Texas Young Lawyers Association
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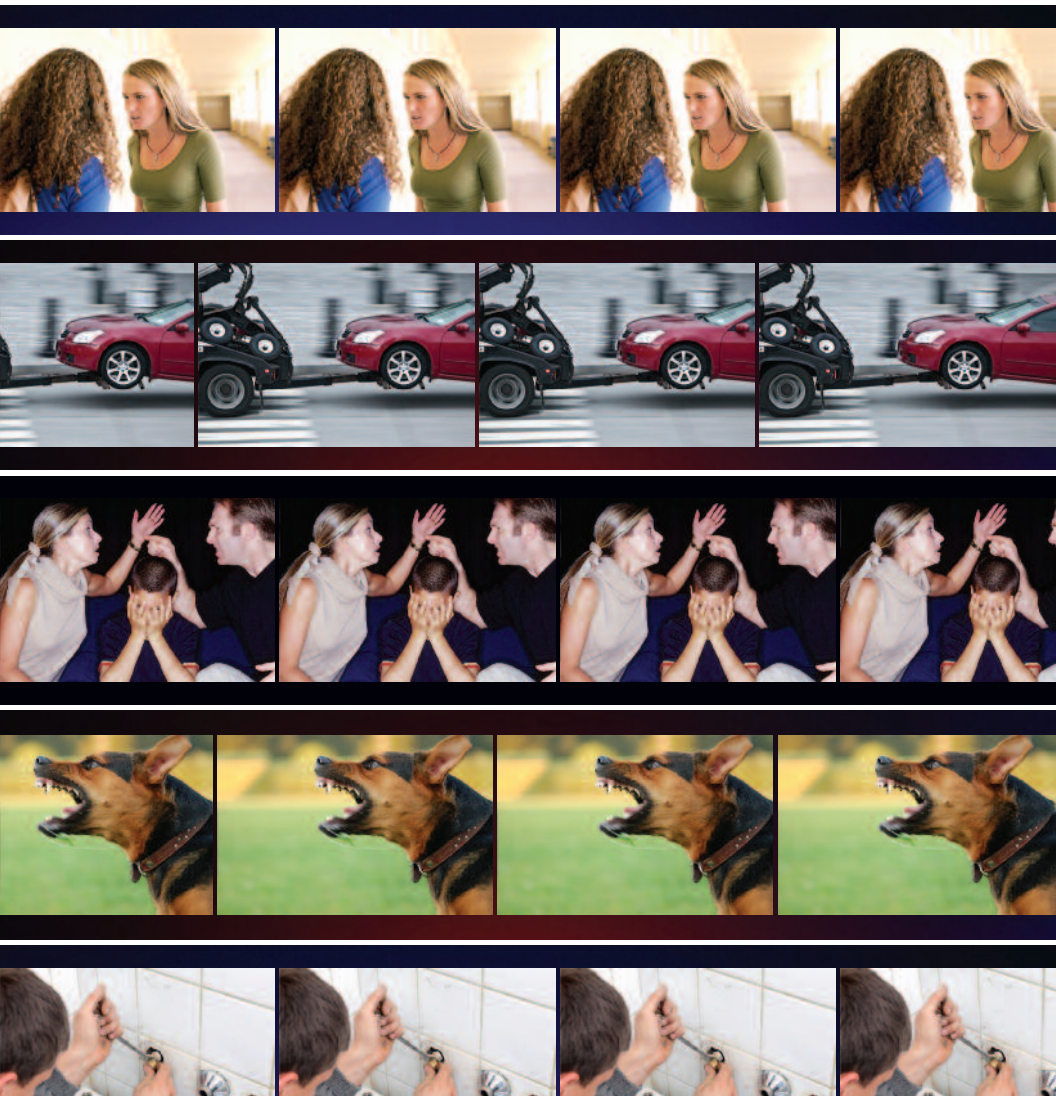
REMAINING CIVIL

AN OFFICER'S GUIDE TO RESPONDING TO NON-CRIMINAL CALLS FOR SERVICE



INTRODUCTION

"Remaining Civil: An Officer's Guide to Responding to Non-Criminal Calls for Service" is designed to educate officers and civilians about the availability of civil remedies arising from common scenarios presented by emergency calls. This Guide will help officers decide when to consider a call civil or criminal in nature, and will provide guidance to help the victim understand the consequences and benefits of pursuing civil remedies. The Guide is a part TCLEOSE (Texas Commission on Law Enforcement Officer Standards and Education) recognized training block for law enforcement personnel.

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Lost and Abandoned Property

Requirements for determining whether a motor vehicle is abandoned:

In order to determine whether a motor vehicle is abandoned, one of the following needs to apply under Texas Transportation Code § 683.002:

1. The vehicle is inoperable, is more than five years old, and has been left unattended on public property for more than 48 hours;

2. The vehicle has remained illegally on public property for more than 48 hours;

3. The vehicle has remained on private property without the consent of the owner or person in charge of the property for more than 48 hours;

4. The vehicle has been left unattended on the right-of-way of a designated county, state, or federal highway for more than 48 hours;

5. The vehicle has been left unattended for more than 24 hours on the right-of-way of a turnpike project constructed and maintained by the Texas Turnpike Authority division of the Texas Department of Transportation or a controlled access highway.

Authority to take abandoned motor vehicle into custody:

A law enforcement agency may take into custody an abandoned motor vehicle, watercraft, or outboard motor found on public or private property.

A law enforcement agency may use agency personnel, equipment, and facilities or contract for other personnel, equipment, and facilities to remove, preserve, store, send notice regarding, and dispose of an abandoned motor vehicle, watercraft, or outboard motor taken into custody by the agency under Texas Transportation Code § 683.011.

Taking an abandoned motor vehicle into custody:

A law enforcement agency shall send notice of abandonment to:

1. the last known registered owner of each motor vehicle, watercraft, or outboard motor taken into custody by the agency or for which a report is received under § 683.031 Garagekeeper's Duty; and

2. each lienholder recorded under Chapter 501 for the motor vehicle or under Chapter 31, Parks and Wildlife Code, for the watercraft or outboard motor.

The notice must be sent by certified mail not later than the 10th day after the date the agency: (i) takes the abandoned motor vehicle, watercraft, or outboard motor into custody; or (ii) receives the report under Section 683.031. The notice must specifically identify the item and give the location of the facility where the item is being held, and it must inform the owner and lienholder of the right to claim the item not later than the 20th day after the date of the notice on payment of: (i) towing, preservation, and storage charges; or (ii) garagekeeper's charges and fees under Section 683.032 and, if the vehicle is a commercial motor vehicle impounded under Section 644.153(q), the delinquent administrative penalty and costs. Finally, the notice must state that the failure of the owner or lienholder to claim the item during the twenty-day period specified is (i) a waiver by that person of all right, title, and interest in the item; and (ii) consent to the sale of the item at a public auction. Notice can be given by publication in one newspaper of general circulation in the area where the motor vehicle, watercraft, or outboard motor was abandoned if: (1) the identity of the last registered owner cannot be determined; (2) the registration has no address for the owner; or (3) the determination with reasonable certainty of the identity and address of all lienholders is impossible. A law enforcement agency is not required to send a notice, however, if the agency has received notice from a vehicle storage facility that an application has or will be submitted to the department for the disposal of the vehicle.

