

SUBCOMMITTEE REPORT/TRCP 737-813

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The subcommittee reviewed written comments as well as testimony before the Texas Supreme Court in its hearing on November 30, 1989 concerning proposed rule amendments as published in the Texas Bar Journal in November, 1989. We recommend the following changes be considered by the full committee at its next regularly scheduled meeting.

2. Rule TRCP 749c

Input from the practicing bench and bar expressed several concerns including that a party appealing informa pauperis from a justice court ruling in a forcible rule and detainer case, be required to continue to pay rent accruing in the duration of the appeal. Conceptually, this is similar to the notion that any litigant be required to post a supersedeas or other security to cover costs accruing by virtue of the appeal being taken. Therefore, Rule 749c and its counterparts are proposed to be amended as follows. The right to appeal in a forcible entry and detainer case by a pauper, is not however, conditioned on the posting of additional rent in proposed amendments to Rule 749c as it has in the past, but only current accruing rent as suggested in Rule 749b.

Approved
2/16

RULE 749a. PAUPER'S AFFIDAVIT

Approved 2/16

If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 7439, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his

inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the notice of the filing of such affidavit thereof to the opposite party or his attorney of record, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as a part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the mailing of notice, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence other than by the affidavit above referred to. When a pauper's affidavit is timely contested by the appellant, the justice shall hold a hearing and rule on the matter within five days.

If the justice of peace disapproves the pauper's affidavit, appellant may, within five days thereafter bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing not later than five days, and shall hear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case.

1. A pauper's affidavit will be considered approved upon one of the following occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon a hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit.

No writ of possession may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 within five days thereafter. If no appeal bond is filed within five days, a writ of possession may issue.

RULE 749c. APPEAL PERFECTED

in conformity with rule 749

When an appeal bond has been timely filed or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.

RULE 751. TRANSCRIPT

When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1) with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

The trial, as well as all hearings and motions, shall be entitled to precedence in the county court.

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When an appeal has been perfected, the justice shall stay all other proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1) with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

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SUBCOMMITTEE REPORT/TRCP 737-813

The subcommittee reviewed written comments as well as testimony before the Texas Supreme Court in its hearing on November 30, 1989 concerning proposed rule amendments as published in the Texas Bar Journal in November, 1989. We recommend the following changes be considered by the full committee at its next regularly scheduled meeting.

1. Rules 748, 749, 749a, 749b, 749c

Comments support that suggested amendments to Rule 4 TRCP [to exclude Saturday, Sunday, and legal holidays from time computation of five days or less]; would serve to enlarge the times relative to forcible entry and detainer actions and appeals therefrom. Suggestions from justices of the peace and practicing attorneys support that these types of actions should be excluded from the application of the enlargement of time as proposed in Rule 4. We endorse the recommendation set forth by the subcommittee charged with reviewing and recommending revisions of TRCP 1-14, that is that Rule 4 be further amended as proposed to include this sentence following the word transfer, Saturdays, Sundays and legal holidays shall be counted for purposes of the five day periods provided under Rule 748, 749, 749a, 749b, and 749c.

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December 20, 1989

Professor Elaine Carlson
South Texas College of Law
1303 San Jacinto, Suite 224
Houston, Texas 77002

Re: Texas Apartment Association's objections to
changes in TRCP 749c

Dear Professor Carlson:

This is a follow-up on several points raised in the hearing in Austin regarding TRCP 749c on Thursday, November 30, 1989. The proposed rule change for TRCP 749c would delete the requirement that the tenant (who has had judgment rendered against him in a non-payment-of-rent eviction) must pay one rental period's worth of rent into the court as a condition of appeal. Very briefly, my additional thoughts are as follows:

1. Constitutionality. I would like to make it clear that the intended meaning of my language in paragraph 2 of page 4 of my letter to Judge Hecht was that the Texas Apartment Association and the Texas Tenants Association believed TRCP 749c to be constitutional at the time of its original adoption by the Court.

