

**PRESENTED AT**

Conference on State and Federal Appeals

June 10-11, 2021

Austin, Texas

## Supersedeas and Stays in State and Federal Court

**Prof. Elaine A. Grafton Carlson**

**Hon. Dustin M. Howell**

Hon. Dustin M. Howell  
455th District Court  
P.O. Box 1748  
Austin, TX 78767

# Hon. Dustin M. Howell

## **BIOGRAPHICAL INFORMATION**

### **Professional Background:**

District Judge, 455th, 200th, and 459th District Courts of Travis County, Austin, TX, Jan. 2018 – Present  
Associate, McKool Smith P.C., Austin, TX, Feb. 2016 – Dec. 2017  
Assistant Solicitor General, Office of the Texas Attorney General, Austin, TX, June 2012 – Jan. 2016  
Associate, Baker Botts L.L.P., Austin, TX, Nov. 2009 – May 2012  
Law Clerk, Supreme Court of Texas, Aug. 2008 – October 2009

### **Professional Activities:**

Texas Lyceum, Board of Directors, January 2021 – Present  
Texas Bar Foundation, Fellow, December 2018 – Present  
Lloyd Lochridge Inn of Court, September 2017 – Present  
Board of Directors, Texas Young Lawyers Association, June 2011 – June 2015  
Board of Directors, Austin Young Lawyers Association, June 2010 – May 2011  
State Bar of Texas Appellate Section, January 2010 – Present  
Austin Bar Association Appellate Section, January 2010 – Present  
Third Court of Appeals Pro Bono Committee, January 2016 – December 2017  
Adjunct Professor, Texas Tech School of Law Regional Externship Program, January 2014 – May 2017  
Texas Tech Law Alumni Association Executive Committee, June 2012 – Present

### **Law Related Publications:**

“The Year in Review: U.S. Supreme Court,” Texas Bar Journal, Jan. 2016, Jan. 2017, Jan. 2018, Jan. 2019, Jan. 2020, Jan. 2021  
“Summary Judgment Appellate Issues in Texas,” Adv. Civ. App. Practice, State Bar of Tex., Sept. 2016 (with co-author David Johnson)  
“Cases Impacting Business Litigation from the 2014 Term,” Business Disputes 2015, State Bar of Tex., Sept. 2015  
“Supersedeas Issues in Texas,” Civ. App. Practice 101, State Bar of Tex., Sept. 2015 (with co-author Elaine Carlson)  
“Preservation: Pre-Trial and Trial,” Civ. App. Practice 101, State Bar of Tex., Sept. 2010 (with co-author Joe Knight)  
“The Texas Supreme Court: A Clerk’s Perspective,” The Texas Lawyer, March 30, 2009

### **Certifications, Bar Admissions, Education:**

Board Certified in Civil Appellate Law, Texas Board of Legal Specialization, January 2017  
State Bar of Texas, November 2008  
United States Supreme Court, November 2011  
United States Court of Appeals for the Fifth Circuit, June 2010  
United States Court of Appeals for the Federal Circuit, February 2016  
United States District Court for the Western District of Texas, March 2010  
United States District Court for the Eastern District of Texas, February 2016  
United States District Court for the Southern District of Texas, September 2017  
United States District Court for the Northern District of Texas, September 2017  
J.D., Texas Tech University School of Law, May 2008  
B.A., University of Texas at Austin, May 2000

# PROFESSOR ELAINE A. GRAFTON CARLSON

## **BIOGRAPHICAL INFORMATION**

### **Professional Activities:**

Tenured Professor of Law, South Texas College of Law 1982-present  
Stanley J. Krist Distinguished Professor of Law  
Elected Member, American Law Institute  
Appointee, Texas Supreme Court Advisory Committee on Rules of Civil Procedure 1986-Present  
Appointee, Chair, Texas Supreme Court Task Force on Ancillary Proceedings 2008-2011  
Appointee, Texas Supreme Court Task Force Code of Judicial Conduct 2003-2004  
Appointee, State Bar of Texas, Appellate Section, Appellate Council 2005-2008  
Appointee, Civil Appellate Law Exam Commission, 1999-2005  
Appointee, Civil Trial Law Exam & Personal Injury Trial Law Exam Commission 2001-2005  
Appointee, Texas Supreme Court Task Force-Reorganization of Civil Procedure Rules  
Faculty, Houston Bench Bar Conference on Appellate Practice 2000, 1998  
Faculty-Texas Judicial Conference 1993-1994; Faculty Texas Briefing Attorney Seminar 1998  
Special Master, District Courts of Harris and Galveston County  
State Bar of Texas Administration of Justice Committee 1991-1992  
State Bar of Texas, Litigation Quarterly Publication, Authored Procedure Update 1987-1999  
Briefing Attorney to Honorable James P. Wallace 1978-1980, First Court of Appeals