What is a junked vehicle?

A junked vehicle is self-propelled and (1) does not have lawfully attached to it an unexpired license plate or a valid motor vehicle inspection certificate; and (2) is wrecked, dismantled or partially dismantled or discarded; or inoperable and (a) has remained inoperable for more than 72 consecutive hours, if the vehicle is on public property; or (b) 30 consecutive days, if the vehicle is on private property.

When is a junked vehicle declared a public nuisance?

A junked vehicle, including any part of a junked vehicle, which is visible at any time of the year from a public place or public right-of-way can be considered a public nuisance when it:

1. is detrimental to the safety and welfare of the public;
2. tends to reduce the value of private property;

3. invites vandalism;
4. creates a fire hazard;
5. is an attractive nuisance creating a hazard to the health and safety of minors; and
6. produces urban blight adverse to the maintenance and continuing development of municipalities.

Check with your city and county for more information. Some helpful links include:

- Round Rock
  http://www.roundrocktexas.gov/home/index.asp?page=215
- Arlington
  http://www.arlingtonva.us/departments/cphd/isd/code_enforcement/CPHDPlanningCode_enforcementCodeEnforcement.aspx
- Texas Transportation Code
  http://www.statutes.legis.state.tx.us/Docs/TN/htm/TN.683.htm

Repossession of Vehicles

If a consumer defaults on a loan agreement used to secure a vehicle, the creditor has legal authority to enter the consumer's property and seize the vehicle at any time and without prior notice or consent of the consumer as long as it is done peaceably.

Under Texas law, which follows the Uniform Commercial Code (UCC), the lender may repossess the vehicle at any time after the loan defaults. Texas laws provide protection for the lender and debtor in the event of a repossession, but if the debtor cannot avoid repossession, it is in his best interest to voluntarily surrender the vehicle to avoid additional fees for the repossession.

Repossession

The lender may perform a repossession without judicial notice if it is performed without a breach of peace. Breach of peace includes intimidation, threats, and violence used to retrieve the vehicle. The repossession process can begin once the loan defaults, which occurs, unless otherwise stated in the contract, the day after the debtor fails to make the scheduled payment. While lenders normally allow for a grace period, Texas laws do not require it. So repossession is entirely within the discretion of the creditor.

Vehicle Redemption

Texas laws allow the debtor 10 days from the date of repossession to retrieve the car. In order to retrieve the car, the debtor will need to pay all past due amounts, the total remainder of the debt, and any fees incurred from the repossession.

Sale of the Vehicle

If the debtor can't redeem the vehicle, the lender may keep the car or dispose of it in a public or private sale. Under Texas law, the sale of the car must be deemed commercially reasonable. A commercially reasonable sale includes selling the vehicle at fair market value in a private sale, or at the wholesale value when sold at an auction. Although uncommon, should the lender sell the vehicle for a higher price than the debtor agreed to pay in the contract, the lender must give the surplus funds to the debtor.

Return of Personal Property

The creditor must make all personal property in the vehicle belonging to the debtor available for retrieval. The license plates registered to the vehicle remain with the vehicle.

For further information contact:

- Texas Attorney General's Office at https://www.oag.state.tx.us/consumer/debt_collection.shtm
- Federal Trade Commission Facts for Consumers Website http://www.ftc.gov/bcp/edu/pubs/consumer/autos/aut14.shtm

What is the Texas Towing and Booting Act?

The Texas Towing and Booting Act, which took effect September 1, 2007, created new licensing requirements for tow truck operators, towing companies, vehicle storage facilities, and employees of vehicle storage facilities. Licenses for tow truck operators and vehicle storage facility employees were required as of September 1, 2008.

What does the Texas Towing and Booting Act do?

The Act moved the licensing of tow truck companies, tow trucks and vehicle storage facilities from the Texas Department of Transportation (TXDOT) to the Texas Department of Licensing and Regulation (TDLR), and transferred all of the functions and activities performed by TXDOT relating to tow trucks, towing operations, or vehicle storage facilities to TDLR.

The Texas Towing Act created some additional requirements for towing companies:

- Licensing requirements for tow operators and vehicle storage facility employees;
- Applicants for licensure must submit evidence that they are in compliance with certain specified drug testing requirements; and
- Periodic and risk-based inspections must be made.

The Act also created a Towing and Storage Advisory Board, and established three types of towing permit: Incident Management, Private Property, and Consent Towing.

What are the different types of tows?

Incident Management Tow: Any tow of a vehicle in which the tow truck is summoned because of a traffic accident or an incident. For example, a tow initiated by law enforcement after a car crash, arrest, etc.

Private Property Tow: Any tow of a vehicle that a parking facility owner authorizes without the consent of the owner or operator of the vehicle. For example, apartment building parking lots, restaurants, paid parking lots, etc.

Consent Tow: Any tow of a motor vehicle in which the tow truck is summoned by the owner or operator of the vehicle, or by a person who has possession, custody, or control of the vehicle. Examples include calling a tow truck when your car breaks down, when your mechanic or body shop tows your vehicle for repair, or when a vehicle has been repossessed by the owner. *The term does not include an incident management tow or a private property tow.*

Who controls Vehicle Storage Facilities?

TDLR is the State's ruling and enforcement authority, which licenses both private and public Vehicle Storage Facilities (VSF). If a vehicle is stored without the owner's permission, the vehicle storage facility must follow rules administered by TDLR. These rules relate to the care of the vehicle while stored at the VSF. If the vehicle is stored with the owner's consent, TDLR vehicle storage rules do not apply.

My vehicle was taken to a storage facility without my consent. Is the vehicle storage facility required to be licensed?

Yes. The VSFs are required to obtain a license and follow statutes administered by TDLR regarding vehicle storage. However, these rules only apply if the vehicle is stored without the vehicle owner's consent.

My vehicle was towed from private property. How can I find out where it's being stored?

If the vehicle was towed from a private parking lot, you can call the telephone number listed on the tow-away signs in order to locate your vehicle. Vehicle storage facilities are required to report non-consent tows to local law enforcement within two hours after receiving the vehicle. You may want to contact the local law enforcement agency from the area where your vehicle was towed. The vehicle storage facility and the tow truck company may or may not be owned by the same company.

My vehicle is being stored with my consent. Do TDLR vehicle storage facility rules regarding storage apply?

