d 866, 869 (Tex. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.). If a party wants to object to a trial court's refusal to allow additional time to present evidence, the party should object to the court's refusal to hear additional evidence, state what evidence the party would present, and give some indication how that evidence would be material and relevant to the issues in the proceeding. *See R & R Unifs, Inc. v. Meischen*, No. 01-96-00733-CV, 1997 Tex. App. LEXIS 2828, 1997 WL 289191, at *3 (Tex. App.—Houston [1st Dist.] May 29, 1997, no writ) (not designated for publication) (overruling appellant's challenge to the trial court's thirty-minute limit of temporary injunction hearing when appellant failed to object until after the trial court entered an adverse ruling).

I. Disinterested Receiver

"By statutory definition—as well as necessity—a receiver must be both a non-party and disinterested in the outcome of the case." *Wiley v. Sclafani*, 943 S.W.2d 107, 110 (Tex. App.—Houston [1st Dist.] 1997, no writ) (citing Tex. Civ. Prac. & Rem. Code Ann. § 64.021(a) (West, Westlaw through 2015 R.S.)). "A 'receiver' is an indifferent person, between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation pendente lite." *Id.* (internal quotations omitted).

J. Order

Regarding a receivership order, Texas Jurisprudence states:

> An order or decree appointing a receiver is interlocutory. It ordinarily fixes the amount of the bond to be given by the receiver, describes the property to be taken into the receiver's possession, prescribes the authority and duties of the receiver, and embodies whatever instructions for the receiver's guidance the court may see fit to give. Any limit intended to be placed on the term of office of the receiver should also be expressed in the order. The order appointing a receiver should find

> the facts on which the appointment must rest. Thus, though not required, a trial court may issue findings of fact and conclusions of law in conjunction with an interlocutory order appointing a receiver.

64 Tex. Jur. 3rd, Receivers, § 81.

One court has held that a trial court errs in appointing a receiver without making the findings required by Texas Business Organizations Code Section 11.404(b). *Chapa v. Chapa*, No. 04-12-00519-CV, 2012 Tex. App. LEXIS 10702 (Tex. App.—San Antonio Dec. 28, 2012, no pet.). Section 11.404(b) provides

> (b) A court may appoint a receiver under Subsection (a) only if: (1) circumstances exist that are considered by the court to necessitate the appointment of a receiver to conserve the property and business of the domestic entity and avoid damage to interested parties; (2) all other requirements of law are complied with; and (3) the court determines that all other available legal and equitable remedies, including the appointment of a receiver for specific property of the domestic entity under Section 11.402(a), are inadequate.

Tex. Bus. Orgs. Code §11.404(b). Thus, a trial court should expressly states in its order the ground or grounds upon which it relies in granting receivership relief.

At least one court has held that a party can waive its objections to the form of the receivership order. *Pouya v. Zapa Interests, Inc*., No. 03-07-00059-CV,2007 Tex. App. LEXIS 7243, 2007 WL 2462001 (Tex. App. — Austin Aug. 13, 2007). That court stated:

> If Pouya took issue with the form of the order appointing the receiver, he should have requested the trial court to modify the order and, if the court refused, appealed the order after requesting findings of fact. *See* Tex R. Civ. P. 307 (providing that a party may appeal from a judgment in which the court issues findings of fact on the ground that the judgment goes against the court's findings of fact); Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(1) (West Supp. 2006) (providing that an appeal may be taken from an interlocutory order appointing a receiver). In this case though, by the time that Pouya filed the motion to terminate the receivership, six months had passed after the order appointing the receiver was entered, much longer than the twenty days necessary for perfecting an appeal of an interlocutory order. *See* Tex. R. App. P. 28.1 (providing that an appeal from an interlocutory order is an accelerated appeal), 26.1 (providing that the notice of appeal in accelerated appeals must be filed within twenty days after order is signed). The order appointing the receiver is thus final and cannot be collaterally attacked. *See, e.g., Sclafani v. Sclafani*, 870 S.W.2d 608, 611 (Tex. App.—Houston [1st. Dist] 1993, writ denied) (quoting *Benningfield v. Benningfield*, 155 S.W.2d 827, 827-28 (Tex. Civ. App.—Austin 1941, no writ)); *Loomis Land & Title Co. v. Diversified Mortgage Investors*, 533 S.W.2d 420, 424 (Tex. App.—Tyler 1976, writ ref'd n.r.e.).

Id.

K. Bond

Texas Rule of Civil Procedure 695a provides:

> No receiver shall be appointed with authority to take charge of property until the party applying therefor has filed with the clerk of the court a good and sufficient bond, to be approved by such clerk, payable to the defendant in the amount fixed by the court, conditioned for the payment of all damages and cost in such suit, in case it should be decided that such receiver was wrongfully appointed to take charge of such property. The amount of such bond shall be fixed at a sum sufficient to cover all such probable damages and costs.

Tex. R. Civ. P. 695a. The purpose of the bond is to ensure that the defendant can be reimbursed for any damages caused by the appointment of the receiver in the event the receiver was wrongfully appointed. *Cont'l Homes Co. v. Hilltown Prop. Owners Ass'n, Inc*., 529 S.W.2d 293, 295 (Tex. App.—Fort Worth 1975, no writ).

Generally, the amount of a bond rests in the trial court's discretion. *See Children v. Great Southwest Life Ins. Co.*, 700 S.W.2d 284, 289 (Tex. App.—Dallas 1985, no writ) (bond for receiver); *see also Maples v Muscletech, Inc.*, 74 S.W.3d 429, 431 (Tex. App.—Amarillo 2002, no pet.) (bond for temporary injunction). At least one court has stated that courts should look to precedent for temporary injunction bonds for determining the sufficiency of a receivership bond. *Genssler v. Harris County*, 2010 Tex. App. LEXIS 8170 (Tex. App.—Houston [1st Dist.] Oct. 7, 2010, no pet.).

A trial court errs in instituting a receivership where the applicant fails to file a bond. *Sutton v. Angell*, No. 04-12-00802-CV, 2013 Tex. App. LEXIS 8779 (Tex. App.—San Antonio July 17, 2013, no pet); *Ahmad v. Ahmed*, 199 S.W.3d 573, 2006 Tex. App. LEXIS 6937

(Tex. App.—Houston [1st Dist.] 2006); *Rubin v. Gilmore*, 561 S.W.2d 231, 234 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *Cont'l Homes Co. v. Hilltown Prop. Owners Ass'n, Inc*., 529 S.W.2d 293, 295 (Tex. Civ. App.—Fort Worth 1975, no writ); *O'Connor v. O'Connor*, 320 S.W.2d 384, 391 (Tex. Civ. App.—Dallas 1959, writ dism'd). As the *Ruban* Court stated:

> The trial court was not, however, authorized to appoint a receiver in the absence of an applicant's bond filed in compliance with Rule 695a, Tex. R. Civ. P. Neither the filing of the receiver's bond nor the filing of the temporary injunction bond satisfied this requirement. The requirement of an applicant's bond is mandatory, and non-compliance with Rule 695a requires the reversal of the order appointing the receiver.

Rubin, 561 S.W.2d at 234 (citations omitted).

Where an applicant failed to execute and file a bond ordered by a trial court in connection with an appointment of a receiver, the prerequisites for the appointment of the receiver had not been met, and the trial court's order appointing the receiver had to be dissolved. *Hawkins v. Hutchison*, 2005 Tex. App. LEXIS 5429 (Tex. App.—Eastland July 14 2005, no pet.).

Trial courts can cure their error in failing to order the applicant for a receiver to post a bond by a subsequent order later requiring the applicant to post a bond. *Green Diesel, LLC v. Vicnrg, LLC*, 2013 Tex. App. LEXIS 8038 (Tex. App.—Houston [14th Dist.] July 2 2013, no pet.). In *Pfeiffer v. Pfeiffer*, the court held that, where a trial court erroneously appoints a receiver without an applicant's bond but corrects the error, there is substantial compliance with Rule 695a. 394 S.W.2d 679, 681 (Tex. Civ. App.—Houston 1965, writ dism'd). "Under such circumstances, reversible error is not shown." *Id; see also Sclafani v. Sclafani*, 870 S.W.2d 608, 609 n.2 (Tex. App.—Houston [1st Dist.] 1993, writ denied) ("We note that while this proceeding was pending in this Court, [appellee] filed an applicant's bond making [appellant's] complaint about the lack of bond moot."); *O & G Carriers, Inc. v. Smith Energy 1986-A P'ship*, 826 S.W.2d 703, 708 (Tex. App.—Houston [1st Dist.] 1992, no writ) (stating that the line of cases holding the failure of an applicant to file a bond requires reversal are distinguishable where the applicant files an applicant's bond after appeal).

In *Fite v. Emtel, Inc.*, the court stated as follows regarding the bond requirements:

> A court may not appoint a receiver until two bonds have been filed. Both the party applying for a receivership and the receiver must file a bond with the clerk of the court payable to the defendant in an amount fixed by the court. The purpose of these bonds is to ensure that the defendant can be reimbursed for any damages caused by the appointment of the receiver in the event that the receiver was wrongfully appointed. These bonds are a prerequisite to the appointment of a receiver, and the trial court's failure to require that both of the bonds be filed necessitates reversal of the order appointing the receiver. The filing of a bond by the receiver will not satisfy the bond requirement for the applicant.
>
> Fite and Woods have waived any issue on appeal regarding the trial court's failure to require an applicant's bond. Pursuant to Rule 33.1(a) of the Texas Rules of Appellate Procedure, as a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion that "stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context."
>
> Here, upon review of the record, and especially in light of the fact that Fite did not object to absence of an applicant's bond in the original receivership order, we hold that Fite's objection before the trial court to the entry of the receivership order was not stated with sufficient specificity to put the trial court on notice that she was complaining of the lack of an applicant's bond rather than the lack or inadequacy of the receiver's bond in the order. Consequently, Fite and Woods have not properly preserved this complaint for appellate review.