2. Relationship of Rule 749c to Rule 749b(1). When the appeal rules for paupers were adopted for non-payment of rent evictions, it was intended that the rental payment required in Rule 749c was the same rental payment as required in Rule 749b(1). The attorney for the Texas Tenants Association and I jointly prepared the original draft of the rule. It was intended that the eviction appeal would not be perfected until both the affidavit was filed and the rent which was called for in Rule 749b(1) was tendered into JP court.

If the proposed change were adopted and if an appeal could be perfected by the tenant in a non-payment-of-rent eviction without payment of rent for one rental period, the landlord would be doomed to unjustified delay and expense, i.e., the landlord would have to hire an attorney, file a motion to dismiss the appeal in county court, arrange for a hearing, wait for the hearing, have the hearing, get the judgment, and then get a writ of possession from the county court if the tenant has not moved out. As a practical matter, any hearing on such a motion would occur no sooner than the hearing on the merits of the appeal. I think you can see, therefore, the practical importance of the requirement of tender into the JP court of one rental period's rent in order to protect the landlord during appeal and minimize frivolous appeals with no factual justification.

3. Appellate supersedeas bond analogy. When an appeal of a JP Court eviction is perfected, there is a trial de novo in county court. It has been assumed by both landlord and tenant lawyers that the perfection of the appeal prevents execution of the judgment and allows the tenant to continue in possession of the premises. TRCP 749c serves as a type of supersedeas bond to protect the landlord during the appeal since he is losing rent by the tenant remaining in possession.

Under the Texas rules of appellate procedure applicable to other civil cases, a losing party may not avoid the necessity of filing a supersedeas bond by merely filing a pauper's oath. (See TRAP 47 in which there is no "pauper" exception for avoidance of a supersedeas bond to suspend the trial court's judgment during appeal and protect the party who won in trial court.

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The requirement in TRCP 749c that the tenant pay one rental period's rent in a nonpayment of rent eviction serves a purpose similar to a supersedeas bond. The provisions of Rules 749 et al were intended to avoid the overwhelming complexities of Appellate Rule 47 regarding supersedeas bonds and to make it simple and easy for the tenant to appeal a nonpayment-of-rent eviction while still protecting the landlord. In such cases, a single rental period of rent is still woefully insufficient to cover past due rent; but it is better than nothing. When Rule 749 et al were adopted, there was considerable doubt as to whether Appellate Rule 47 actually governed JP court eviction appeals to county court; and it was believed by the lawyers supporting the change that there may indeed have been a void in the Texas Rules on that subject. This author believes that TRAP 47 did not and still does not apply to eviction appeals from JP court to county court and that therefore a traditional supersedeas bond is not available for the landlord's protection.

4. Federal Appeal Rules and Supersedeas Bonds. Federal Rule of Appellate Procedure 24 allows paupers affidavits in civil cases for appeal bonds to cover fees and costs of appeal. However, under federal rules, there is no provision for waiver of the requirement of a supersedeas bond under FRAP 8 merely because the appellant is a pauper.

5. Limited to non-payment of rent cases. I would emphasize that the requirement of the payment of one rental period's rent as a condition of appeal under Rule 749c applies only when judgment has been rendered against the pauper tenant in a non-payment-of-rent eviction case. It does not apply to other eviction appeals.

6. JP Association. We would urge you to make inquiry to the Justices of the Peace and Constables Association of Texas as to whether that association shares our fear that the proposed change to TRCP 749c will result in widespread abuses. You may find that the JPs will agree with TAA. If the proposed rule change is adopted, we believe that it will be used and abused by many, many tenants who claim they are "broke". *Tenants who haven't paid their rent will be able to appeal the eviction by merely filing a "pauper's affidavit", do nothing further, and still get two to four more weeks of free rent from a landlord while the landlord tries to get extricated from the appeal. And, in addition, the tenant will have unjustifiably run up another attorneys fee bill for the landlord. The potential drain on the court's time is also a factor.*

Thank you for your patience and indulgence with regard to this Rule. The proposed change has a very serious potential economic effect on the apartment industry, and for that reason I would appreciate the opportunity to attend the next meeting of the Supreme Court Advisory Committee on the rules to answer any questions.