No. If a vehicle is stored with the consent of the owner, the business is not required to have a vehicle storage facility license. Additionally, TDLR rules/regulations regarding facility lighting and fencing, maximum charges, notices mailed to the vehicle owner, vehicle release, and other rules do not apply.

What happens when an owner arrives at the scene before his or her vehicle is towed?

- If the owner arrives before the vehicle is fully loaded onto the tow truck (i.e. tow driver is not ready to drive away with the vehicle), the owner can request to have his or her vehicle unloaded and cannot be charged a drop fee for unloading the vehicle. A drop fee is the fee that the tow driver charges to unhook a vehicle once it is attached to the tow truck.
- If the owner arrives after the vehicle is attached, but before the tow truck has left the property, the owner can request to have the vehicle unloaded but may be charged a drop fee.
- If the owner arrives after the vehicle has left the property (i.e. the tow truck is already on a public street), the tow operator must deliver the vehicle to the licensed vehicle storage facility.

Prohibition Against Unattended Vehicles in Certain Areas

The owner or operator of a vehicle may not leave unattended on a parking facility a vehicle that:

(1) is in or obstructs a vehicular traffic aisle, entry, or exit of the parking facility;
(2) prevents a vehicle from exiting a parking space in the facility;
(3) is in or obstructs a fire lane marked according to Subsection (c), which is described below;

(4) does not display the special license plates issued under Section 504.201, Transportation Code, or the disabled parking placard issued under Chapter 681, Transportation Code, for a vehicle transporting a disabled person and is in a parking space that is designated for the exclusive use of a vehicle transporting a disabled person; or
(5) is leaking a fluid that presents a hazard or threat to persons or property.

These prohibitions do not apply to an emergency vehicle that is owned by, or the operation of which is authorized by, a governmental entity. If a government regulation governing the marking of a fire lane applies to a parking facility, a fire lane in the facility must be marked as provided by the regulation. If a government regulation on the marking of a fire lane does not apply to the parking facility, all curbs of fire lanes must be painted red and be conspicuously and legibly marked with the warning "FIRE LANE—TOW AWAY ZONE" in white letters at least three inches tall, at intervals not exceeding 50 feet.

For more information on towing regulations contact:

Texas Towing and Storage Association
http://www.ttsa.org/ForthePublic/TowedVehiclesFAQ.aspx

Texas Department of Licensing and Regulation
http://www.tdlr.state.tx.us/towing/towinglaw.htm

Animal Issues

Law enforcement officers quite often are faced with situations involving animals and/or their owners. Many of these situations involve requests for law enforcement to help solve a problem, and more often than not, the law enforcement officer is put in a position in which they are unable to provide assistance. Many of these situations that involve animals are civil in nature. There are some statutes and ordinances that the law enforcement officer can often pursue in some situations involving animal issues, so it is important for the officer to know those avenues. The Texas Health & Safety Code Chapter 822 covers a wide array of issues that may arise and gives authority to the municipalities and counties to enact ordinances concerning animal issues. The Texas Penal Code also addresses some of the more serious animal crimes. The following section of this brochure will address the most common questions law

enforcement officers face when dealing with animal issues and will provide a general overview of available criminal and civil remedies.

FAQs:

A citizen reports that the neighbor's dog has been allowed to roam the street without a leash or supervision and has now bitten her young child, and she wants the dog put down and the neighbor arrested. What can a police officer do?

Under the Texas Health & Safety Code Section 822.005, a person could be charged with a felony offense if the person, with criminal negligence, fails to secure the dog, and the dog makes an unprovoked attack on another person that occurs at a location other than the owner's real property AND the attack caused serious bodily injury or death to the person. Serious bodily injury is bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. Also, the owner can be charged if the owner knows the dog is considered "dangerous," the dog makes an unprovoked attack on another person that occurs at a location other than a secure enclosure in which the dog is restrained, and it causes serious bodily injury or death to the other person. A dog is considered dangerous if the dog has attacked before, the owner has been issued a notice by a court of law that has found the dog to be dangerous, or the owner has been informed by the animal control authority that the dog is dangerous. An offense under this section is a felony of the third degree unless the attack causes death, in which event the offense is a felony of the second degree. Also, if a person is found guilty of this offense, the court may order the dog destroyed.

In this type of situation, an officer can file charges on the neighbor if the dog caused serious bodily injury to the child; otherwise the citizen may have to seek civil relief. The county or city/municipality may have ordinances under which the officer would be able to issue citations to the neighbor for violations, such as failure to restrain the animal and dog bite tickets. The citizen may also be able to seek relief for injuries in civil court by filing a lawsuit, if the neighbor failed to stop the dog from attacking after the attack has begun.The owner of a dog has a duty to attempt to stop the attack.

The animal may also be seized under Texas Health & Safety Code Section 822.002. Under this Section, if the dog has caused the death or serious bodily injury to a person

by attacking, biting, or mauling the person, a court with the proper sworn complaints may order the animal control authority to seize the dog and may order the disposition of the dog.

A dog or coyote is shot and killed by the owner of an animal that was being attacked by the dog or coyote. Can they be criminally or civilly liable for shooting the animal?

No. Under Texas Health & Safety Code Section 822.013, a person who kills a dog or coyote while witnessing the attack or the owner of the attacked animal who has knowledge of the attack is not liable for damages to the owner of the dog or coyote. Also an officer may have an affirmative defense of official immunity if sued in civil court.

A citizen complains that a foul odor is coming from the neighbor's yard because the neighbor does not clean up after the ten dogs that are in the back yard. Is there anything the officer can do?

Depending on the city and/or county ordinances, the officer may be able to issue nuisance citations or "failure to restrain an animal" citations to the neighbor. Also many cities/municipalities have ordinance that limit the amount of pets a person can have.

This type of situation can sometimes also lead to an animal-cruelty type situation. If the owner has failed to provide the necessary food, water, care or shelter for an animal, they could be charged with animal cruelty under Texas Penal Code Section 42.092. A charge of animal cruelty under this section is a Class A misdemeanor, but it can be enhanced to a felony if the person has prior convictions of animal cruelty.

If the city/county ordinances provide no relief for the homeowner, they could always pursue their nuisance claim in small claims court. Also, if the homeowner and neighbor belong to a homeowner's association, that association may provide rules regarding pets and nuisance behaviors. The homeowner's association may be able to provide relief in addition to the above stated options.

A citizen complains that the neighbor's dog will not stop howling, keeping them up all night. Are there penalties for a howling dog?

An officer may be able to issue nuisance or "barking dog" citations if the city/municipality or county have these type of ordinances in place. A homeowner's

association may also provide relief if there are rules regarding pets and nuisance behaviors. Otherwise, the homeowner may have to pursue action in a civil court, i.e. small claims court.

A citizen complains that the neighbor has a trespassing dog that uses their lawn for their "business," eats their dog's food, or is impeding their ability to breed their own dogs. Is there anything that the officer can do?