### **Law Related Publications & Academic Appointments and Honors:**

Author, McDonald and Carlson, Texas Civil Practice Treatise, Volumes 1-6, West Publishing Co.

Co-author with Professors William Dorsaneo, David Crump & Beth Thornburg: Texas Pretrial and Trial & Appellate Practice texts, Lexis Publishing; Author of numerous articles focusing upon civil procedure and related topics, including publications with University of Texas, Baylor Law Review, Texas Tech Law Review, St. Mary's Law Review, South Texas Law Review; Texas Bar Journal.

Honors: Texas Extraordinary Women in Texas Law, Texas Lawyer Award 2008; Distinguished Alumna, South Texas College of Law 2008; State Bar of Texas Bar Foundation Outstanding Law Review Article of the Year, 1995; Vinson & Elkins Faculty Excellence Award; South Texas College of Law Outstanding Professor Award. Alumni of The Year, South Texas College of Law, 2008.

Visiting Professor and CLE Lecturer, University of Texas School of Law; Continuing Legal Education Author and Frequent Lecturer, State Bar of Texas, Southern Methodist University School of Law, South Texas College of Law, Houston Bar Association, Travis County Bar Association; Internal Seminars: First and Fourteenth Court of Appeals, Texas Association of Defense Counsel, Texas College of Trial Advocacy, Texas Judicial Conference. Advisor to Texas Legislature, Joint Special Committee on Security for Judgment, Texas Legislation 1987.

### **Education and Bar Admissions:**

Admitted to Bar 1979. Admitted to practice before all Texas Courts as well as the U.S. Supreme Court; U.S. Court of Appeals, Fifth and Eleventh Circuits; U.S. District Court, Southern District of Texas. Member, including litigation and appellate sections, American Bar Association, Texas Bar Association, Houston Bar Association.  
Preparatory education: Southern Illinois University, B.A, Political Science, Cum Laude 1974.  
Advanced degrees: McMaster University, Canada, Master of Arts, Political Economics, 1976.  
Legal education: South Texas College of Law (J.D.) Summa Cum Laude 1979.

I.	INTRODUCTION .....	1
II.	POST-JUDGMENT ENFORCEMENT, GENERAL PRINCIPLES .....	2
A.	Voluntary Nature of Supersedeas .....	2
B.	Enforcement Rights When Judgment Debtor Fails to Supersede .....	2
C.	Finality of Judgment to Support Enforcement .....	3
D.	Alternate Methods of Staying Judgment Enforcement .....	4
Bankruptcy Stay .....	4	
Private Supersedeas Agreements.....	5	
Covenants to Refrain from or Delay Execution .....	5	
Injunctive Relief from Trial or Appellate Courts in Lieu of Supersedeas.....	6	
III.	THE RIGHT TO SUPERSEDE .....	6
A.	General Right to Supersede.....	6
B.	Exceptions.....	7
C.	Superseding Orders Granting Interlocutory Relief .....	7
IV.	PREREQUISITES TO SUPERSEDING JUDGMENTS.....	8
A.	Appealable Order or Judgment .....	8
B.	Pending Appeal .....	9
V.	EFFECT OF FILING SUPERSEDEAS OR LEGAL EQUIVALENT .....	10
A.	In General.....	10
B.	Discovery Pertaining to Appellate Security .....	10
VI.	SUPERSEDEAS PROCEDURE .....	11
A.	Time to File Appellate Security .....	11
B.	Supersedeas Options - In General .....	13
C.	Supersedeas By Private Agreement .....	13
D.	Supersedeas Bond .....	14
In General.....	14	
Multiple Parties .....	14	
Form of Bond.....	14	
Sufficiency of Sureties .....	15	
E.	Cash Deposit in Lieu of Bond.....	16
F.	Amount of Supersedeas Bond or Cash Deposit .....	17
In General.....	17	
Money Judgments .....	18	
a.	Compensatory Damages.....	18
Damages That Are Punitive Are Not Compensatory .....	18	
Attorneys’ Fees Are Not Compensatory Damages .....	19	
b.	Interest For The Estimated Duration of the Appeal .....	20
Postjudgment Interest.....	20	
Prejudgment Interest .....	20	
c.	Costs .....	20
<b>The “Net Worth Cap”</b> .....	21	
Calculating Net Worth .....	21	