No. 01-07-00273-CV, 2008 Tex. App. LEXIS 7343, 2008 WL 4427676 (Tex. App.—Houston [1st Dist.] Oct. 2, 2008, pet. denied).

L. Motion to Vacate Receiver

A party opposed to a receivership can file a motion to vacate a receivership. A motion to vacate a receiver must (1) present to the trial court a previously unknown fact relating to the propriety of entering an order appointing a receiver, or (2) call to the trial court's attention some fundamental error that renders the order void. *Lane v. Lane*, No. 06-12-00058-CV, 2012 Tex. App. LEXIS 7471 (Tex. App.—Texarkana Sept. 4, 2012, no pet.); *Arensberg v. Drake*, 693 S.W.2d 588,

592 (Tex. App.—Houston [14th Dist.] 1985, no pet.). "An order appointing a receiver will be vacated where the receivership was procured by false allegations, or fraud, or where it is shown that the order was granted improperly or unnecessarily." 64 Tex. Jur. 3rd, Receivers, § 86.

M. Procedural Defects May Be Waived

Errors in receivership procedure may be waived. *See Genssler v. Harris County*, 2010 Tex. App. LEXIS 8170 (Tex. App.—Houston [1st Dist.] Oct. 7, 2010, no pet.) (alleged defect in bond requirement was waived); *Fite v. Emtel, Inc.*, No. 01-07-00273-CV, 2008 Tex. App. LEXIS 7343, 2008 WL 4427676, at *9 (Tex. App.—Houston [1st Dist.] Oct. 2, 2008, pet. denied) (mem. op.); *Loomis Land & Cattle Co. v. Diversified Mortg. Investors*, 533 S.W.2d 420, 423 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (holding that failure to post applicants bond was an error waived by appellant's failure to timely appeal).

In *Hawkins v. Twin Montana, Inc*., the court discussed the concept of a receivership order being voidable, not void, due to certain procedural errors. 810 S.W.2d 441, 444 (Tex. App.—Fort Worth 1991, no writ). The court held:

> It is provided that no receiver shall be appointed until the party applying therefor has filed a good and sufficient bond, Rule 695a, Texas Rules of Civil Procedure, and that before a receiver enters into his duty, he shall file an oath and a receiver's bond. Tex. Rev. Civ. Stat. Ann. art. 2296 (Vernon 1971). Although the failure to comply with the statutes and rules controlling the appointment of a receiver may be rectified in an appeal for that purpose, *Continental Homes v. Hilltown Property Owners*, 529 S.W.2d 293, 295 (Tex. Civ. App.—Fort Worth 1975, no writ); *Rogers v. Boykin*, 286 S.W.2d 440, 443 (Tex. Civ. App.—Eastland 1956, no writ), neither the rule nor the statute cited provides that an appointment made in violation of its inhibition shall be void. Rather, because the appointment of a receiver in a proceeding ancillary to the main suit is within the court's jurisdiction, *Spence v. State Nat. Bank*, 5 S.W.2d 754, 755 (Tex. Comm'n App.1928), and power, *Hunt v. State*, 48 S.W.2d 466, 469 (Tex. Civ. App.—Austin 1932, no writ), such an appointment is merely voidable. *James v. Roberts Telephone & Electric Co.*, 206 S.W. 933, 934 (Tex. Comm'n App. 1918, judgmt adopted); *Rogers v. Boykin*, supra. Additional to the lack of Snyder's application bonds and Wilson's and Cavazos' oaths and bonds just mentioned, there is record evidence that Payne had notice of the appointments of Wilson and Cavazos as temporary receivers. Payne conceded that neither he nor, as far as he knew, his attorney filed any objection to, or moved the court for the vacation of, the appointments.

Id. (quoting *Payne v. Snyder*, 661 S.W.2d 134 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.)); *Rogers v. Boykin*, 286 S.W.2d 440, 442-43 (Tex. Civ. App.—Eastland 1956, no writ).

N. Finding of Fact and Conclusions of Law

Though not required, a trial court may issue findings of fact and conclusions of law in conjunction with an interlocutory order appointing a receiver. *Unit 82 Joint Venture v. Int'l Commercial Bank of China, Los Angeles Branch*, 460 S.W.3d 616 (Tex. App.—El Paso 2014, pet. denied); *Elliott v. Weatherman*, 396 S.W.3d at 224; *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 884 (Tex. App.—Dallas 2003, no pet.); *Mueller v. Beamalloy, Inc*.., 994 S.W.2d 855, 858-59 (Tex. App.—Houston [1st Dist.] 1999, no pet.); see Tex. R. App. P. 28.1(a). These findings and conclusions may be helpful in determining if the trial court exercised its discretion in a reasonable and principled fashion. *Mueller*, 994 S.W.2d at 859. However, they do not carry the same weight on appeal as findings made under Rule 296 and are not binding on this court if unchallenged. *Id*.; *see IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997).

In *Mueller v. Beamalloy, Inc*., the court discussed a party's ability to challenge findings:

> Wilson and Beamalloy argue that we must affirm the appointment of the liquidating receiver because Mueller has not specifically challenged the trial court's extensive findings of fact and conclusions of law. This argument might have merit were this an appeal from a bench trial on the merits, in which the trial court is required to file findings and conclusions on request.
>
> In an appeal from an interlocutory order appointing a receiver, the trial judge may file findings and conclusions but is not required to file them. Neither rule 296 of the Rules of Civil Procedure nor any other rule or statute requires findings and conclusions for the appointment of a receiver. Findings and conclusions filed in an interlocutory matter are "helpful" in determining if the trial court exercised its discretion in a reasonable and principled fashion. When findings and conclusions are merely helpful but not required, they do not carry the same weight on appeal as findings made under rule 296, and

> are not binding if unchallenged. We therefore reject Wilson's and Beamalloy's contention that we must affirm the trial court's appointment of a liquidating receiver solely because Mueller has not challenged the trial court's findings of fact and conclusions of law.

994 S.W.2d 855, 860-61(Tex. App.—Houston [1st Dist.] 1999, no pet.) (internal citation omitted). Accordingly, it is not necessary to request findings and conclusions, but a careful practitioner who is appealing a trial court's order or judgment will always request findings and conclusions.

Some courts hold that where there are no express findings, that a court of appeals will affirm a receivership order on any valid basis supported by evidence. *A-Medical Advantage Healthcare Sys., Associated v. Shwarts*, No. 10-18-00050-CV, 2019 Tex. App. LEXIS 11278 (Tex. App.—Waco Dec. 31, 2019, no pet.). The *A-Medical* court stated:

> When, as here, the trial court makes no separate findings of fact or conclusions of law, we draw every reasonable inference supported by the record in favor of the trial court's judgment." *Perry v. Perry*, 512 S.W.3d 523, 526 (Tex. App.—Houston [1st Dist.] 2016, no pet.). A trial court's order must be affirmed if it can be upheld on any legal theory that finds support in the evidence. *Perry*, 512 S.W.3d at 526. If there is some evidence of a substantive and probative character to support the trial court's order, the trial court did not abuse its discretion.

Id. *See also Pouya v. Zapa Interests, Inc*., No. 03-07-00059-CV, 2007 Tex. App. LEXIS 7243, 2007 WL 2462001 (Tex. App.—Austin Aug. 13, 2007) ("because the parties did not request and the court did not sua sponte file findings of fact, we must uphold the district court's order if any legal theory in support of the order is supported by the record.").

A reviewing court cannot consider oral statements made by the trial court as findings of fact. *Pouya v. Zapa Interests, Inc*., No. 03-07-00059-CV, 2007 Tex. App. LEXIS 7243, 2007 WL 2462001 (Tex. App.—Austin Aug. 13, 2007). The *Pouya* court held:

> Although the district court made oral comments concerning the reasons for denying Pouya's motion during the hearing, we cannot use these comments as the basis for the court's decision because oral comments do not constitute findings of fact or conclusions of law. *Nesmith v. Berger*, 64 S.W.3d 110, 119 (Tex. App.—Austin 2001, pet. denied) (citing *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984)).

Id.

VII. APPEALS OF RECEIVERSHIP ORDERS

A. Interlocutory Appeal Allowed

A person may appeal from an interlocutory order of a district court that "appoints a receiver or trustee" or "overrules a motion to vacate an order that appoints a receiver or trustee." Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(1), (2); *Bhardwaj v. Pathak*, No. 05-14-01030-CV, 2015 Tex. App. LEXIS 8591 (Tex. App.—Dallas Aug. 17, 2015, pet. dism.) (As a husband's notice of appeal was timely filed from the appealable interlocutory order appointing a receiver, it was reviewable). An order denying the termination of a receivership is appealable as a final judgment. *Pouya v. Zapa Interests, Inc*., No. 03-07-00059-CV,2007 Tex. App. LEXIS 7243, 2007 WL 2462001 (Tex. App.—Austin Aug. 13, 2007); *Akin, Gump, Strauss, Hauer and Feld, L.L.P. v. E-Court, Inc.*, No. 03-02-00714-CV, 2003 Tex. App. LEXIS 3966, at *7 (Tex. App.—Austin May 8, 2003, no pet.) (mem. op.); *Christie v. Lowrey*, 589 S.W.2d 870, 874 (Tex. Civ. App.—Dallas 1979, no writ).

The name on an order is not important, it is the substance that determines whether it is an order that appoints a receiver or overrules a motion to vacate a receivership. Because a portion of an order appointing a special master under Texas Rule of Civil Procedure 171 functioned as an order appointing a receiver, an interlocutory appeal from that portion of the order was proper. *Chapa v. Chapa*, No. 04-12-00519-CV, 2012 Tex. App. LEXIS 10702 (Tex. App.—San Antonio Dec. 28, 2012, no pet.). The *Chapa* court stated:

> Our interlocutory jurisdiction is controlled by the substance and function of an order, viewed in the context of the record, not the title or form of the order or the parties' characterization of the order.
> …
>
> Considering the substance and function of section 4 in the context of the record, we construe that portion of the order as appointing a receiver over Chapco's assets and business. Therefore, we have jurisdiction over this appeal challenging that portion of the August 8, 2012 order.