Unfortunately there are no statutes for criminal mischief by a dog or a criminal trespass of a dog. The only avenue the officer could remedy this is by possibly issuing city/municipality citations if there are ordinances governing failure to restrain an animal or nuisance ordinances.

The owner may seek relief in a civil court for damages for the destruction of property or impeding their ability to breed for monetary loss or damages.

A report is made by a newly-separated couple. The husband has in his possession a dog that the couple purchased together, and the wife wants the officer to go get the dog and return it to her because she has been the dog's primary caretaker. Can the officer intervene and retrieve the dog for the lady?

No. Animals are considered personal property and the issue is a civil matter. The couple would have to pursue the issue in a civil court to determine who gets possession of the animal and what visitation they will receive.

An officer gets a call for an animal at large, if the officer shoots the animal, are they liable either criminally or civilly?

Usually, an officer cannot be held criminally liable if he shoots an animal that is about to attack. If an animal is rightfully at large, an officer who shoots it may be liable for injuries caused to the animal by the officer's negligence. If unlawfully at large, liability is based in gross negligence. If the animal is a wild animal, law enforcement officers are not liable to an owner of a dangerous wild animal for damages, including death, arising from the escape of the animal.

Resources regarding Animal Issues:

- Texas Health and Safety Code, Chapter 822
- Texas Penal Code Chapter 42
- Local city/municipality and/or county ordinances
- Animal Law Section, State Bar of Texas – http://www.animallawsection.org
- U.S. Department of Agriculture, Guide to Federal Laws & Regulations Governing Animals – http://awic.nal.usda.gov
- U.S. Department of Justice, COPS, The Problem of Dog-Related Incidents and Encounters – http://cops.usdoj.gov

Consumer Disputes

It is often difficult to decide whether a consumer issue involves a criminal or civil matter. Some confusion is natural since there is overlap in the remedies provided by the Texas Penal Code and Texas Civil Practice and Remedies Code with respect to consumer disputes. The following section of this handbook will address the most common questions law enforcement officers face when dealing with consumer issues and will provide a general overview of available criminal and civil remedies.

FAQs:

Will pursuing a civil remedy bar criminal prosecution?

No. Civil cases are brought by victims of crimes with the goal of receiving monetary compensation, while criminal cases are brought on behalf of the State with the goal of punishing the offender. If a victim recovers in a civil suit, the State may still choose to punish the offender, even if the victim decides to drop the charges. However, criminal cases can also seek to compensate the victim by asking the judge to order that the victim pay restitution, a monetary sum, to the victim. If the victim has already filed a civil suit and recovered money, restitution should not be awarded since that would be considered to be a double recovery. Also, victims can file a civil suit even after the offender has been found guilty in a criminal proceeding.

A restaurant owner calls 911 after he catches a group of minors participating in a failed dine and dash attempt. Is this a civil or criminal matter?

Both. Dine and dash is theft of service as contemplated by Chapter 31 of the Texas Penal Code. "A person commits theft of service if, with intent to avoid payment for service that he knows is provided only for compensation, he intentionally or knowingly secures performance of the service by deception." TEX. PENAL CODE. ANN. § 31.04(a)(1). The definition of service includes restaurant service, and intent to avoid payment is presumed if the "actor absconded without paying for the service." TEX. PENAL CODE. ANN. §§ 31.01(6)(c), 31.04(b)(1).

However, the Texas Penal Code will only punish the offender, and restitution may or may not be ordered. Instead, the best remedy is provided by the Texas Theft Liability Act, codified in Chapter 134 of the Texas Civil Practice and Remedies Code. Under this Act, a person has civil liability for damages as a result of theft. Typically, a restaurant owner can sue a person who commits theft and can recover the amount of actual damages, court costs, attorney's fees, and an additional sum if awarded by a fact finder, not to exceed $1,000. In this scenario, however, the offenders are minors. The Texas Theft Liability Act makes parents responsible for thefts committed by their children. Thus, the restaurant owner can sue "a parent or other person who has the duty of control and reasonable discipline of a child" and can recover the amount of actual damages, court costs, attorney's fees, and an additional sum if awarded by a fact finder, not to exceed $5,000.

After officers complete a police report, restaurant owners can pursue a claim in small claims courts. To find out more about this option, visit the TYLA Guide How to Sue in Small Claims Court at http://tyla.org/tasks/sites/default/assets/File/37322-HowToSueInSmallClaims_2010.pdf.

A service provider calls to complain about a customer who refuses to pay for services rendered. What remedy is available?

The theft of service statute covers more than just the dine and dash scenario. Under Section 31.04 of the Texas Penal Code, a person commits theft of service if they agree to provide compensation for a service but fail to make a payment ten days after receiving notice demanding payment pursuant to a service agreement. As in the dine

and dash scenario, suit can be filed pursuant to Chapter 134 of the Texas Civil Practice and Remedies Code. However, service providers must comply with the requirement that notice demanding payment be in writing and sent by registered or certified mail return receipt requested. In most cases, the service provider can file suit for breach of contract. Attorney's fees will be awarded to the service provider if he/she wins the lawsuit.

Is a criminal or civil remedy more appropriate if a consumer purchases a product that does not work?

This may seem obvious, but the consumer should first attempt to return the product. Although the Texas Penal Code criminalizes deceptive business practices in Section 32.42, consumers should look to Chapter 17 of the Texas Business and Commerce Code for products that do not work. This Chapter, otherwise known as the Deceptive Trade Practices Act (DTPA), holds a seller liable for representing that a product has uses that it does not have, or is of a particular standard. A prevailing consumer under the DTPA will be awarded court costs, attorneys fees, economic damages, and may be awarded mental anguish damages and up to three times the amount of economic damages if the violation was committed knowingly.

If the cost of the product is minimal, and other consumers are making a similar complaint, the complaining consumer may want to pursue a class action lawsuit. However, consumers may be satisfied if directed to the Better Business Bureau website at https://www.bbb.org/consumer-complaints/file-a-complaint/get-started, where they can file a complaint against businesses that are members of the BBB.

If the product has considerable worth, others have been scammed, and the consumer does not believe that the seller of the product is solvent, the goal may switch from recovery of money to punishment pursuant to Section 32.42 of the Penal Code.

A consumer calls to complain that the $500 Gucci purse she purchased from a local store was a fake. What remedy is available?

Both criminal and civil remedies are available. Section 32.42 of the Texas Penal Code makes it a crime to sell a mislabeled commodity. This Section and Section 17.46 of the DTPA prohibit a seller from representing that a good is of a particular style, grade, or model if it is not. If the seller altered the purse to make it look like a Gucci

purse, the seller could also have committed the crime of Criminal Simulation, set forth in Section 32.22 of the Texas Penal Code. The proper remedy can be suggested depending on the result the consumer is seeking.

