DAMAGE CONTROL

Procuring prejudgment attachments for victims of child sexual abuse.

BY ROBERT D. CLEMENTS JR. AND ROB TEIR

Six years ago, the Texas Legislature quietly brought back from a partial constitutional hiatus prejudgment attachments on unliquidated damages when the plaintiff is a minor (or was at the time of the incident) and the civil suit defendant is an alleged sexual predator.[1] As a result, victims of child sexual abuse now have a weapon that has not been available to other plaintiffs for 50 years.

Section 61.0021 of the Texas Civil Practice and Remedies Code—which became effective September 1, 2009, with little fanfare—authorizes prejudgment attachments of the assets of alleged perpetrators in favor of plaintiffs claiming underage sexual abuse. A Westlaw search reveals no appellate decisions interpreting, enforcing, or measuring the constitutionality of this statute.

What follows is a discussion of some of the hurdles that must be overcome to procure prejudgment attachment for plaintiffs alleging child sexual abuse.

PREJUDGMENT ATTACHMENT DISFAVORED

Prejudgment garnishments and attachments are considered problematic. The once widely used practice was declared unconstitutional by the U.S. Supreme Court in *Sniadach v. Family Finance Corp.* and *Fuentes v. Shevin.*[2] In 1982, the Supreme Court further held that a civil defendant whose property was improperly attached prejudgment could then sue and collect civil rights damages for violation of the creditor's right to due process.[3] Almost without exception, prejudgment attachment absent a liquidated debt or security interest is rarely allowed.[4] Rarer still are circumstances where prejudgment attachment is available when prosecuting a claim based upon a tort.

STATUTORY REQUIREMENTS

What kind of defendant is subject to this second-generation prejudgment attachment? The statute permits attachment when a plaintiff in a civil suit alleges that the defendant is liable for damages for activity that violates one or more of these criminal statutes:

- Texas Penal Code section 22.011 (sexual assault of a child);
- section 22.021 (aggravated sexual assault of a child)
- section 21.02 (continuous sexual abuse of a young child or children); and
- section 21.11 (indecency with a child).

The trial court is specifically authorized to issue a writ of attachment against the defendant's property that is sufficient to pay for the medical and counseling needs of the plaintiff. This reaches most sexual predators whose victims are minors, putting them at a very real risk of losing possession of their bank accounts, non-homesteaded real property, and other assets. Such an expansion of plaintiffs' rights and remedies over the past decade is almost without precedent.

The attachment option is available without having to first prove that a sex crime took place. A plaintiff does not need to prove that the defendant committed the act. Under the statute, the sole inquiry is whether a plaintiff "institutes a suit for personal injury arising as a result of conduct that violates" the relevant criminal statutes. A significant part of the plaintiff's evidentiary burden is met simply by having the court take judicial notice of a carefully worded original petition.

It is also important to note that the remedy in section 61.0021 of the Texas Civil Practice and Remedies Code can be invoked even if criminal charges for sexual abuse are never filed. It is simply necessary to plead—and, eventually, to prove—that conduct occurred that would violate the relevant statutes (regardless of whether criminal charges were actually filed).

In *Christopher Scott Primeaux, et. al. v. Michael Wayne McIntosh,* the statute was used successfully[5]—prejudgment—to encumber commercial property, proceeds from the sale of a home, and stock in a thriving business. The gross value of the defendant's property attached was in excess of $1 million.

DUMPING ASSETS

The legislative intent of the statue presumes a proclivity of defendants toward making themselves judgment-proof, thereby leaving the plaintiffs without adequate remedy. It is foreseeable that some defendants will attempt to liquidate assets, prepay their attorneys before and after charges are filed, hide assets, and take other actions specifically

designed to frustrate a plaintiff's recovery. Some defendants might think that the mere appearance of insolvency may result in plaintiffs abandoning litigation. Paradoxically, defendants might develop feelings of being wronged, or unjustly attacked, such that they'd rather see anyone get the money from their assets rather than a single dollar go to the plaintiffs.

DEALING WITH CONSTITUTIONAL HURDLES

Attachment can occur ex parte or at a previously noticed hearing. There are advantages and disadvantages to both. An ex parte attachment has the element of surprise but the information available to plaintiff's counsel may be limited to what can be found in the real property records. Judges unfamiliar with attaching assets in a tort case may be extremely reluctant to grant ex parte relief.

An attachment hearing attended by both parties is an opportunity to discover assets by subpoenaing relevant documents but also includes the very real potential for dumping or hiding property. In the *Primeaux* case, the defendant liquidated a million-dollar property just days before the writ of attachment hearing.[6] Choosing a hearing instead of an ex parte attachment may also strengthen a plaintiff's position if, at some point, the defendant makes a constitutional (due process) challenge.[7]

If criminal charges are pending against the defendant, asset discovery attempts—even related to property—may be frustrated by the defendant's assertions of privilege under the Fifth Amendment.[8] The argument is that *any* voluntary disclosure (including revealing assets by the defendant) "may tend to incriminate him." The defendant is, in essence, saying that he should not have to cooperate in his own prosecution.

Since the courts often view the privilege broadly, dealing with the objection can be difficult. The plaintiff must argue that the extent and value of a defendant's assets, unless some were used in the crime, are hard to view as potentially incriminating.[9]

DETERMINING THE AMOUNT ATTACHED

At the hearing for a writ of attachment request, a qualified expert should be present to opine on the anticipated costs of necessary medical and psychiatric treatment and counseling. Effects of such experiences often are lifelong.[10] When it comes to the number of properties and dollar value of the properties attached, plaintiff's counsel should err on the side of inclusion. With most defendants, counsel will only get one shot at freezing assets.