Procedures To Establish Net Worth .....	22
Lowering The Cap: Substantial Economic Harm .....	23
Security Amount When Judgment Is For Recovery of an Interest in Real or Personal Property.....	25
Judgments Other than for Money or Property.....	25
Superseding Judgment when Governmental Entity Is Judgment Creditor.....	26
Power of Trial Court to Enjoin Dissipation of Assets .....	26
G.    Supersedeas by Notice of Appeal.....	26
H.    Judgment Liens .....	27
I.    Continuing Trial Court Jurisdiction Notwithstanding Appeal.....	28
VII.  APPELLATE REVIEW OF SECURITY ORDERS .....	29
A.  In General.....	29
B.  Review of Trial Court Rulings By Court of Appeals Is By Motion.....	29
C.  Review of Court of Appeal Supersedeas Rulings Is By Mandamus To Supreme Court.....	29
D.  Standard of Review Applied to Appellate Security Rulings .....	29
E.  Appellate Modification of Security Orders.....	30
F.  Compliance with Modified Security Orders .....	31
G.  Effect of Execution and Judgment Satisfaction During Appeal.....	31
H.  Supersedeas on Appeal to Texas Supreme Court or U.S. Supreme Court .....	31
I.  Disposition of Security on Conclusion of Appellate Review.....	33
VIII. FEDERAL PRACTICE MODEL .....	36
A.  Introduction.....	36
B.  Supersedeas Bond as Norm.....	37
C.  Alternate Security .....	38
In General.....	38
Justification .....	38
Forms of Security.....	39
D.  Disposition of Security on Conclusion of Federal Appeal.....	39
E.  Effect of Failure to Post Security .....	39
F.  Flexibility of Federal Practice.....	39

## I. INTRODUCTION

This article focuses upon the enforcement and superseding of civil judgments pending appeal under Texas state practice, with a comparative summary of federal law. Historically, appellate security was viewed as necessary to protect the judgment winner and ensure that the judgment could be paid in the event the judgment loser did not prevail on appeal. After all, the parties had enjoyed their day in court, at least in the trial court, and the judgment winner had a property interest in the trial court judgment that warranted protection by the posting of supersedeas in the amount of the judgment, interest and costs. If supersedeas could not be posted in the full amount, execution would issue. A Texas judgment could not be partially superseded. In 1988 the legislature, initially in response to the *Texaco, Inc. v. Pennzoil Co.* decision,<sup>1</sup> effectively took over the rule making authority in this area, passing Chapter 52 of the Civil Practices & Remedies Code, providing for the posting of alternate (lesser) security on appeal with a focus on maintaining the status quo and upon the dissipation of the judgment loser's assets pending appeal, not necessarily ensuring that the full judgment could be satisfied at the end of the appellate process.

The Texas legislature, through the enactment in June 2003 of House Bill 4,<sup>2</sup> once again significantly altered the amount of security required to suspend enforcement of money judgments on appeal.<sup>3</sup> The legislature made sweeping changes to Chapter 52, making the posting of alternate security to suspend judgment enforcement on appeal substantially easier for the judgment loser, reflecting a new balancing between the judgment creditor's right in the judgment and the dissipation of the judgment debtor's assets during the appeal against the judgment debtor's right to meaningful and easier access to appellate review.<sup>4</sup> In summary, appellate security now required to suspend enforcement of a money judgment on appeal need only cover compensatory damages, interest for the duration of the appeal, and costs awarded in the judgment. But no money judgment loser can be required to post security that exceeds \$25 million dollars, or 50% of the judgment debtor's net worth, whichever is less. Net worth is not defined. A further restriction applies when a judgment debtor establishes that it is likely to suffer substantial economic harm if required to post security in these amounts, and in that event the judgment debtor

is entitled to a court order lowering the amount of the security required to suspend judgment enforcement on appeal to an amount that will not cause the judgment debtor substantial economic harm. These new limits on supersedeas are apparently intended to provide relief to judgment debtors facing insolvency to avoid judgment execution or to those whose judgment is so large that the cost of supersedeas would effectively inhibit their ability to appeal.