A consumer purchases a new car that breaks down within the month. He is so angry after being given the runaround from the dealership that he calls the police. What is the Texas Lemon Law?

The Texas Department of Motor Vehicles can best assist the consumer in seeking the desired remedy. Under Section 2301.204 of the Texas Occupations Code, a consumer can make a complaint about a defect in the vehicle covered by a warranty (the Lemon Law covers new vehicles and used vehicles covered under the original manufacturer's warranty). Section 2301.603 requires conformance with the warranty, and replacement or refund may be available under Section 2301.604. Consumers can visit this website to begin the complaint procedure: http://www.txdmv.gov/protection/lemon_law.htm.

If the vehicle is not new or is not covered by the manufacturer's warranty, consumers should contact an attorney to obtain other options for civil remedies, including remedies under the DTPA. Consumers can also file a complaint with the Better Business Bureau and/or the Office of the Attorney General at https://www.oag.state.tx.us/consumer/complain.shtml.

A gas station owner receives complaints from his customers that gang members are hanging around his gas station conducting gang activity. The gang members are consumers of the products sold at the gas station. Is there a remedy available to this gas station owner that would allow him to shoo away the gang members?

A civil remedy is available to the gas station owner. While members of the gang may be individually arrested for gang activities, this is not the type of remedy that will achieve the goal of the gas station owner. A civil remedy is provided under Texas Civil Practice and Remedies Code Section 125.063. Under this section, the habitual use of a place by a combination or criminal street gang for engaging in activity is a public nuisance. Through a civil lawsuit, the gas station owner can obtain an order from the court prohibiting gang members from meeting at the gas station. Attorney's fees may be awarded by the judge. Violation of the order can result in fines and/or imprisonment.

The owner of a furniture store gave credit to a customer to purchase a dining room set upon his certification that he had a well-paying job. The storeowner discovers that the customer was unemployed. What remedies are available to the storeowner?

Making a false statement to obtain property or credit is a crime under Section 32.32 of the Texas Penal Code. However, the owner of furniture store should be advised to contact an attorney to pursue civil causes of action, which will provide more beneficial remedies to the owner.

A sporting goods store has a security interest in a consumer's boat and threatens repossession of the boat due to the consumer's failure to pay the loan. The consumer becomes upset, refuses to pay the balance of the loan, and hides the boat so that it cannot be located. What remedies are available to the sporting goods store owner?

Hindering a secured creditor is a crime pursuant to Texas Penal Code Section 32.33. Considering the value of the item and immediate threat to the property, law enforcement involvement may be needed. However, the owner of the sporting goods store will also want to recover the boat or receive immediate monetary compensation. In that case, the owner should hire an attorney who can help file a civil suit, which will allow the owner to immediately seek pre-judgment remedies in the form of a writ of sequestration or temporary injunction.

A homeowner calls and complains that a loan modification company that promised his home could be saved from foreclosure cheated him. What remedies are available to the homeowner?

Loan modification scams are on the rise. The consumer will want to seek civil remedies. Consumers should read the TYLA Loan Modification Scam Pamphlet, which will provide free assistance: http://tyla.org/tyla/assets/File/LoanModification2011.pdf.

A victim of identity theft calls to report that he believes his credit card information was stolen by a store employee when he used his new credit card at a local store. What remedies are available to this victim of identity theft?

Fraudulent use or possession of a person's identifying information is a crime punishable under Texas Penal Code Section 32.51. If the identity of the thief is known,

law enforcement should become involved. Victims should read the pamphlet found here http://tyla.org/tasks/sites/default/assets/File/08_Identity_Theft_Pamphlet.pdf, which will provide direction on what steps to take next. If the victim insists that store employees are responsible, they should consult with an attorney who can explore the possibility of civil remedies for negligence.

What to Do When Confronted with a Mentally Ill Individual

Individuals with mental illness may pose a risk of harm to themselves or others. Several questions may arise as to whether the individual may be arrested and, if so, what will happen to the person. Peace officers and the public should exercise extreme care and caution when approaching a person with a suspected mental illness. Negotiating and attempting counseling prior to approaching the individual is beyond the scope of this discussion.

FAQs:

Can an officer arrest a mentally ill person without a warrant?

An officer may, without a warrant, take a person into custody if the officer has reason to believe and does believe that the person is mentally ill and, because of that mental illness, there is a substantial risk of serious harm to the person or to others unless the person is immediately restrained. The officer may arrest the person without a warrant under these circumstances only if the officer believes that there is not sufficient time to obtain a warrant before taking the person into custody. If there is sufficient time to obtain a warrant before a substantial risk of serious harm to the person or to others could materialize, the officer must obtain an arrest warrant.

On what information can an arresting officer rely to form a belief about the mental capacity of an individual and the potential risk of harm?

A substantial risk of serious harm may be demonstrated by the mentally ill person's behavior or evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty. An officer can form a belief that the person meets the criteria for apprehension based on the representation of a credible person with knowledge or on the basis of the conduct of the apprehended person or the circumstances under which the apprehended person is found.

If the officer decides to apprehend a person without a warrant, where can the officer take that person, and what information is the officer required to provide?

An officer who takes a mentally ill person into custody without a warrant must immediately take that person to (1) the nearest appropriate inpatient mental health facility; or (2) a mental health facility deemed suitable by the local mental health authority, if an appropriate mental health facility is not available. A jail or a similar detention facility may not be deemed suitable except in extreme emergencies. If it is determined that an extreme emergency exists then the officer must transport the apprehended person to jail or to a nonmedical facility, the apprehended person must be kept separate from any person who is charged with or convicted of a crime.

A person apprehended, detained, or transported for emergency detention has the right: (1) to be advised of the location of detention, the reasons for the detention, and the fact that the detention could result in a longer period of involuntary commitment; (2) to a reasonable opportunity to communicate with and retain an attorney; and (3) to be advised that communications with a mental health professional may be used in proceedings for further detention. Additional disclosures are required relating to the transportation of an individual after being detained at a facility and as to the individual's right to release from the facility after an evaluation by a physician. Those disclosures are contained in Section 573.025 of the Texas Health and Safety Code. The officer or mental health facility must communicate these rights orally in simple, nontechnical terms, within 24 hours after the time the person is detained, and in writing in the person's primary language if possible; or through the use of a means reasonably calculated to communicate with a hearing or visually impaired person, if applicable.

Is the officer required to do anything more after apprehending a person without a warrant and transporting the person to an appropriate facility?

Yes. The officer must immediately file an application for detention after transporting the person to an appropriate facility. The application must contain: (1) a statement that the officer has reason to believe and does believe that the person evidences mental illness; (2) a statement that the officer has reason to believe and does believe that the person evidences a substantial risk of harm to himself or others; (3) a specific description of the risk; (4) a statement that the officer has reason to believe and does believe that the risk of harm is imminent unless the person is immediately restrained; (5) a statement that the officer's beliefs are derived from specific recent behavior, overt acts, attempts, or

threats that were observed by or reliably reported to the officer; (6) a detailed description of the specific behavior, acts, attempts, or threats; and (7) the name and relationship to the apprehended person of any person who reported or observed the behavior, acts, attempts, or threats.