Id. (internal citations omitted).

B. Appeal After Final Judgment

Rule 26.1(b) of the Texas Rules of Appellate Procedure provides that an interlocutory appeal "must

be filed within 20 days after the judgment or order is signed." Tex. R. App. P. 26.1(b). Section 51.014(a)(1) of the Texas Civil Practice And Remedies Code provides that a party "may appeal from an interlocutory order" that "appoints a receiver." Tex. Civ. Prac. & Rem. Code § 51.014(a)(1); *see also* Tex. Gov't Code Ann. § 311.016(1) ("'May' creates discretionary authority or grants permission or a power."). Does a party lose the right to challenge a receivership order if it fails to appeal the order in an interlocutory fashion?

Some courts of appeals have held that a party does waive the right to appeal a receivership order by waiting. *See In re Estate of Denton*, No. 11-14-00222-CV,2014 Tex. App. LEXIS 12116, 2014 WL 5823338 (Tex. App.—Eastland Nov. 6, 2014, no pet.); *Hernandez v. Rooker*, No. 02-15-00139-CV, 2016 Tex. App. LEXIS 8115 (Tex. App.—Fort Worth July 28, 2016, no pet.); *Fortenberry v. Cavanaugh*, No. 03-07-00310-CV,2008 Tex. App. LEXIS 8872, 2008 WL 4997568 (Tex. App.—Austin Nov. 26, 2008, pet. denied); *Long v. Spencer*, 137 S.W.3d 923, 926 (Tex. App.—Dallas 2004, no pet.); *Sclafani v. Sclafani*, 870 S.W.2d 608, 611 (Tex. App.--Houston [1st Dist.] 1993, writ denied); *Benningfield v. Benningfield*, 155 S.W.2d 827, 827 (Tex. Civ. App.—Austin 1941, no writ).

In *Long*, the appellant appealed from the trial court's judgment disbursing the proceeds from the sale of real property in a suit for partition. 137 S.W.3d at 924-25. Because the initial appointment of the receiver was by agreed order, the court concluded that the "general receiver-based complaints and complaints concerning the original receiver were appealable after entry" of the agreed order. *Id*. at 926 n.2. The court dismissed the issues raised concerning the initial appointment for lack of jurisdiction because "[a] challenge to the receivership order after twenty days has passed is untimely and will be dismissed by the appellate court." *Id*. at 926.

In *Sclafani*, the court dismissed the appeal from the overruling of a motion to set aside a receivership for lack of jurisdiction, explaining the policy reasons behind the twenty-day requirement for appealing the establishment of a receiver:

> A contrary holding would mean that a party could rightfully attempt to set aside an order of receivership in an appeal regardless of how long ago the receivership order was entered. The setting aside of an order of receivership has "the effect of nullifying all intervening acts of the receiver . . . or, at least, of raising serious questions concerning the validity of such intervening acts." *Christie v. Lowrey*, 589 S.W.2d 870, 873 (Tex. Civ. App.—Dallas 1979, no writ). Allowing the vacation of a receivership at any time after its creation would work undue hardship on third parties who have dealt in good faith with the receiver. Furthermore, an unlimited time to appeal would mean that the order of receivership would never be beyond challenge, and thus never attain the finality upon which the parties, the receiver, and those who have transacted with the receiver, are entitled to depend.

Sclafani, 870 S.W.2d at 611.

More recently, the Texas Supreme Court held that parties do not waive the right to appeal interlocutory orders by failing to appeal them in an interlocutory manner and may wait until after judgment to appeal. *Bonsmara Nat. Beef Co., LLC v. Hart of Tex. Cattle Feeders, LLC*, No. 19-0263, 2020 Tex. LEXIS 617 (Tex. June 26, 2020). The Court held: "When a trial court renders a final judgment, the court's interlocutory orders merge into the judgment and may be challenged by appealing that judgment." *Id*. *See also Hernandez v. Ebrom*, 289 S.W.3d 316, 318-19 (Tex. 2009). However, the Court also recognized that:

> [I]nterlocutory appeals from certain types of orders may prove to be the only opportunity for appellate review because doctrines entirely separate from the interlocutory appeal statutes can prevent those orders from being challenged on appeal from a final judgment… Similarly, the reasons that courts have held orders appointing receivers are not appealable at the end of a case have nothing to do with the Legislature's choice to authorize interlocutory appeals of such orders. Rather, those holdings are rooted in principles of estoppel—the reliance of third parties who dealt with the receiver in good faith—and in our holding that orders resolving discrete issues in receivership proceedings are considered final and therefore must be appealed immediately, before the case concludes. *See, e.g., Huston v. FDIC*, 800 S.W.2d 845, 848 (Tex. 1990); *Gibson v. Cuellar*, 440 S.W.3d 150, 154-55 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Sclafani v. Sclafani*, 870 S.W.2d 608, 611 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

Id.

C. A Party Generally Cannot Use Order On Receivership To Appeal Other Rulings

Statutes authorizing appeals from interlocutory orders are strictly construed. *Art Inst. of Chicago v. Integral Hedging, L.P.*, 129 S.W.3d 564, 570 (Tex. App.—Dallas 2003, no pet.). "An interlocutory order

that is explicitly appealable under section 51.014 may not be used as a vehicle for carrying other nonappealable interlocutory orders to the appellate court." *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 627 n.24 (Tex. App.—Fort Worth 2007, pet. denied). For example, an appellate court had jurisdiction to hear an interlocutory appeal regarding the appointment of a receiver but did not have jurisdiction to hear the denial of a plea to the jurisdiction because no governmental body was involved. *Krumnow v. Krumnow*, 174 S.W.3d 820 (Tex. App.—Waco 2005); *Spiritas v. Davidoff*, 459 S.W.3d 224, 234 (Tex. App.—Dallas Feb. 27, 2015, no pet.). So, an appellant may not challenge other collateral orders that are not otherwise appealable, such as discovery rulings.

However, orders that affect the validity of the interlocutory order may also be reviewed. *State v. Cook United, Inc.*, 464 S.W.2d 105 (Tex. 1971) (holding order denying plea in abatement could be attacked in appeal from temporary injunction "in so far as the questions raised affect the validity of the injunction order"); *Texas State Bd. Of Examiners in Optometry v. Carp*, 343 S.W.2d 242 (Tex. 1962) (The rule that appellate courts lack jurisdiction to review an unappealable interlocutory order in an appeal from another interlocutory order does not apply where the questions raised might affect the validity of the latter order."); *Santos Ltd. v. Gibson*, No. 14-00-00151-CV, 2000 Tex. App. LEXIS 7164 (Tex. App.—Houston [14th Dist.] October 26, 2000, no pet.) (not design. for publication) (to the extent that the subject matter of the non-appealable interlocutory order may affect the validity of the appealable order, the non-appealable order may be considered); *Letson v. Barnes*, 979 S.W.2d 414 (Tex. App.—Amarillo 1998, pet. denied) (to the extent the subject matter of a non-appealable interlocutory order may affect the validity of an appealable interlocutory order, the non-appealable order may be considered on interlocutory appeal); *Positive Feed, Inc. v. Wendt*, Nos. 01-96-00614-CV, 01-96-01250-CV,1998 Tex. App. LEXIS 774, 1998 WL 43321 (Tex. App.—Houston [1st Dist.] Feb. 5, 1998, pet. denied) (not design. for publication) (reviewed nonappealable interlocutory order where it affected appealable interlocutory order); *Railroad Commission v. Air Prods. & Chems., Inc.*, 594 S.W.2d 219, 221-22 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) ("[n]on-appealable interlocutory orders cannot be attacked in an appeal from an appealable interlocutory order, except insofar as the question raised might affect the validity of the appealable order").

For example, in *Santos Ltd.*, the Houston Fourteenth Court of Appeals resolved the issue regarding a trial court's order on a motion to strike an answer in the interlocutory appeal of a special appearance order. 2000 Tex. App. LEXIS 7164 at *8. The Court stated:

> However, to the extent that the subject matter of the non-appealable interlocutory order may affect the validity of the appealable order, the non-appealable order may be considered. *See Letson v. Barnes*, 979 S.W.2d 414, 417 (Tex. App.—Amarillo 1998, pet. denied*); Texas R.R. Comm'n v. Air Prods. & Chems., Inc*., 594 S.W.2d 219, 221-22 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.). After a review of the record, it appears that the trial court based its denial of Santos's special appearance on its findings denying Santos's motion to strike. Stated differently, the trial court appears to have found that Santos waived its special appearance based on its finding that Santos's initial answer was authorized. Accordingly, the trial court's finding on Santos's motion to strike issue affects the validity of its finding on the special appearance. Under this "pendent" interlocutory jurisdiction, then, we now examine Santos's second point of error.

Id. So, where the trial court's ruling on a collateral issue directly affects the validity of its ruling on a receivership issue, the collateral issue is also within an appellate court's "pendent" appellate jurisdiction. *Id*.

In fact, the Texas Rules of Appellate Procedure provide that some subsequent orders may be brought forward for review:

> While an appeal from an interlocutory order is pending, on a party's motion or on the appellate court's own initiative, the appellate court may review the following: (1) a further appealable order concerning the same subject matter; and (2) any interlocutory order that interferes with or impairs the effectiveness of the relief sought or that may be granted on appeal.

Tex. R. App. P. 29.5(a); *Public Utility Commission of Texas v. Coalition of Cities for Affordable Utility Rates*, 776 S.W.2d 222 (Tex. App.—Austin 1989, no pet.).

D. Notice of Appeal

An appeal of a receivership order is an accelerated appeal. Tex. R. App. P. 28.1. An appellant must file its notice of appeal within 20 days after the signing of the order. Tex. R. App. P. 26.1(b). Court of appeals lacked jurisdiction to review the trial court's order appointing a receiver and any subsequent receiver-related order because sellers' appeal was untimely under this statute and Tex. R. App. P. 26.1(b) and 28.1; the sellers did not appeal the order appointing the receiver within 20 days, did not appeal the orders approving and confirming the sale within 30 days, and did not otherwise file anything

to extend the 30-day deadlines. *Gibson v. Cuellar*, 440 S.W.3d 150, 2013 Tex. App. LEXIS 11446 (Tex. App.—Houston 14th Dist. Sept. 5, 2013, no pet.).