Whether or not supersedeas or other appellate security is posted on appeal, a trial court now has express jurisdiction to enjoin a judgment debtor from dissipating or transferring assets to avoid satisfaction of a judgment, provided the trial judge may not enter an order that interferes with the judgment debtor's use, transfer, conveyance or dissipation of assets in the normal courses of business.

Following entry of a final judgment, an unsuccessful litigant may face an immediate attempt to enforce an appealable judgment. Although a writ of execution generally will not issue until thirty days have passed since judgment entry or overruling of timely filed post-judgment motions, other enforcement steps may be taken sooner which may significantly impair a judgment debtor's assets or other creditors.

Sage trial counsel, faced with the reality of a potentially adverse result, should assess the necessity and ability to supersede a money judgment prior to judgment signing. Notwithstanding sound prospects for a successful appeal, obtaining security to supersede judgment enforcement can be commercially difficult and expensive—if not impossible to obtain.

What avenues are available? Generally, a judgment debtor on a money judgment has six options:

- (1) Do nothing and face possible execution on its assets to satisfy the judgment;
- (2) Supersede by posting a supersedeas bond or cash deposit;
- (3) Supersede by posting alternate security as approved by the court;
- (4) Supersede by private agreement;
- (5) Negotiate a private covenant not to execute or to delay execution, when allowed by law; or
- (6) Seek bankruptcy protection.

---

<sup>1</sup> *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), rev'd on other grounds 481 US 1 (1986) (only one method to supersede enforcement of Texas judgment and inability to pay bond is not it). See also Elaine A. Carlson, *Mandatory Supersedeas Bond Requirements—A Denial of Due Process?*, 39 Baylor L. Rev. 29 (1987).

<sup>2</sup> Act of June 11, 2003, 78th Leg. R.S., ch. 204, 2003 Tex. Gen. Laws 847.

<sup>3</sup> TEX. CIV. PRAC. & REM. CODE § 52.006. Elaine A. Carlson, *Reshuffling the Deck: Enforcing and Superseding Civil Judgments on Appeal after House Bill 4*, 46 S. Tex. L. Rev. 1035 (2005); Elaine A. Carlson, *Tort Reform: Redefining the Role of the Judge and the Jury*, 47 S. Tex. L. Rev. 245 (2005).

<sup>4</sup> Doug Rendleman, *A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform*, 39 Akron L. Rev. 1089, 1090 (2006).

This paper explores each option in depth. In addition, appellate review of security orders, including disposition of security at the conclusion of appellate review, is explored. A brief discussion of federal practice pertaining to alternate security is included for comparative analysis.

## II. POST-JUDGMENT ENFORCEMENT, GENERAL PRINCIPLES

### A. Voluntary Nature of Supersedeas

A judgment creditor may, as a general rule, seek to enforce a civil-money judgment notwithstanding that appellate review is pending unless the judgment debtor timely takes appropriate action.<sup>5</sup> In most instances, enforcement—which normally involves obtaining a judgment lien and execution on a debtor’s property—may be forestalled by timely securing the judgment. Providing appellate security is voluntary. A party has the right to forgo protection from execution. Posting supersedeas cannot be compelled. However, an unsuccessful litigant wishing to suspend judgment enforcement must act expeditiously.

### B. Enforcement Rights When Judgment Debtor Fails to Supersede

The means available to enforce a civil money judgment are varied and are, to some extent, dependent upon the time expired since judgment entry as well as the surrounding circumstances. Attendant costs and risks vary with each collection procedure. A creditor of an unsatisfied judgment, in formulating an enforcement plan, may consider utilizing a multiple of collection avenues either simultaneously or *in seriatim*. Methods of collection include the creation of a judgment lien, levy and execution, garnishment, turnover, and receivership.<sup>6</sup>

The signing of a final judgment commences the timetable by which an unsuccessful litigant may take steps in an attempt to set aside, modify or seek appellate review of an adverse judgment.<sup>7</sup> The entry of a final

judgment is also significant to the successful litigant. It commences the time frame by which the judgment creditor may take steps to create a priority position as to the judgment debtor’s subsequent creditors.