The application must be immediately presented to a judge or magistrate, who then will examine the application and may interview the officer. If approved, the judge or magistrate will issue a warrant for the detention, and the officer must then immediately transmit a copy of the warrant and the application for detention to the facility where the mentally ill person is being detained.

The application must be filed and ruled on immediately. But how long does the officer have to obtain the order?

A mental health facility must accept a patient that has been transmitted there for services, but the facility can only legally detain the individual for 48 hours from the time the individual arrives at the facility unless a written order for protective custody is submitted to the facility. The 48-hour period includes any time the patient spends waiting in the facility for medical care before the person receives the preliminary examination. If the 48-hour period ends on a Saturday, Sunday, legal holiday, or before 4 p.m. on the first succeeding business day, the person may be detained until 4 p.m. on the first succeeding business day. If the 48-hour period ends at a different time, the person may be detained only until 4 p.m. on the day the 48-hour period ends. If extremely hazardous weather conditions exist or a disaster occurs, the presiding judge or magistrate may, by written order made each day, extend by an additional 24 hours the period during which the person may be detained. The written order must declare that an emergency exists because of the weather or the occurrence of a disaster.

What else does the officer need to do?

The officer should immediately notify the county or district attorney that an individual has been transported for emergency detention, so that the prosecutor can determine if an application for protective custody and continued detention can be made to the court. The motion must be filed promptly, so notifying the district or county attorney immediately is critical.

What if there appears to be no immediate threat of substantial harm?

The officer has two choices. If there is a threat of substantial harm, but a warrant could be obtained, then the officer must apply for a warrant. If, however, there is no substantial threat of harm and a warrant would be inappropriate, the officer should attempt to contact the individual's family to supervise the individual and advise them to contact their local mental health facility and the local district or county attorney to obtain mental health services for the individual.

Additional Options

If you or someone you know is facing a mental health crisis, contact the local mental health authority for your county. The person may be eligible for services through the Texas Department of Health Services. The Texas Department of Health Services provides a directory of local mental health agencies by county, at http://www.dshs.state.tx.us/mh-services-search/. This agency also provides a list of local mental health crisis hotlines, available at http://www.dshs.state.tx.us/mhsa-crisishotline/. If you or someone you know is contemplating suicide, the following crisis hotlines are available: 1-800-273-TALK (8255) or 1-800-799-4TTY (4889); Red Nacional de Prevencion del Suicidio 1-888-628-9454; Veterans Suicide Prevention Hotline: 1-800-273-TALK (8255) and press 1.

Additionally, if a person you know has a mental illness, but does not demonstrate an immediate risk of harm, a lawyer could be consulted by a family member or other responsible person to assist with creating a potential guardianship of the person or of the estate. Local bar associations and the State Bar of Texas provide lawyer referral services to assist with locating an attorney. *See* State Bar of Texas Lawyer Referral Information Service, http://www.texasbar.com/AM/Template.cfm?Section=LRIS_Online_Referral_Form.

Additional Resources for Mental Health Issues

- Texas Department of Aging and Disability Services, http://www.dads.state.tx.us/news_info/about/index.html

- For a directory of Mental Health Facilities, http://facilityquality.dads.state.tx.us/qrs/public/qrs.do?page=geoArea&serviceType=res_mr&lang=en&mode=P&dataSet=1&ctx=421137

- National Alliance on Mental Illness Local Affiliate Directory, http://www.namitexas.org/affiliates/

- TYLA's "Breaking the Silence–A Path to Mental Health," http://www.tyla.org/tyla/index.cfm/projects/breaking-the-silence/

- State Bar of Texas's Lawyers Assistance Program, http://www.texasbar.com/AM/Template.cfm?Section=How_TLAP_Can_Help&Template=/CM/HTMLDisplay.cfm&ContentID=15111

Domestic Violence: Protective Orders, Restraining Orders, and Peace Bonds

Family violence is one of the saddest and most difficult problems anyone can face. If a person is a victim of family violence, it's hard to know where to turn—to know who can help. The first call after any violent episode is 9-1-1, but it is good to know that the law also has other ways to help. This section explains the protections that come in the form of protective orders, restraining orders, and peace bonds. They are all different, and understanding how they work can help a person find the best solution.

FAQs:

What is a protective order?

A protective order is a court order that requires one person to stop harming another. Protective orders are designed to stop an abuser from continuing acts of violence. The purpose of a protective order is to: (1) prevent future violence, (2) identify appropriate and inappropriate behavior, and (3) reinforce beliefs that family violence is wrong and needs to be stopped. The order can place various restrictions on the abuser, such as ordering him to stay away from a potential victim, vacate a residence, attend counseling, and/or not possess a firearm.

Abusers who violate protective orders can be fined, arrested, or both. Law enforcement agencies are notified of all protective orders issued in their area, and they are required to maintain a list of those orders. So, if there is a protective order in place and someone is violating it, you should call the police immediately, even if the person the order

protects does not have a copy of the order. The police should have their own record. And know that if an offender violates a protective order in the presence of an officer, the offender must be arrested immediately.

Can anyone get a protective order?

To be eligible to obtain a protective order, a person must be a victim of family violence. (If a person hasn't been a victim yet but has been threatened, he or she can still get a peace bond—more on this later.) "Family violence" means an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault (though it does not include defensive measures to protect oneself). In Texas, "family" has a very broad definition and includes relatives by blood or marriage, former spouses, parents of the same child (even if not married), foster parents or foster children, or any member or former member of the household. A person can also obtain a protective order regarding someone they are or were dating.

A person may also seek a Protective Order on behalf of another. Any adult member of the family or household can file for a protective order seeking protection of him or herself, or any other member of the applicant's family or household. Note that an application for protection may also be filed by a prosecuting attorney or the Department of Protective and Regulatory Services.

Are there different types of protective orders? If so, what are they?

There are three different types of protective orders: (1) Temporary Ex Parte Protective Order, (2) Permanent Protective Order, and (3) Magistrate's Order of Emergency Protection (often referred to as an Emergency Protective Order).

A Temporary Ex Parte Protective Order is issued by a civil court upon an application. A person can obtain a temporary ex parte order without the abuser present in court. It lasts for a specified time "not to exceed 20 days." A judge will make a decision about whether an abuser presents a clear and present danger of family violence to the applicant or a family member, and if so, issue the order. The order can also "kick-out" the abuser from a home, but only if the violence occurred within the last 30 days and the victim

and the abuser lived together during that time. Know that the order is not enforceable by arrest, meaning that the police cannot arrest someone who violates the order. A violation of the order, however, could constitute contempt of court. The order should also set a time for a hearing at which both the applicant and the abuser can attend.