The notice of appeal must contain the following information: the identity of the trial court, the style of the case, the cause number, the date the trial court signed the order, the order appealed from, a statement that the party filing the notice wants to appeal, the identity of the court of appeals to which the appeal is being made, the name of the party or parties filing the notice, and an statement that the appeal will be accelerated. Tex. R. App. P. 25.

Generally, the appellee does not need to file a notice of appeal unless it seeks to alter the trial court's judgment or seek more favorable relief than that awarded by the trial court. Tex. R. App. P. 25.1(c); *Lubbock Cty v. Trammel's Lubock ail Bonds*, 80 S.W.3d 580, 584 (Tex. 2002). If an appellee desires to file a notice of appeal, it must do so either by the time that the appellant's notice is due or within fourteen days of the appellant's notice being filed, whichever is later. Tex. R. App. P. 25.1(d); *Charette v. Fitzgerald*, 213 S.W.3d 505, 509 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

The original notice must be filed with the trial court, and a copy of the notice filed with the court of appeals. Tex. R. App. P 25.1(a); *Ace Ins. Co. v. Zurich Am. Ins. Co.*, 59 S.W.3d 424, 426 n.1 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). If the county where the trial court is located can send appeals to two courts of appeals, the copy of the notice should be filed with the court of appeals that is randomly selected if there is a random selection procedure, or otherwise in the court of appeals of the appellant's choice. *Miles v. Ford Motor Co*., 914 S.W.2d 135, 137-38 (Tex. 1995). The appellant should serve all other parties in the proceeding with the notice of appeal. Tex. R. App. P. 25.1(e); *Pena v. McDowell*, 201 S.W.3d 665, 666 (Tex. 2006). The appellant should also file the appropriate filing fee with the court of appeals and prepare a docketing statement to file with the court of appeals.

It should be noted that filing a motion for new trial or a request for findings of fact does not extend the time to perfect an accelerated appeal. Tex. R. App. P. 28.1(b). Tex. R. App. P. 5, 32; *In re Estate of Denton*, No. 11-14-00222-CV, 2014 Tex. App. LEXIS 12116, 2014 WL 5823338 (Tex. App.—Eastland Nov. 6, 2014, no pet.).

E. Supersedeas Rights

1. General Supersedeas Rights

Unless the law or the rules of appellate procedure provide otherwise, any judgment may be superseded and enforcement of the judgment suspended pending appeal. Tex. R. App. P. 24.1(a). Supersedeas preserves the status quo of the matters in litigation as they existed before the issuance of the order or judgment from which an appeal is taken. *Renger v. Jeffrey*, 182 S.W.2d 701, 702 (1944) (orig. proceeding); *Kantor v. Herald Publ'g Co.*, 632 S.W.2d 656, 657-58 (Tex. App.—Tyler 1982, no writ). Generally, the right to supersede a judgment is one of absolute right and is not a matter within the trial court's discretion. *Houtchens v. Mercer*, 29 S.W.2d 1031, 1033 (Tex. 1930, orig. proceeding); *State ex rel. State Highway & Pub. Transp. Comm'n v. Schless*, 815 S.W.2d 373, 375 (Tex. App.—Austin 1991, orig. proceeding [leave denied]).

A judgment debtor may supersede the judgment by filing with the trial court a good and sufficient bond. Tex. R. App. P. 24.1(a)(2). A supersedeas bond must be in the amount required by Rule 24.2 of the Texas Rules of Appellate Procedure. Tex. R. App. P. 24.1(b)(1)(A). Under Rule 24.2, the amount of the bond depends on the type of judgment. Tex. R. App. P. 24.2(a). For example, when the judgment is for the recovery of money, the amount of the bond must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. Tex. R. App. P. 24.2(a)(1).

When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post:

> When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. But the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that relief was improper.

Tex. R. App. P. 24.2(a)(3). Absent the posting of the judgment creditor's own bond, which acts to basically supersede the judgment debtor's supersedeas, the trial court must allow the judgment debtor to supersede. *Haedge v. Cent. Tex. Cattleman's Ass'n*, No. 07-15-00368, 2016 Tex. App. 2311, at *5–6 (Tex. App.—Amarillo Mar. 3, 2016, no pet.). Upon the request of the judgment debtor, a trial court is required to set a supersedeas amount. *Orix Capital Mkts., LLC v. La Villita Motor Inns, J.V.*, No. 04-09-00573, 2010 Tex. App. LEXIS 435 (Tex. App.—San Antonio January 27, 2010, orig. proceeding) (court of appeals ordered trial court to set supersedeas amount on order requiring a lender to release its liens).

Under Rule 24.2(a)(3), this type of relief could be receivership relief. This "language is mandatory" and, thus, a judgment debtor must be given the opportunity to preserve the status quo during its appeal:

> The purpose of Rule of Appellate Procedure 24 is to provide the means for a party to suspend enforcement of a judgment pending appeal in civil cases. By superseding a judgment against it, the judgment debtor may "preserve[ ] the status quo of the matters in litigation as they existed before the issuance of the order or judgment from which an appeal is taken."

Alpert v. Riley, 274 S.W.3d 277, 297 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

However, under Rule 24, a judgment debtor's right to supersede the enforcement of a judgment during the pendency of an appeal is not absolute. Rule 24.2(a)(3) recognizes that a trial court may refuse to allow a judgment debtor to supersede the judgment so long as the judgment is considered an "other" judgment and the judgment creditor posts security "in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted . . . ." Tex. R. App. P. 24.2(a)(3); *Devine*, 2015 Tex. App. LEXIS 5173, at *2; *Orix Capital Mkts*, 2010 Tex. App. LEXIS 435, at *3. In such cases, the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if the appellate court reverses. *Id. See also El Caballero Ranch, Inc. v. Grace River Ranch, LLC*, No. 04-16-00298-CV, 2016 Tex. App. LEXIS 9180 (Tex. App.—San Antonio August 24, 2016, mot. denied) (court affirmed trial court's order denying supersedeas to judgment debtor where creditor posted security).

Therefore, an appellate court's determination regarding whether a judgment is primarily one for money, the recovery of real property, or for something "other than money or an interest in real property" has serious ramifications for a judgment debtor. *El Caballero Ranch, Inc.*, 2016 Tex. App. LEXIS 9180, *14. In the event that a court determines that the judgment awarded the recovery of money or an interest in real property, the trial court abuses its discretion by failing to allow the debtor to post bond and supersede the enforcement of the judgment during the pendency of the appeal. *Id.* However, in the event the court determines that the judgment awarded something "other than money or an interest in real property," the trial court has discretion to decline a debtor's request to supersede the judgment so long as the creditor posts security in an amount that would secure the debtor against any loss or damage. *Id.* The amount that the creditor must post would be in the discretion of the trial court after an evidentiary hearing on that issue. *Id.*

Nevertheless, a trial court's discretion to refuse to permit a judgment to be superseded under Rule 24.2(a)(3) does not extend to denying a party its appeal by rendering the appeal moot. *In re Dallas Area Rapid Transit*, 967 S.W.2d 358, 360 (Tex. 1998); *Mossman v. Banatex, L.L.C.*, 440 S.W.3d 835, 839 (Tex. App.—El Paso 2013, order); *Hydroscience Techs., Inc. v. Hydroscience, Inc.*, 358 S.W.3d 759, 761 (Tex. App.—Dallas 2011, no pet.).

2. Supersedeas For Interlocutory Orders

Generally, supersedeas rights apply to final judgments. However, a trial court has discretion to allow a party to supersede an interlocutory order as well:

> The trial court may permit an order granting interlocutory relief to be superseded pending an appeal from the order, in which event the appellant may supersede the order in accordance with Rule 24. If the trial court refuses to permit the appellant to supersede the order, the appellant may move the appellate court to review that decision for abuse of discretion.

Tex. R. App. P. 29.2. Further, if the trial court refuses supersedeas, the appellant may also consider filing a motion to stay the order pending appeal. *Id.* at 29.3 ("When an appeal from an interlocutory order is perfected, the appellate court may make any temporary order necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security. But the appellate court may not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas or another order made under Rule 24."). For example, an appellate court does not have to wait for a trial court's refusal to set supersedeas before entering orders to protect its jurisdiction. *Maples v. Muscletech, Inc.*, 74 S.W.3d 429, 431 (Tex. App.—Amarillo 2002, no pet.).

In *Hawkins v. Twin Montana, Inc.*, the court discussed the supersedeas bond requirements for a receivership order. 810 S.W.2d 441, 444 (Tex. App.—Fort Worth 1991, no writ). The court stated:

> [T]he court had directed the receiver to make a lease. Appellants have not explained how they were harmed by this action of the trial court. Appellants correctly argue that supersedeas is a matter of absolute right. *Houtchens v. Mercer*, 119 Tex. 431, 438, 29 S.W.2d 1031, 1033 (1930). However, the court fixed the amount of the supersedeas bond at $ 16,000. After filing a proper supersedeas bond, an appellant is entitled to

> demand restoration to the status quo as it existed before a receiver was appointed. *People's Cemetery Ass'n v. Oakland Cemetery Co.*, 24 Tex. Civ. App. 668, 60 S.W. 679, 680 (1901). Appellants have not cited any authority which indicates the trial court abused its discretion based on exactly when the trial court fixed the amount of the bond. *See generally*, 4 TEX. JUR. 3d Appellate Review § 280 (1980). Appellants' twelfth point of error is overruled.

Id.