Although a writ of execution, as a general rule, will not issue prior to the expiration of thirty days following judgment entry, other enforcement steps may be taken immediately if a judgment is not properly superseded. For example, a judgment lien may be created against the judgment debtor’s assets any time following entry of a final judgment. Post-judgment discovery to determine available assets for collection may commence immediately upon final judgment signing, unless enforcement has been suspended.<sup>8</sup> Further, a writ of garnishment to create a lien upon the garnishable assets of the judgment debtor in the hands of a third party may issue at any time following the entry of a final judgment to obtain proceeds. However, a garnishment judgment would not be proper until the judgment is no longer subject to being set aside or modified on appeal, although it is not clear if this principle would apply when no supersedeas or other appellate security has been posted.<sup>9</sup> Turnover relief may be sought immediately following the entry of a final judgment and requires no waiting period.<sup>10</sup>

A judgment creditor need not await the loss of a trial court’s plenary power before taking steps to create a lien upon the judgment debtor’s assets. That is not to say, however, that the judgment may be satisfied through execution while the trial court enjoys plenary jurisdiction.

As noted above, the general rule is that execution may not issue until the expiration of 30 days since the entry of a final judgment. If a motion for new trial or a motion to set aside, reform, or vacate a judgment is filed, then execution is not to issue until 30 days following the overruling of these post-judgment motions.<sup>11</sup> However, if a judgment creditor establishes by affidavit proof that the debtor is about to remove its property subject to execution out of the country or to transfer or secrete its assets for the purposes of

---

<sup>5</sup> *In re General Motors Acceptance Corp.*, 2008 WL 4822227, at \*3-4 (Tex. App.—Corpus Christi, 2008, orig. proceeding) (not designated for publication).

<sup>6</sup> A detailed discussion of prerequisites to utilizing various avenues of collection are beyond this work. See ch. 31 (Enforcement of Domestic Judgment) and ch. 32 (Enforcement of Out-of-State and Federal Judgment. 5 McDonald & Carlson, TEXAS CIVIL PRACTICE (2d ed. rev. 2014). See also Volume 6, Appeals, ch. 14, Superseding the Judgment, McDonald & Carlson, TEXAS CIVIL PRACTICE (2d ed. rev. 2014).

<sup>7</sup> TEX. R. CIV. P. 329b.

<sup>8</sup> TEX. R. CIV. P. 621a.

<sup>9</sup> *Waples-Platter Grocer Co. v. Texas & P.R. Co.*, 68 S.W.

265 (Tex. 1902); *Horst v. City of London Fire Ins. Co.*, 11 S.W. 148, 149 (Tex. 1889). See also *Baca v. Hoover, Bax & Shearer*, 823 S.W.2d 734 (Tex. App.—Houston [14th Dist.] 1992, writ denied). If the underlying suit is reversed on appeal, the garnishment proceedings and the writs issued in connection with that proceeding, become a nullity. *Taylor v. Trans Continental Props., Ltd.*, 670 S.W.2d 417, 420 (Tex. App.—Tyler 1984), rev’d on other grounds, 717 S.W.2d 890 (Tex. 1986) (It is not clear whether a supersedeas bond was filed in Taylor).

<sup>10</sup> TEX. CIV. PRAC. & REM. CODE § 31.002; *Childre v. Great Southwestern Life Ins. Co.*, 700 S.W.2d 284, 287 (Tex. App.—Dallas 1985, no writ); *Thomas v. Thomas*, 917 S.W.2d 425 (Tex. App.—Waco 1996, no writ).

<sup>11</sup> TEX. R. CIV. P. 627.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Supersedeas and Stays in State and Federal Court

Also available as part of the eCourse

[2021 eConference on State and Federal Appeals](#)

First appeared as part of the conference materials for the  
31<sup>st</sup> Annual Conference on State and Federal Appeals session  
"Supersedeas and Stays in State and Federal Court"