At the hearing, and if the judge believes it's warranted, the judge may issue a Permanent Protective Order. A permanent order is effective for the time stated in the order up to a maximum of two years. If the order does not specify a date, it expires two years from the date the order was issued. Note that if the person subject to the Permanent Protective Order is in prison at the time the order is set to expire, the order can be extended, and it will expire one year after the person is released from confinement. A new Permanent Protective Order can also be requested within the last 30 days of the expiration of the original permanent order and any time thereafter. This order can be enforced through arrest.

The final type of protective order, a Magistrate's Order for Emergency Protection, is not obtained by an application, but is instead ordered by the criminal court when an abuser is convicted of family violence, sexual assault, or stalking. It usually lasts between 31 and 60 days, though it may last between 61 and 90 days if the abuser was arrested for assault with a deadly weapon. The court can issue the order upon a request of a victim, or upon the request of a victim's guardian, a police officer, or the state attorney. If the crime involved serious physical injury or use of a deadly weapon, the court is required to issue the order even if no one requests it. This, too, can be enforced by arrest.

How does someone get a Protective Order?

Step one to getting a protective order is to complete an application, which is usually available through the office of the county or district attorney, a private attorney, or through a legal aid service program. One will also likely find an application at his or her county courthouse. A person can go talk to the clerk of the court and ask for "An Application for a Protective Order." There is no fee.

The person seeking protection should then carefully fill out the application, but wait to sign it until he or she is back at the courthouse. An application must be signed under oath swearing that the facts and circumstances described in the application are

true to the best of the applicant's knowledge. It must then be signed in front of a notary or a judge at the courthouse.

If a victim is applying for a Temporary Ex Parte Protective Order, a judge will decide whether there is an immediate danger that the abuser would commit family violence based on the facts set out in the application. The judge will then set a hearing. The clerk of the court will give the abuser notice that says he or she has been accused of family violence, that he has a right to an attorney, and lets him know the date of the hearing for a Permanent Protective Order.

At the hearing, the judge will need to believe that it is more likely than not that the abuser is or was a member of the victim's family or household or someone that the person is/was dating, that the abuser committed an act of family violence, and that the abuser will likely do so again. A victim can bring an attorney, an advocate, and/or a friend or family member for support. If the abuser does not show up at the hearing, the judge can still grant a Permanent Protective Order, though he may order a new hearing date.

Is a protective order from another state valid in Texas?

All terms of a valid out-of-state protective orders are enforceable in Texas. That's true even if the out-of-state order contains relief that a Texas court could not issue. And there is no requirement that an out-of-state protective order be registered in Texas for it to be enforced. The order can be enforced by a police officer if they believe that a valid protective order exists and has been violated (even if an officer has not seen a certified copy of the order).

What are peace bonds or restraining orders, and how are they different?

A peace bond is a form of protection available when someone has not yet been a victim of family violence, but has been threatened. The purpose is to warn someone not to break the law. When a judge issues a peace bond, he orders the potential abuser to deposit money with the court. If the person who made the threats commits the threatened criminal action, not only does he face criminal charges but he also gives up the deposited money to the state. A peace bond can last up to one year. To obtain a peace bond, a person should file an application, called a Peace Bond Complaint and Statement of Offense by Complaining Party, at the local Justice of the Peace's office.

A restraining order, on the other hand, is protection granted by a civil court, rather than a criminal court. In this context, these are typically sought when there is already a lawsuit between the parties, such as when there is an ongoing divorce proceeding. The civil judge can order a party in the lawsuit not to harm the other person's property, or to harass, threaten, or harm them. The restraining order cannot be enforced by arrest, but violation of the order could be contempt of court. Know that in many counties there is automatically a restraining order that is in effect in certain types of proceedings, like divorce actions, that prevents the parties from harassing or harming each other. One final thing to know about restraining orders is that, like protective orders, there are three main types: temporary restraining orders, temporary injunctions, and permanent injunctions. The main difference is how long they last and what notice is required. A temporary restraining order lasts fourteen days and notice to the other party is not required. Notice is required for temporary and permanent injunctions. A temporary injunction lasts until a proceeding ends, while a permanent injunction can last after the trial is over.

Where else can a victim get help?

First and foremost, if anyone is in immediate danger, they should dial 9-1-1. But there are other resources that are available to assist victims of family violence, including:

- Crime Victims' Compensation: 800-983-9933
- National Domestic Violence Hotline: 800-799-7233 or TTY 800-787-3224
- Texas Advocacy Project
    - Family Violence Legal Line: 800-374-4673
    - Family Law Hotline: 800-777-3247
    - Sexual Assault Legal Line: 888-296-7233
- Texas Department of Human Services Abuse Hotline: 800-252-5400
- Texas Legal Services Center: 800-622-2520

Custody Disputes

A call regarding a custody dispute usually presents officers with both an emotionally stressful situation and a complicated legal determination. This section of the brochure seeks to reduce the stress involved by giving guidance to officers responding to these types of calls.

The most important thing in responding to these types of calls is to ask for a court order. If there is an order, it controls possession of the child (unless the child needs to be removed from the home for other reasons). Many of these calls may be related to a parent's disagreement with the court order or the other parent's alleged failure to comply with the order. In those circumstances, the parent needs to go to court to have the order modified or enforced. More information is below.

Can an officer be held liable for enforcing a court order in good faith?

No. Police officers benefit from official immunity, which protects government officers and employees from personal liability for claims arising from the performance of (1) discretionary duties, (2) within the scope of their authority, (3) as long as they act in good faith. Enforcing what appears to be a valid court order is a discretionary duty within the scope of the officer's authority, so the officer will be immune from suit or liability if it was done in good faith.

What rights and duties do parents have while the child lives with him or her?

Parents have the following rights and duties when a child lives in his or her home:

- the duty of care, control, protection, and reasonable discipline of the child;
- the duty to support the child, including providing the child with clothing, food, shelter, and medical and dental care not involving an invasive procedure;
- the right to consent for the child to medical and dental care not involving an invasive procedure;
- the right to consent for the child to medical, dental, and surgical treatment during an emergency involving immediate danger to the health and safety of the child; and
- the right to direct the moral and religious training of the child.

What rights and duties does the parent appointed as "sole managing conservator" (in other words, the parent with whom the child usually lives) have?

A sole managing conservator has the following rights and duties:

- the right to establish the primary residence of the child, including what city he or she lives in and what residence (unless a court order specifies otherwise);
- the right to consent to medical, dental, and surgical treatment involving invasive procedures, and to consent to psychiatric and psychological treatment;
- the right to receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child;
- the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
- the right to consent to marriage and to enlistment in the armed forces of the United States;
- the right to make decisions concerning the child's education;
- the right to the services and earnings of the child; and
- except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government.