More recently, in *WC 1st & Trinity, LP v. Roy F. & Joann Cole Mitte Found.*, the court of appeals held that a trial court erred in setting supersedeas for a party appealing a receivership order. No. 03-19-00905-CV, 2020 Tex. App. LEXIS 932 (Tex. App.—Austin February 3, 2020, no pet). The court held that: "Rule 24.2(a)(3) governs the supersedeas issue in this appeal because the receivership order is a judgment "'for something other than money or an interest in property.'" *Id*. The court held that the trial court erred in allowing a cross-supersedeas posting by the defendant:

> We hold that the trial court abused its discretion by concluding that the $100,000 counter-supersedeas bond posted by Mitte secures appellants "against any loss or damage caused by" the receivership order "if an appellate court determines, on final disposition, that that relief was improper." Tex. R. App. P. 24.2(a)(3). The receivership order grants the receiver all powers to manage the receivership assets that were granted to the general partners under the Partnership agreements. A party's management rights are "unique, irreplaceable, and 'cannot be measured by any certain pecuniary standard.'" *Cheniere Energy, Inc. v. Parallax Enterprises LLC*, 585 S.W.3d 70, 83 (Tex. App.—Houston [14th Dist.] 2019, pet. filed) (affirming temporary injunction maintaining status quo pending litigation of parties' claims on merits related to control over limited liability corporation). In addition, Mitte provided no evidence to support its assertion that this amount would be sufficient to protect appellants. Appellants, on the other hand, presented evidence of the risk of foreclosure on Partnership assets created by the appointment of a receiver, which could put their loans in default and removes their ability to negotiate with the lenders. Under the circumstances of this case, in which the Partnerships' assets are worth millions of dollars (even if the precise value is currently disputed), a $100,000 bond is inadequate to protect appellants from the loss of their management rights and the danger of foreclosure presented by the receivership, if this Court determines on appeal that the receivership was improper.
>
> We further hold that the trial court abused its discretion by refusing to allow appellants to supersede the receivership order. The findings in the receivership order that the trial court relied on when determining that Mitte's rights would not be adequately protected by a bond include the following: [
>
> - The property of the Partnerships is in danger of being lost, removed, or materially injured.
> - The Partnerships are insolvent or in immediate danger of insolvency.
> - The actions of the governing persons of the Partnerships are illegal, oppressive, or fraudulent.
> - The properties of the Partnerships are being misapplied or wasted.
>
> While we express no opinion on whether these findings are correct, we conclude that in this particular situation Mitte can be adequately protected "against loss or damage that the appeal might cause" by a supersedeas bond. *See* Tex. R. App. P. 24.2(a)(3). Unlike appellants' interests in their Partnership management rights, Mitte's interests as a limited partner in the Partnerships can be protected by monetary security.

Id.

3. Appellate Review of Supersedeas Rulings

Rule 24.4 authorizes appellate courts to engage in supersedeas review, specifically to review (1) the sufficiency or excessiveness of the amount of security, (2) the sureties on a bond, (3) the type of security, (4) the determination whether to permit suspension of enforcement, and (5) the trial court's exercise of discretion in ordering the amount and type of security. Tex. R. App. P. 24.4(a); Tex. Civ. Prac. & Rem. Code Ann. § 52.006(d).

An appellate court reviews the trial court's determination of the amount of security under an abuse of discretion standard. *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 909 (Tex. App—Houston [14th Dist.] 2005, published order). "Generally, the test for abuse of discretion is whether the trial court acted without reference to any guiding rules and principles or whether the trial court acted arbitrarily and unreasonably." *Id*. at 910. A failure by the trial court to analyze or apply the law correctly is an

abuse of discretion. *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 623-24 (Tex. 2005).

To complain of a trial court's net worth determination in connection with setting a supersedeas bond amount, a party must file a motion in the court of appeals. Tex. R. App. P. 24.4. A petition for writ of mandamus is the proper vehicle to present a complaint in the Supreme Court of Texas.

A court of appeals may also "issue any temporary orders necessary to preserve the parties' rights" to seek appellate review of the trial court's determination. Tex. R. App. P. 24.4(c). A stay may be necessary to preserve the status quo and prevent execution on the underlying judgment pending a court's resolution of the issues raised with the trial court's supersedeas determinations. *Id*. For example, one court has stayed enforcement of an underlying judgment that awarded possession of real property while the court reviewed a trial court's actions on supersedeas determinations. *See In re It's The Berry's, LLC*, No. 12-06-00298-CV, 2006 Tex. App. LEXIS 9146, at *13 (Tex. App.—Tyler Oct. 25, 2006, order) (imposing stay while Court considered issues regarding right to and amount of supersedeas).

F. Record for Appeal/Scope of Review

"When an appellate court is called upon to revise the ruling of a trial court, it must do so upon the record before that court when such ruling was made." *Stephens Cnty. v. J.N. McCammon, Inc.*, 122 Tex. 148, 52 S.W.2d 53, 55 (Tex. 1932); *accord Spiritas v. Davidoff*, 459 S.W.3d 224 (Tex. App.—Dallas Feb. 27, 2015, no pet.); *Tanner v. McCarthy*, 274 S.W.3d 311, 323 n.22 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (declining to consider testimony in record of hearing held subsequent to trial court's challenged ruling in deciding whether trial court abused its discretion by rendering turnover order unsupported by evidence); *Congleton v. Shoemaker*, Nos. 09-11-00453-CV, 09-11-00654-CV, 2012 Tex. App. LEXIS 2880, 2012 WL 1249406, at *6 n.3 (Tex. App.—Beaumont Apr. 12, 2012, pet. denied) (mem. op.) (declining to consider evidence attached to motion to reform trial court's turnover order in deciding whether entry of such turnover order was abuse of discretion). This rule applies to receivership appeals. *Spiritas v. Davidoff*, 459 S.W.3d at 224.

The appellate record must be forwarded to the court of appeals. The purpose of the record is to bring the trial court's proceedings to the appellate court so that the appellate court can review the trial court's order. There are two parts to the record: the clerk's record and the reporter's record. Tex. R. App. P. 34.1. The clerk's record is a bound volume prepared by the trial court's clerk that contains the items filed with the clerk, i.e., pleadings, motions, and orders. *See id*. at 34.5. The reporter's record is the verbatim transcription of the oral proceedings in the trial court and is prepared by the court reporter. *See id*. at 34.6. The trial court and appellate courts are jointly responsible for filing the record. *See id*. at 35.3. The trial court clerk is responsible for filing the clerk's record as soon as a notice of appeal is filed and the appealing party makes arrangements to pay for the record. *See id*. 37.3. The Texas Rules of Appellate Procedure provide what items are normally included in the clerk's record, however, if either party wants some other document included that is not expressly listed, then that party has the duty to file a written request with the clerk for such documents. The court reporter is responsible for filing the reporter's record when a notice of appeal is filed, and when the appealing party makes a written request for it and makes arrangements to pay for it. *See id*. at 35.3. The written request should clarify what portions of the proceedings need to be transcribed. In an accelerated appeal, the appellate record is due to be filed within 10 days of the notice of appeal. *See id*. at 35.1(b).

Although rarely done, an appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn and uncontroverted copies of those papers. Tex. R. App. P. 28.3. Further, the court of appeals may consider the appeal without appellate briefing. *See id.*

If an appellant fails to request the record, the court of appeals should summarily affirm. *Davis v. Davis*, No. 05-12-00257-CV,2013 Tex. App. LEXIS 5525, 2013 WL 1896194 (Tex. App.—Dallas May 6, 2013, no pet.) (mem. op). "As stated previously, the trial court's order recited that evidence was heard in this case, but our record does not contain the reporter's record of the hearing. In response to a query from this court, the court reporter advised us that appellant did not request one. Without a reporter's record, we do not know what evidence was presented to the trial court, and we presume the missing record supports the trial court's order." *In re Spiegel*, 6 S.W.3d 643, 646 (Tex. App.—Amarillo 1999, no pet.)." *Id*. *See also Unit 82 Joint Venture v. Int'l Commercial Bank of China, Los Angeles Branch*, 460 S.W.3d 616 (Tex. App.—El Paso 2014, pet. denied).

G. Briefing Schedule

The appellant's brief is due to be filed twenty days after the record is filed. Tex. R. App. P. 38.6. The appellee's brief is due to be filed twenty days after the appellant's brief is filed. See id. The appellant's reply brief is due twenty days after the appellee's brief is filed. Disposition of the appeal is also accelerated because interlocutory appeals are required to be given priority over other appeals. *See id.* at 40.1(b). The court of appeals has discretion to extend these deadlines, or in the interests of justice, can also shorten the time for filing briefs and for submission of the case. *See id*. at 38.6.

H. Oral Argument

Once the briefing is complete, the court of appeals will set a submission date. The court may submit the case with or without oral argument. If a party wants oral argument, it must state that it wants oral argument on the cover of its brief. Tex. R. Civ. P. 39.7. The court of appeals may grant the right to argue, but it may not. Texas Rule of Appellate Procedure 39.1 states:

> A party who has filed a brief and who has timely requested oral argument may argue the case to the court unless the court, after examining the briefs, decides that oral argument is unnecessary for any of the following reasons: (a) the appeal is frivolous; (b) the dispositive issue or issues have been authoritatively decided; (c) the facts and legal arguments are adequately presented in the briefs and record; or (d) the decisional process would not be significantly aided by oral argument.

Tex. R. App. P. 39.1. When granted, a party should have one attorney argue. Tex. R. App. P. 39.4. However, on leave of court, a party may have two attorneys argue, and only one attorney can argue rebuttal. *Id*.

A party may not raise an issue for the first time at argument; it must be raised in the party's brief. *Herring v. Heron Lakes Estates Owners Ass'n*, 2011 Tex. App. LEXIS 5, 2011 WL 2739517 (Tex. App.—Houston [14th Dist.] Jan. 4 2011, no pet.); *Nix v. State*, 2010 Tex. App. LEXIS 3717 (Tex. App.—Tyler May 19 2010, no pet.); *Poland v. Willerson*, 2008 Tex. App. LEXIS 1805 (Tex. App.—Houston [1st Dist.] Mar. 13 2008, no pet.).