Sincerely,

NIEMANN & NIEMANN

By



Larry Niemann

Attorneys for Texas Apartment Association

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xc: Judge Nathan Hecht, Texas Supreme Court
Judge David Peoples
Mr. Luther H. Soules III, Chairman, Supreme Court Advisory Committee on Rules
Mr. Paul Heath Till
Mr. Joe Bax, Attorney for the Houston Apartment Association
Mr. Jerry Adams, TAA Executive Vice President
Judge Fay Murphree, President, Justices of the Peace and Constables Association of Texas

OBJECTION TO PROPOSED CHANGE IN TRCP 749c

The proposed changes in Rule 749c of the Texas Rules of Civil Procedure as published in the Bar Journal are as follows (hyphenated language is being deleted and underlined language is new):

TRCP 749c. Appeal Perfected. The appeal in any forcible detainer case shall be perfected when an appeal bond has been filed.

When a pauper's affidavit has been filed in lieu of the appeal bond, the appeal shall be perfected when the pauper's affidavit is filed with the court; ~~however, when the case involves nonpayment of rent, such appeal is perfected when both the pauper's affidavit has been filed and when one rental period's rent has been paid into the justice court registry.~~ In a case where the pauper's affidavit is contested by the landlord, the appeal shall be perfected when the contest is overruled and, if the case involves nonpayment of rent, one rental period's rent has been paid into the justice court registry.

ARGUMENTS AGAINST CHANGE

1. DELAY OF POSSESSION. The most significant result of perfecting an appeal is to stop the writ of possession from being issued by the JP. If appeal can be perfected in a nonpayment-of-rent eviction of a pauper *without* an appeal bond or *without* at least one rental period's rent being tendered to the court to protect the landlord, then a pauper can merely file a pauper's affidavit in lieu of an appeal bond and ride the "free rent" gravy train for two to four weeks more while the landlord tries to get a hearing and a decision out of the county court. This is patently unfair. Who is going to compensate the landlord for this extra time period without any rent coming in? the pauper?
2. CONSTITUTIONALITY AND PAST APPROVAL BY TENANTS. The Texas Tenant's Association helped draft existing Rules 749a, b, and c. They supported the rules in public hearing, and they wrote a letter to the Court urging the initial adoption of the rules several years ago. They and TAA both were of the opinion that the rules were unconstitutional. No one has ever challenged the constitutionality of the rules.
3. NO COMPLAINT BY JP ASSOCIATION. We would encourage the Court to inquire about the wisdom of this rule with the Justices of the Peace and Constables Association of Texas. The JPs live with these rules on a daily basis and collectively have experience and insight regarding the need for any change and the potential abuse from the change. We believe the Court will find no opposition to the existing rule from that body.
4. POTENTIAL ABUSE. If the rent-tender requirement were deleted from pauper appeals in nonpayment-of-rent evictions, it would very likely be a real source of abuse by knowledgeable tenants who would claim pauper status, force the landlord to a possible hearing to contest the pauper status, and probably squeeze another month's worth of free rent out of the landlord via the county court trial de novo process. In this regard, it would be difficult for a landlord to contest the pauper affidavit since the landlord is seldom privy to sufficient facts to contest the alleged pauper status. Furthermore, to contest the alleged pauper status would probably cost the landlord more in attorneys fees than an extra month's rent; so he cannot come out ahead, even if he is right.
5. RULES WHICH ARE AFFECTED. Set forth below are the various rules which relate to the proposed change in TRCP 749c. The bold language is for purposes of emphasis only.

Pauper's Affidavit in Lieu of Bond

[Existing] Rule 749c. APPEAL PERFECTED. The appeal in any forcible detainer case shall be perfected when an appeal bond has been filed. **When a pauper's affidavit has been filed in lieu of the appeal bond, the appeal shall be perfected when the pauper's affidavit is filed with the court; however, when the case involves nonpayment of rent, such appeal is perfected when both the pauper's affidavit has been filed and when one rental period's rent has been paid into the justice court registry.** In a case where the pauper's affidavit is contested by the landlord, the appeal shall be perfected when the contest is overruled and, if the case involves nonpayment of rent, **one rental period's rent has been paid into the justice court registry.**