A complicating factor is that child abuse victims (especially once they are adults) may say that they have suffered no harm. A sexual abuser may go to great lengths to induce the abuse victim to feel that he or she is controlling the process. The victim may think that he or she caused the activity, was unharmed by it, is ashamed of it, and/or financially or personally benefited from it. When this problem is present, expert testimony that fully explores its dynamics should be presented to the court.

FULFILLING THE BOND REQUIREMENT

As it was under common law, a writ of attachment comes with a bond requirement.[11] A good defense lawyer will argue for a very large bond to protect the client and, possibly, to prevail by creating "a bridge too far" for the plaintiff. The plaintiff, in turn, will argue that a modest bond is consistent with the Legislature's clear intent that children be protected from sexual abuse. The statute is close to useless if it is available only to millionaires who can afford six-figure bond premiums. The plaintiff should suggest that the smallest reasonable bond should be ordered to promote the public policy implicit in the statute.

Plaintiff's counsel can possibly keep bond amounts low by arguing that this can also preserve the defendant's property. Large bonds are not generally necessary for the attachment of real property, as the property will be there afterwards if the defendant is successful in the case. Real estate is not a wasting asset, and, in most markets, its value increases with time. Stocks and other securities are also usually secure in the long term. With careful crafting, most of the defendant's assets can be protected without the imposition

of a bond so large that the plaintiff cannot post it.

Defense counsel should argue that the writ of attachment will threaten the defendant's ability to pay his or her own bills and lawyers—thereby depriving the defendant of the right to counsel. Plaintiff 's counsel can reply that the Legislature could have provided for these exceptions in the statute, and, since it did not, no Texas court should contradict the express statutory priorities.[12]

AVOIDING EXEMPT PROPERTY

In the case where a defendant has only exempt assets (house, cars, work tools), careful consideration of a writ of attachment should still be contemplated. The trial court in *Primeaux* ordered that the proceeds from the defendant's potential sale of his homestead—that he had placed on the market—were enjoined immediately upon sale. They could be released only if timely invested in another homestead that is in the defendant's name. This removed the defendant's incentive to sell the property because he could not access the funds. Had he sold the homestead, he would have had to reinvest the proceeds in a home in his name to escape the writ of attachment. The question then arises: If a defendant held criminally liable is sentenced to jail and therefore cannot live on the property—is it no longer his or her homestead?

In closing, any lawyer approached by a child sexual abuse victim should carefully scrutinize Texas Civil Practice and Remedies Code section 61.0021. Imagine the difference between trapping thousands or tens of thousands of dollars with a timely prejudgment writ of attachment versus being confronted by a defendant, post-judgment—assets nowhere to be found—smugly claiming "you can't get blood from a turnip." **TBJ**

NOTES

1. *See* Tex. H.B. 3246, 81st Leg., R.S. (2009).
2. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (prejudgment garnishments are a violation of the due process clause of the 14th Amendment); *Fuentes v. Shevin*, 407 U.S. 67, 92 (1983) (*Sniadach* was not limited to prejudgment garnishment of wages and reached prejudgment attachments as well).
3. *See Lugar v. Edmondson Oil Co., Inc.*; 457 U.S. 922 (1982).
4. Attachments can be granted for torts and unliquidated demands if directed against a person or entity on whom personal service cannot be made in the state of Texas. *See* Tex. Civ. Prac. & Rem. Code § 61.005. No cases involving a tort or unliquidated demand are on record. A pre-World War II federal court held that an attachment cannot issue for an unliquidated amount in Texas in absence of a statute authorizing it. *See Sweatt v. Grogan*, 25 FSupp. 585 (N.D. Tex. 1938).
5. *Christopher Scott Primeaux, et. al. v. Michael Wayne McIntosh*, Cause No. 13CV1426, 122nd Judicial District Court, Galveston County (writ of attachment granted on May 15, 2014).
6. The plaintiff discovered this by issuing a subpoena to the defendant to bring to the attachment hearing records of all property transfers dated after the defendant was served with notice of the lawsuit.
7. *See University of Houston v. Sabeti*, 676 S.W.2d 685, 689 (Tex. App.—Houston [1st Dist.] 1984) ("The basic elements of due process, notice and a right to be heard, were afforded"); *see also Kelley v. Dist. of Columbia*, 893 FSupp.2d 115, 123 (D.D.C. 2012) ("demonstrating a lack of opportunity to be heard is an essential element of a procedural due process claim").
8. *See* U.S. Const., amend. V; *see also* Tex. Const., art. I, § 10 ("He shall not be compelled to give evidence against himself").
9. *See Fisher v. United States*, 425 U.S. 391, 408 (1976) (in order to claim the privilege, the party must demonstrate that revealed information would be incriminating); *In re Schick*, 215 B.R. 4, 7 (Bankr., S.D.N.Y. 1997) (Fifth Amendment privilege does not apply to debtor's production of assets and records); *but see EBSCO Industries, Inc. v. Lilly*, 840 F.2d 333 (6th Cir. 1988) (mentioning, but not ruling on, claim of Fifth Amendment privilege to not reveal assets).
10. *See, e.g.*, Joan Raymond, *Effects of Sexual Abuse Last for Decades, Study Finds*, Univ. of Southern Cal. School of Social Work (Nov. 29, 2011), https://sowkweb.usc.edu/news/effects-sexual-abuse-last-decades-study-finds.
11. *Cf. Read Bros. & Co. v. Joseph L. Levy & Co.*, 30 Tex. 738, 742, 1868 WL 4620, at *3 (Texas 1868).
12. *See Thomas v. Buckley*, 61 Tex. 33, 35 1848 WL 3583 (Texas 1846) ("The courts cannot make laws—it is their province to expound them"); accord *Davis v. State*, 22 S.W.3d 9, 19 (Tex. App.—Houston [14th Dist.] 2000).

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