I. Standard of Review

A court of appeals reviews a trial court's order appointing a receiver for an abuse of discretion. *See, e.g., Spiritas v. Davidoff*, 459 S.W.3d 224, (Tex. App.—Dallas Feb. 27, 2015, no pet.); *Elliott v. Weatherman*, 396 S.W.3d 224 (Tex. App.—Austin 2013, no pet.); *Benefield v. State*, 266 S.W.3d 25, 31 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Balias v. Balias, Inc*., 748 S.W.2d 253, 256 (Tex. App.—Houston [14th Dist.] 1988, writ denied). "It is an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles, or to rule without supporting evidence." *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998) (citations omitted). A corollary principle is that a court of appeals may not reverse for abuse of discretion merely because it disagrees with the court's decision, if that decision was within the court's discretionary authority. *See Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991).

A trial court generally does not abuse its discretion when its decision is based on conflicting evidence and some evidence in the record reasonably supports the trial court's decision. *Estate of Hoskins*, 501 S.W.3d 295 (Tex. App.—Corpus Christi 2016, no pet.) (citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002)). A trial court does abuse its discretion when it rules without any supporting evidence. *Templeton v. RKR Inv. Inc.*, No. 02-18-00024-CV, 2018 Tex. App. LEXIS 3730 (Tex. App.—Fort Worth May 24, 2018, no pet.).

Under the abuse of discretion standard, legal and factual insufficiency are not independent reversible grounds, but are relevant components in assessing whether the trial court erred. *In re Estate of Martinez*, NO. 01-18-00217-CV, 2019 Tex. App. LEXIS 2614 (Tex. App.—Houston [1st Dist.] April 2, 2019, no pet.); *Estate of Hoskins*, 501 S.W.3d at 295; *Coburn v. Moreland*, 433 S.W.3d 809, 823 (Tex. App.—Austin 2014, no pet.); *see also In the Interest of DC*, No. 13-15-00486-CV, 2016 Tex. App. LEXIS 7724, 2016 WL 3962713 at *6 (Tex. App.—Corpus Christi July 21, 2016, no. pet. h.) (mem. op.) (same). In determining whether an abuse of discretion has occurred because the evidence is legally or factually insufficient to support the trial court's decision, an appellate court should ask: (1) whether the trial court had sufficient information upon which to exercise its discretion; and (2) whether the trial court erred in the application of its discretion. *Estate of Hoskins*, 501 S.W.3d at 295; *Gonzalez v. Villarreal*, 251 S.W.3d 763, 774 n.16 (Tex. App.—Corpus Christi 2008, pet. dism'd); *In re TDC*, 91 S.W.3d 865, 872 (Tex. App.—Fort Worth 2002, pet. denied). The sufficiency review is related to the first inquiry. *Estate of Hoskins*, 501 S.W.3d at 295; *Gonzalez*, 251 S.W.3d at 774 n.16; *see also Interest of DC*, 2016 Tex. App. LEXIS 7724, 2016 WL 3962713 at *6.

However, a trial court has no discretion in determining what the law is or applying the law to the facts. *Elliott v. Weatherman*, 396 S.W.3d 224 (Tex. App.—Austin 2013, no pet.). Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion. *Id.* A trial court also abuses its discretion when it rules arbitrarily, unreasonably, without regard to guiding legal principles, or without supporting evidence. *Id.* (citing *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998)).

The decision to discharge a receiver is within the discretion of the appointing court, and such decision will not be overturned absent an abuse of discretion. *Lane v. Lane*, No. 06-12-00058-CV, 2012 Tex. App. LEXIS 7471 (Tex. App.—Texarkana Sept. 4, 2012); *Pouya v. Zapa Interests, Inc*., No. 03-07-00059-CV,2007 Tex. App. LEXIS 7243, 2007 WL 2462001, at *6 (Tex. App.—Austin Aug. 13, 2007); *In re Waggoner Estate*, 163 S.W.3d 161, 165 (Tex. App.—Amarillo 2005, no pet.); *Stanfield v. Stanfield*, No. 09-99-435-CV, 2000 Tex. App. LEXIS 6743, 2000 WL 1475853 (Tex. App.—Beaumont Oct. 5, 2000, no pet.) (not designated

for publication); *Buck v. Johnson*, 495 S.W.2d 291, 299 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.); *DateGilles v. Yarbrough*, 224 S.W.2d 720, 722 (Tex. Civ. App.—Fort Worth 1949, no writ).

J. Right To Appeal Receivership Impacting Non-Parties

In *Genssler v. Harris County*, the court of appeals held that a party had no standing to challenge a trial court's receivership order that authorized a receiver to seize assets of non-party entities. 584 S.W.3d 1 (Tex. App.—Houston [1st Dist.] Oct. 7, 2010, no pet.). *See also Goffney v. Houston Indep. Sch. Dist.*, No. 01-08-00063-CV, 2009 Tex. App. LEXIS 5927, 2009 WL 2343250, *3-4 (Tex. App.—Houston [1st Dist.] July 30, 2009, no pet.) (holding that appellant lacked standing on appeal to challenge alleged procedural due process violations against third party).

K. Waiver Of Appeal By Agreeing To Receivership

Under the invited error doctrine, "a party cannot complain on appeal that the trial court took a specific action that the complaining party requested . . . ." *Tittizer v. Union Gas Corp*., 171 S.W.3d 857, 862 (Tex. 2005). This concept also applies to receivership appeals. *I-10 Colony, Inc. v. Chao Kuan Lee,* No. 01-14-00465-CV, No. 01-14-00718-CV, 2015 Tex. App. LEXIS 4136 (Tex. App.—Houston [1st Dist.] Apr. 23, 2015, no pet.) ("We conclude that I-10 has waived its complaints, including its constitutional complaints, regarding the appointment of a receiver and the scope of the receiver's authority by requesting the appointment and agreeing to confer upon the receiver the authority about which it now complains.").

In *Templeton v. RKR Inv. Inc*., the court stated: "One who invokes the jurisdiction of the court to appoint a receiver of his property cannot thereafter question the validity of the appointment for want of jurisdiction. We hold that Templeton's repeated requests in the trial court that a receiver be appointed bar his challenge in this interlocutory appeal to the appointment of the receiver." No. 02-18-00024-CV, 2018 Tex. App. LEXIS 3730 (Tex. App.—Fort Worth May 24, 2018, no pet.).

L. Challenge Every Ground

Where an appellant challenges a trial court's receivership order, it must challenge all potential grounds that would sustain the order. *Hartwell v. Lone Star, PCA*, 528 S.W.3d 750 (Tex. App.—Texarkana 2017, pet. dism.); *Hyperion Holdings, Inc. v. Tex. Dept. of Housing & Comm. Affairs*, No. 03-05-00563-CV, 2006 Tex. App. LEXIS 1366 (Tex. App.—Austin February 16, 2006, no pet.). Absent a specific complaint as to each potential ground, the court of appeals should summarily affirm the judgment on those unchallenged grounds. *See id. See also Specialty Retailers v. Demoranville*, 933 S.W.2d 490, 493 (Tex. 1996); *Carone v. Retamco Operating, Inc*., 138 S.W.3d 1, 7 (Tex. App.—San Antonio 2004, pet. denied) ("Generally, when a trial court's judgment rests upon more than one independent ground or defense, the aggrieved party must assign error to each ground, or the judgment will be affirmed on any ground with merit to which no complaint is made."). *See also* Tex. R. App. P. 38.1 (appellant's brief must contain "a clear and concise argument . . . with appropriate citations to authorities"). As the First Court of Appeals has stated:

> An appellant must attack all independent bases or grounds that fully support a complained-of ruling or judgment. If an appellant does not, then we must affirm the ruling or judgment. This rule is based on the premise that an appellate court normally cannot alter an erroneous judgment in favor of a civil appellant who does not challenge that error on appeal. If an independent ground is of a type that could, if meritorious, fully support the complained-of ruling or judgment, but the appellant assigns no error to that independent ground**,** then we must accept the validity of that unchallenged independent ground. Thus, any error in the grounds challenged on appeal is harmless because the unchallenged independent ground could, if meritorious, fully support the complained-of ruling or judgment.

Yazdchi v. Bennett, No. 01-04-01057-CV, 2006 Tex. App. LEXIS 3122 (Tex. App.—Houston [1st Dist.] April 20, 2006, no pet.) (internal citations omitted). *See also Pearson v. Visual Innovations Co. Inc.*, No. 03-04-00563-CV, 2006 Tex. App. LEXIS 2795 (Tex. App.—Austin April 6, 2006, no pet.) ("by presenting no argument to this Court on whether the trial court erred in determining that Pearson was liable for fraud, breach of a fiduciary relationship, misappropriation of a trade secret, conversion of confidential information, and tortious interference with a business relationship, Pearson has waived the right to contest Visual Innovations' monetary relief on those grounds.").

M. Effect On Appeal By Termination Of Receivership

An appeal from an order granting an application for receivership is moot and the appeal should be dismissed if the receivership terminates before the appellate court makes a decision. Tex. R. App. P. 47.1; *Saad v. Friedman & Feiger, LLP*, No. 05-18-00034-CV, 2018 Tex. App. LEXIS 3654 (Tex. App.—Dallas May 23, 2018, no pet.); *Nwabuisi v. Mohammadi*, No. 04-14-003630CV, 2015 Tex. App. LEXIS 7815 (Tex. App.—San Antonio July 29, 2015, no pet.); *R-Zaq, Inc. v.*

Mohawk Servicing, LLC, No. 08-15-00065-CV, 2015 Tex. App. LEXIS 4227 (Tex. App.—El Paso April 24, 2015, no pet.); *Rogers v. PLS Water Company, Inc*., No. 14-94-1135-CV, 1996 Tex. App. LEXIS 304, 1996 WL 28791 (Tex. App.—Houston [14th Dist.] 1996, writ dism'd w.o.j.)(not designated for publication)(holding that order terminating the receivership rendered moot the appeal from an order authorizing further action by the receiver and the receiver's order to seize).