[Existing] Rule 751. TRANSCRIPT. **When an appeal has been perfected, the justice shall stay all further proceedings** on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

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November 27, 1989

Justice Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

via hand delivery

Re: TAA objections to changes in TRCP 4 and TRCP 749c

Dear Justice Hecht:

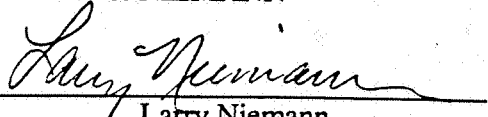
I am writing this letter on behalf of the Texas Apartment Association. TAA wishes to object to the proposed rule changes in TRCP 4 regarding computation of time and TRCP 749c regarding appeal by paupers in eviction cases. Our specific reasons for objecting to the language of the proposed changes in those rules are set forth in the attached summaries.

It may come as a surprise to the Court that forcible detainer cases comprise approximately 11.76% of all civil cases filed in all original jurisdiction courts in Texas. For the reporting year which ended in 1988, the total number of new civil cases filed in JP, county level, and district courts in this state was 899,820. Of that total, 29.88% (or 268,923 cases) were filed in JP courts. Forty percent of the JP court cases were eviction cases. We suspect, therefore, that the number of people affected by the eviction rules far exceeds any other one kind of civil litigation. The impact of eviction cases on the people of our state and their pocketbooks cannot be overemphasized.

Accordingly, the Texas Apartment Association respectfully requests that TRCP 4 be modified to exclude the 5-day time period under TRCPs 748 through 749c regarding writs of possession and eviction appeals.

Respectfully submitted,

NIEMANN & NIEMANN

By 
Larry Niemann
Attorneys for Texas Apartment Association

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enclosures

xc: Mr. Luke Soules, Jr., Chairman, Supreme Court Advisory Committee, via FAX 224-9144
Mr. Frank Finch, TAA President
Mr. Jerry Adams, TAA Executive Vice President

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November 28, 1989

Justice Nathan L. Hecht
Supreme Court of Texas
Supreme Court Building
Austin, Texas 78711

VIA FEDERAL EXPRESS
AIRBILL #5000353945

RE: Objections of the Houston Apartment Association to
changes in TRCP 4.

Dear Justice Hecht,

Our firm is counsel to the Houston Apartment Association, a trade association representing over 350,000 apartment units in the Houston area. We have discussed the proposed changes to TRCP Rule with Larry Niemann, counsel for both the Texas Building Owners and Managers Association, and the Texas Apartment Association. We must concur with Larry's comments and we share the same objections expressed to you by Mr. Niemann.

Simply stated, Texas landlords are in the business of collecting rent for the shelters that they provide; they are not in the business of evicting tenants. As you know the vast majority of evictions are filed for nonpayment of rent. By the time that eviction has been filed for the average tenant, who knew the date the rent was due in the first place, has received a late notice, various forms of informal request for payment, a notice to vacate, and a copy of the plaintiff's eviction petition. If the lease required some opportunity to cure there would have been an additional written notice furnished that resident. It goes without saying that at any point along that process, the resident has the opportunity of curing the default and tendering payment to the landlord, who in most cases would gladly accept the payment.

The proposed change in the rules would simply elongate the delay in returning the apartment to production.

The joinder of a claim for the delinquent rent with the eviction petition has not been effective. Most tenants are judgment proof and therefore the landlords do not have a practical remedy to gain back the lost rent. For this reason it is extremely important that the eviction process continue to be an

Justice Nathan L. Hecht
November 28, 1989
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expedited one designed to return an unproductive asset back to an income producing apartment unit.

Candidly, we have heard no objection from any of the Constables or Justices of the Peace regarding the current rules. In fact, we have heard no real request for a modification of those rules. Accordingly, we would urge the court to make an exception to the proposed Rule TRCP 4 for the five day time periods involved in TRCP 748 through 749c regarding the waiting period for writs of possession and eviction appeals.

Respectfully submitted,

HOOVER, BAX & SHEARER


Joe G. Bax
Attorney for the
Houston Apartment Association

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cc: Mr. Paul Heiberger

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