A court of appeals is prohibited from reviewing an order that is moot because such a review would constitute an impermissible advisory opinion. *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999); *R-Zaq, Inc. v. Mohawk Servicing, LLC*, 2015 Tex. App. LEXIS 4227. The court of appeals should dismiss the case once it becomes moot on appeal. *Isuani v. Manske-sheffield Radiology Group, P.A.*, 802 S.W.2d 235, 236 (Tex. 1991). *See also N.W. Enters. v. City of Houston*, No. 14-09-00561-CV, 2010 Tex. App. LEXIS 791 (Tex. App.—Houston [14th Dist.] February 4, 2010, no pet.).

The issue can arise as to what happens to an opinion that has been issued before a case becomes moot. Previously, the general rule was that when a case becomes moot while on appeal, the proper course was not to merely dismiss the appeal, but to vacate the judgments and orders of the lower courts. *See, e.g., United Services Automobile Ass'n v. Lederle*, 400 S.W.2d 749 (Tex. 1966); *Guajardo et al v. Alamo Lumber Co.*, 159 Tex. 225, 317 S.W.2d 725, 726 (1958); *International Association of Machinists, Local Union No. 1488 et al. v. Federated Association of Accessory Workers et al*, 133 Tex. 624, 130 S.W.2d 282 (1939); *Service Finance Corporation v. Grote*, 133 Tex. 606, 131 S.W.2d 93 (1939). The rule prevented what might have been an erroneous opinion and judgment from becoming final in a moot case. *Lederle*, 400 S.W.2d at 749. *See also Speer v. Presbyterian Children's Home*, 847 S.W.2d 227 (Tex. 1993); *Raborn v. Davis*, 795 S.W.2d 716 (Tex. 1990). "To grant the motion [to dismiss without vacating opinion] would leave in effect the judgment of the Court of Civil Appeals in which respondents obtained relief and would deny to petitioner the right to have that judgment reviewed." *Texas Foundries, Inc. v. International Moulders & Foundry Workers' Union*, 151 Tex. 239, 241, 248 S.W.2d 460, 461 (1952).

More recently, in reviewing mootness due to settlement, appellate courts have not had to vacate an opinion if it concerns matters of public importance. In *Houston Cable TV, Inc. v. Inwood West Civic Ass'n, Inc*., after the court of appeals issued its opinion, a party filed an application for writ of error to the Texas Supreme Court. 860 S.W.2d 72 (Tex. 1993). The parties subsequently settled, and then pursuant to settlement, filed a joint motion asking the Texas Supreme Court to grant its writ, vacate the judgment and opinion of the court of appeals, and vacate the trial court's judgment. *See id*. The Texas Supreme Court, noting that "a private agreement between litigants should not operate to vacate a court's writing on matters of public importance," refused to vacate and indicated that the precedential authority of the court of appeals' opinion is equivalent to a "writ dismissed" case. *Id. See also Ritchey v. Vasquez*, 986 S.W.2d 611 (Tex. 1999) (Texas Supreme Court may decline to vacate a court of appeals's opinion even though the judgment is dismissed as moot).

Other courts have followed the Texas Supreme Court's lead on this point. *See, e.g., Dallas/Fort Worth Int'l Airport Bd. v. Funderburk*, 2006 Tex. App. LEXIS 9786 (Tex. App.—Fort Worth Nov. 9, 2006, no pet.); *Polley v. Odom*, 963 S.W.2d 917, 918 (Tex. App.—Waco 1998, order, no pet.) (per curiam) ("Because our opinion in this case addresses matters of public importance, our duty as a public tribunal constrains us to publish our decision."); *Vida v. El Paso Employees' Fed. Credit Union*, 885 S.W.2d 177, 182 (Tex. App.—El Paso 1994, no writ) ("Although this Court certainly encourages the settlement of controversies . . . we do not sit as a purely private tribunal to settle private disputes. We believe that our opinion in this case involves matters of public importance, and our duty as an appellate court requires that we publish our decision.").

In one appeal, the court of appeals vacated its judgment because the parties settled the controversy between them while the appeal was pending in the Texas Supreme Court. *Swanson Broadcasting, Inc. v. Clear Channel Communications, Inc*., 762 S.W.2d 360 (Tex. App.—San Antonio 1988, no writ). The court of appeals did not, however, withdraw or vacate its opinion, and it was still authority for future cases.

The Texas Rules of Appellate Procedure also allow a court of appeals to maintain its opinion even if the underlying case becomes moot. In dismissing a proceeding upon a voluntary dismissal or settlement, Rule 42.1(c) provides that the court of appeals will determine whether to withdraw any opinion that it has already issued. Tex. R. App. P. 42.1(c). Further, if a case becomes moot while a petition for review is pending in the Texas Supreme Court, Rule 56.2 provides: "If a case is moot, the Supreme court may, after notice to the parties, grant the petition and, without hearing argument, dismiss the case or the appealable portion of it without addressing the merits of the appeal." *See id.* at 56.2. Further, if a case is settled while on appeal in the Texas Supreme Court, the Court can effectuate the parties' settlement, but the order will not vacate the court of appeals' opinion unless it specifically provides otherwise. *See id.* at 56.3. *See also Tex. Mut. Ins. Co. v. Howell*, No. 05-0806, 2007 Tex. LEXIS 587 (Tex. June 22, 2007) (vacated court of appeals's judgment on temporary injunction appeal but refused to vacate opinion).

N. Effect of Appeal On Trial Proceedings

1. Appeal Does Not Suspend Order

Perfecting an appeal does not normally suspend the order appealed from unless the order is suspended by the trial court or the court of appeals suspends the order on a motion by the appealing party. Tex. R. App. P. 29.1. The trial court may allow an order to be suspended pending appeal and may require the appealing party to post security. There are limited exceptions where the filing of the notice of appeal does suspend the order: governmental defendants can suspend an order without providing any security. *See, e.g., In re Long*, 984 S.W.2d 623, 625-26 (Tex. 1999). Normally, a party should seek an order suspending an order from the trial court first, and then from the court of appeals.

However, when an appeal from an interlocutory order is perfected, an appellate court "may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security." Tex. R. App. P. 29.3. One court has stated:

> Proving one is clearly entitled to relief under Rule 29.3 would, at the very least, require discussion of how the "parties' rights" are in jeopardy if relief is not forthcoming. Implicit in that is citation by the movant to authority not only supporting the position urged but also legitimizing the scope or breadth of the relief sought under the particular circumstances.

Castleman v. Internet Money, Ltd., No. 07-16-00320-CV, 2016 Tex. App. LEXIS 13149 (Tex. App.—Amarillo December 9, 2016, no pet.).

In *Oryon Techs., Inc. v. Marcus*, the party was seeking a stay of a sealing order. 429 S.W.3d 762 (Tex. App.—Dallas 2014, no pet.). The court of appeals held:

> A stay is not a writ of prohibition: a stay is intended to be only temporary, and the requisite showing for a stay is less formal than the requisite showing for a writ of prohibition. Particularly in cases such as this one, where the actions of the trial court during the pendency of the appeal endanger this Court's jurisdiction over the appeal, just as under Rule 29.3, the question on a motion for stay is not whether the trial court acted within its discretion in issuing the order in question, but rather whether a stay is needed to preserve the rights of the parties pending appeal.

Id.

If necessary to protect the parties' rights, a court of appeals may hear a motion to stay without the issue first going to the trial court. *Maples v. Muscletech, Inc*., 74 S.W.3d 429, 431 (Tex. App.—Amarillo 2002, no pet.); *Hailey v. Texas New-Mexico Power Co*., 757 S.W.2d 833 (Tex. App.—Waco 1988, writ dism'd w.o.j.). If the appellate court does stay a receivership, a trial court's further order in contravention of that stay is void. Orders issued by a respondent trial court in violation of an appellate court stay order are void. *See City of Corpus Christi v. Maldonado*, 398 S.W.3d 266, 269 n.3 (Tex. App.—Corpus Christi 2011, no pet.) (holding trial court's temporary injunction order void because court entered order despite appellate court staying underlying proceedings pending disposition of interlocutory appeal); *In re Helena Chem. Co*., 286 S.W.3d 492, 498 (Tex. App.—Corpus Christi 2009, orig. proceeding) ("[A]ny actions subsequently made by such parties in the trial court are rightfully considered violations of the stay and are void as a matter of law."); *In re El Paso Cnty. Comm'rs Court*, 164 S.W.3d 787, 787 (Tex. App.—El Paso 2005, orig. proceeding) ("The orders issued by Respondent are in direct violation of this Court's stay order, and therefore are void.").

2. Appeal Does Not Stay Trial

Appealing a receivership order does have the effect of staying the commencement of trial pending resolution of the appeal. Tex. Civ. Prac. & Rem. Code Ann. §51.014(b). Section 51.014(b) provides: "An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4) [providing for interlocutory appeal of temporary injunction orders] stays the commencement of a trial in the trial court pending resolution of the appeal." Tex. Civ. Prac. & Rem. Code Ann. §51.014(b). The statute is mandatory and allows no room for discretion. *Waite v. Waite*, 76 S.W.3d 222, 222-23 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *Sheinfeld, Maley & Kay, P.C. v. Bellush*, 61 S.W.3d 437, 2001 WL 314804 (Tex. App.—San Antonio 2001, no pet) (citing *Tarrant Regional Water Dist. v. Gragg*, 962 S.W.2d 717, 718 (Tex. App.—Waco 1998, no pet)). "Because the statute requires commencement of trial stayed after an interlocutory appeal has been filed, the trial court erred in beginning the trial." *Waite v. Waite*, 76 S.W.3d 222, 222-23.

3. Trial Courts Can Enter Other Orders

Appealing a receivership order does not have the effect of staying any other aspect of the trial court proceedings pending resolution of the appeal. Tex. Civ. Prac. & Rem. Code Ann. §51.014(b). Further, the Texas Rules of Appellate Procedure allow a trial court to enter other and additional orders. Texas Rule of Appellate Procedure 29 governs the pendency of interlocutory appeals in civil cases. It expressly provides that a trial court can proceed to trial while an interlocutory appeal is pending:

> While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of

> the case and may make further orders, including one dissolving the order appealed from, and if permitted by law, may proceed with the trial on the merits.

Tex. R. App. P. 29.5; *Tex. Health & Human Servs. Comm'n v. Advocates for Patient Access, Inc*., 399 S.W.3d 615, 623 (Tex. App.—Austin 2013, no pet.); *Ahmed v. Shimi Ventures, LP*, 99 S.W.3d 682 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Waite v. Waite*, 76 S.W.3d 222, 223 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (the trial court retained jurisdiction of the case pending the interlocutory appeal and could make further orders including one dissolving the temporary order on appeal).

A trial court cannot make an order that: "(a) is inconsistent with any appellate court temporary order; or (b) interferes with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal." Tex. R. App. P. 29.5. *See also McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227, 238 (Tex. 2001) (finding that under the facts of a class action certification case, a severance order impaired the effectiveness of the relief that the appellant sought and therefore vacated that decision). The purpose of this provision is to prevent a trial court from interfering with a party's right to appellate review or the appellate court's power to grant relief in interlocutory appeals. *In re M.M.O.*, 981 S.W.2d 72, 78 (Tex. App.—San Antonio 1998, no pet.); *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984) (construing a predecessor to Rule 29, former Tex. R. Civ. P. 385b(d)); *Eastern Energy, Inc. v. SBY P'shp*., 750 S.W.2d 5, 6 (Tex. App.—Houston [1st Dist. 1988, no writ).

Furthermore, Rule 29.3 provides that an appellate court can make any order that is necessary to preserve the parties' rights until the interlocutory appeal is determined. Tex. R. App. P. 29.3. It is not always clear whether an order is ''necessary to preserve the parties' rights" under Appellate Rule 29.3. One court of appeals stayed discovery in an underlying case while considering a trial court's ruling on a motion to compel arbitration. *In re Scott*, 100 S.W.3d 575, 578 (Tex. App.—Fort Worth 2003, no pet.) (appellate court noting it had stayed trial court's discovery order pending outcome of ruling on arbitration). Further, in *H & R Block, Inc. v. Haese*, the Texas Supreme Court issued an order in a mandamus proceeding staying a trial court order while an interlocutory appeal of an order certifying a class action was pending. 992 S.W.2d 437, 439 (Tex. 1999). The Court concluded that the appeal would become moot unless the trial court's order was stayed, thus suggesting that a stay is necessary any time it is required to prevent the appeal from becoming moot. *Id*.

In *Lacefield v. Electronic Financial Group, Inc*., the court of appeals ordered a stay of trial court proceedings in an appeal from the denial of a special appearance motion. 21 S.W.3d 799, 800 (Tex. App.–Waco 2000, no pet.), *overruled on other grounds*, 151 S.W.3d 300. The court reasoned that requiring the appellant to participate in pretrial discovery pending resolution of his appeal would be an unfair and onerous burden on his time and finances. *See id*. Similarly, in *Teran v. Valdez*, the court of appeals stayed trial court proceedings pending resolution of an interlocutory appeal on the issue of official immunity of the defendant to prevent the imposition of an unnecessary burden on the defendant. 929 S.W.2d 37, 38 (Tex. App.—Corpus Christi 1996, no writ).

O. Texas Supreme Court's Review of Receivership Appeals

Generally, an interlocutory appeal of a receivership order is final in the court of appeals. However, the Texas Supreme Court may have jurisdiction over such an appeal.

1. Historical Standards For Supreme Court Jurisdiction

Historically, the Texas Government Code granted the Texas Supreme Court jurisdiction to review interlocutory orders only when: (1) the court of appeals's opinion conflicts with a prior decision of the Texas Supreme Court or another court of appeals ("conflicts jurisdiction"); or (2) if one member of the court of appeals disagrees on a material question ("dissent jurisdiction"). Former Tex. Gov't Code Ann. §§ 22.001(a)(1), 22.225(c).

The Texas Supreme Court interpreted its conflicts jurisdiction very narrowly. *Wagner & Brown, Ltd, v. Horwood*, 53 S.W.3d 347, 349 (Tex. 2001) (Hecht, J. dissent from denial of rehearing of petition for review). It found that to have jurisdiction, the conflicting decisions must not merely be an implicit conflict, but a decision based on practically the same state of facts and announcing antagonistic conclusions. *Christy v. Williams*, 298 S.W.2d 565, 567 (Tex. 1957).

The Court's dissent jurisdiction applied when there is a disagreement on a material question. If a disagreeing justice issued a concurrence, there was an argument that the disagreement was not really "material." *Brown v. Todd*, 53 S.W.3d 297, 301 (Tex. 2001) (party requesting dissent jurisdiction must argue that the issue sought for review was the basis for the dissent). Further, the Court held that a dissent from a denial of a motion for rehearing en banc who did not sit on the original panel was sufficient to support dissent jurisdiction if there was a "direct clash between the justice and the court on the appropriate analysis for the case." *American Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801 (Tex. 2002).

2. New Jurisdictional Statute

Effective September 1, 2017, the Texas Legislature's HB 1761 substantially modified the Texas Supreme Court's jurisdiction over final and interlocutory orders. This statutory change impacts receivership orders executed on or after September 1, 2017. This bill provides that Texas Government Code Section 22.001 is amended to state that the Texas Supreme Court has jurisdiction via one basis: any judgment or order that the Court determines raises an issue of law that is important to the jurisprudence of Texas. That is it. It is unclear how this will impact the Texas Supreme Court's review of receivership appeals.

P. Review By Mandamus

In Texas, a person may obtain mandamus relief from a court action only if (1) the trial court abused its discretion and (2) the party requesting mandamus has no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 135-36 (Tex. 2004); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). A trial court can abuse its discretion in granting or denying an application for receivership. Moreover, depending upon the circumstances, this ruling may result in no adequate remedy by appeal.

The "no adequate remedy at law" requirement "has no comprehensive definition," and the determination of whether a party has an adequate remedy by appeal requires a "careful balance of jurisprudential considerations" that "implicate both public and private interests." *In re Prudential*, 148 S.W.3d at 136. "When the benefits [of mandamus review] outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate." *Id. See also In re Ford Motor Co*., 165 S.W.3d 315, 317 (Tex. 2005). The Supreme Court stated:

> The operative word, 'adequate', has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate both public and private interests. . . Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is "adequate" when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.

In re Prudential, 148 S.W.3d at 136.

Normally, where a party has the right to appeal an order, there is an adequate remedy by appeal. However, where harm will befall the party before an appeal can be heard, a court of appeals may grant mandamus relief.

For example, The Texas Supreme Court has repeatedly held that orders from requests for temporary restraining orders and temporary injunctions are subject to mandamus where there is not sufficient time to set a hearing on the temporary injunction or to appeal a temporary injunction before the complained of act occurs. For example, in *In re Francis*, the Supreme Court held that: "This Court may review a temporary injunction from a petition for writ of mandamus when an expedited appeal would be inadequate; if, for example, the appeal could not be completed before the issue became moot." 186 S.W.3d 534, 538 (Tex. 2006); *In re Newton*, 146 S.W.3d 648 (Tex. 2004) (the Supreme Court held that it could review a temporary restraining order via mandamus where the merits of the dispute would be mooted if the parties were required to wait to appeal a temporary injunction determination); *In re Texas Natural Resource Conservation Commission*, 85 S.W.3d 201 (Tex. 2002) (party could utilize a petition for writ of mandamus to challenge a TRO wrongfully extended); *Republican Party of Texas v. Dietz*, 940 S.W.2d 86 (Tex. 1997) (party entitled to challenge trial court's temporary injunction by mandamus in Supreme Court); *Sears v. Bayoud*, 786 S.W.2d 248 (1990) (Supreme Court mandamus review available for election mandamus based on its "statewide application," "urgency of time constraints," and potential for the case to become moot without immediate attention).

In fact, the Texas Supreme Court has held that it could entertain a mandamus proceeding while an interlocutory appeal is still ongoing in the court of appeals:

> While appeal to the court of appeals of the temporary injunction order is final absent Supreme Court conflicts or dissent jurisdiction, *see* Tex. Gov't Code § 22.225(b)(3), we have mandamus jurisdiction in the pending cause regardless of the finality of the court of appeals' ruling in the interlocutory appeal of the temporary injunction. We are not divested of mandamus jurisdiction because we lack appellate jurisdiction. *See Deloitte & Touche LLP v. Fourteenth Court of Appeals,* 951 S.W.2d 394, 396 (Tex. 1997).

In re AutoNation, Inc., 228 S.W.3d 663 (Tex. 2007).

Courts have held that a party who challenges the order granting a receivership are not entitled to mandamus relief as they have an adequate remedy at law via an appeal. *In re Sutton*, No. 04-12-00786-CV, 2012 Tex. App. LEXIS 10028 (Tex. App.—San Antonio December 5, 2012, original proc.). Courts have granted mandamus relief in receivership actions. *See, e.g., Parker County's Squaw Creek Downs, LP v. Watson*, No. 02-08-255-CV, 2009 Tex. App. LEXIS 2206 (Tex. App.—Fort Worth Aril 2, 2019, original proceeding); *Plaza Court, Ltd. v. West*, 879 S.W.2d 271 (Tex. App.—Houston [14th Dist.] 1994, no writ). Accordingly, if a party's rights are going to be lost before a party has the opportunity to appeal a receivership determination, it should consider whether a petition for writ of mandamus would be appropriate. Of course, the party must still prove a clear abuse of discretion. If there is a fact question regarding the merits of a claim or defense, the court of appeals will likely deny the petition.

VIII. CONCLUSION

A pre-trial receivership is a very valuable remedy that can preserve the substance of a plaintiff's claims. However, it is an extreme remedy that takes a party's business out of its hands and places it into the hands of another. For these reasons, courts should carefully balance the parties' interests in awarding such relief. This article was intended to assist parties who seek to obtain receivership relief or those that seek to defend against it.