What does it take to change/modify a custody order?

Legal custody can be changed, but only if the parents go to court to modify the previous child support order and establish a child support amount for the new non-custodial parent. A parent must demonstrate to the court that (since the last court order was signed) there has been a material and substantial change in the child's circumstances or child's residence. If the modification is requested within one year of the last order, the parent would have to show: (a) that the child's present environment may endanger the child or significantly impair his or her emotional development; (b) the custodial parent is the one requesting the change or agrees with it and that the change is in the best interest of the child; or (c) the custodial parent has voluntarily left the child with you for at least six months.

Is a non-custodial parent entitled to visit the child if he or she is not paying child support?

Child support and visitation rights are separate issues. The court determines both and will usually order the non-custodial parent to pay child support and the custodial parent to make the child available for visits. The custodial parent has a duty to obey the court order for visitation, even if the noncustodial parent cannot or will not pay child support. The court can enforce its orders against either parent.

If the custodial parent dies, does the other parent have to go to court to get the children? What if the custodial parent leaves a will designating someone other than me for the children to live with?

It's a possibility. Presuming no other conservators are named in the most recent court orders, the children will go to live with the other parent in the event the custodial parent dies. If a relative of the custodial parent takes the children, court action may be needed. Any will left by the parent is not binding. State law prevails. The children would still come to live with the other parent.

A parent says that his or her child wants to come live with him or her. What should I do?

Children who are 12 or older may designate in writing which parent they want to live with. The court does not have to agree and can make the child stay where they are. If both parents agree and the child signs the statement, then the court will usually go along with everyone's wishes. If there is an existing court order, file a motion to modify to ask the court to change the order.

If everyone agrees that the child should live with one parent, do they have to go back to court?

Yes. It would not be a difficult process if everyone agrees, but it is still necessary. Until the court signs a new court order, you are still responsible for paying child support and the custodial parent can still demand the return of the child.

There has been physical violence during our relationship. Can this be used against a parent even if the children were never abused or injured?

Yes. Acts of violence are taken very seriously by the courts. If one parent was physically violent with the other parent, even if the children were never hurt, this can be used as a basis to restrict custody or visitation with the children.

What if the court order is from another state? Does that matter?

No, that does not matter. A court order from another state must be enforced in Texas.

What happens if a parent has to work on a weekend when he or she is supposed to have the children?

The non-custodial parent must notify the custodial parent and the children ahead of time. Virtually all visitation orders allow the parents to swap weekends, or make any other visitation arrangements they wish, as long as both parents agree on the change. If both parents cannot agree on a change, then that visitation period is lost.

What if a parent asks someone else to pick up the children for him or her?

Normally either parent may designate any competent adult to pick up the children or be there when they are dropped off. If the adult is not designated, the children should not go with him or her.

The custodial parent wants to move out of state with the children. What can the non-custodial parent do?

If there is no court order regarding the non-custodial parent's rights, he or she should immediately consult an attorney and begin court action while Texas still has authority to make decisions about the children. If there is a court order, carefully read the custody portion of the court order. Most court orders state which parent has the right to determine where the child lives and often it will include a geographic restriction on where the children may live. However, it is possible the custodial parent would have the right to move without geographic restriction.

Is the parent required to allow the other parent to see the children?

Unless a child was born during the marriage, some other presumption of paternity exists, or the unmarried parents have signed and filed an Acknowledgement of Paternity (AOP), a biological father has no legal rights concerning the child. If you were married, but now separated, and there is no court order for visitation, there is no legal requirement for one parent to let the other parent visit with the child.

What other resources are there to help parents resolve custody issues?

- Legal Aid of Northwest Texas – 1-866-292-4636
- Lone Star Legal Aid (East Texas) – 1-800-733-8394
  www.lonestarlegal.org
- Texas RioGrande Legal Aid, Inc. – 1-888-988-9996
  www.trla.org
- Texas Attorney General's Office
  https://www.oag.state.tx.us/cs/parents/faq
- Texas Advocacy Project – 1-800-777-3247

Landlord–Tenant Issues

Landlords and tenants often contact the police in the event of a dispute. Most often, these calls arise out of lockouts/evictions, interruption of utilities, and landlords' duties to repair the property. While most of these calls placed to the police department are civil in nature, sheriffs and constables are responsible for carrying out evictions.

The best advice you can give—to tenants or to landlords—is to contact a civil attorney regarding these issues. Usually, if the landlord and tenant cannot reach agreement, the dispute will have to be resolved in justice court (a.k.a. J.P. or justice of the peace court). A useful resource for tenants is the Texas Tenant Advisor's website, www.texastenant.org. The page gives helpful summaries on several of these topics and links to other resources available around the state. The Texas Apartment Association provides helpful information for landlords: www.taa.org. More details on resources for both tenants and landlords appear below.

FAQs:

Evictions/Lockouts:

What is the difference between a lockout and an eviction?

A lockout, as described below, is a temporary remedy a landlord can utilize to attempt to secure payment of delinquent rent. An eviction is a judicial proceeding in which the landlord terminates the lease agreement with the tenant and obtains a court order directing the tenant to vacate the property.

What is a landlord required to do in order to evict a tenant?

Landlords are first required to give tenants three days' written notice to vacate the premises before the landlord can file an eviction suit. This notice can be delivered by mail; by personal delivery to a person at least 16 years of age living at the premises; or by affixing the notice to the inside of the main entry door. After the appropriate notice is given, the landlord can file an eviction suit in justice court.

How does a landlord have a tenant removed from the property if the landlord wins the eviction suit?

The landlord is required to wait five days from the date of the judgment of the eviction suit. At that point, the constable or sheriff must post a 24-hour written notice on the tenant's front door stating when the constable or sheriff will return to force the tenant to move out. If the tenant or any other occupants fail to comply, the officer is permitted to use reasonable force to physically remove the individuals from the premises.

Is a landlord allowed to remove a tenant's personal belongings from the property?

If the landlord lawfully evicts the tenant, then the landlord is permitted to remove the tenant's personal property, provided that the landlord does so without intent to appropriate the property and holds the property only until the tenant requests its return. The landlord is not required to store the property and is permitted to leave the property outside the rental unit, as long as the property is not blocking a public

sidewalk, passageway, or street. Also, the landlord cannot leave the property outside if it is raining, sleeting, or snowing. If the property is stored, the tenant is responsible for any associated expenses.

Can the tenant do anything to prevent this?

Yes. If the tenant files a notice of appeal within the five day waiting period, the tenant can remain on the premises pending the resolution of the appeal. The tenant is, however, still responsible for rent during the pendency of the appeal.

Is a landlord allowed to lock out a tenant if they fail to pay rent or otherwise fail to comply with the terms of the lease?

Yes, but only if the appropriate notice is given by the landlord and only if the landlord makes a key available to the tenant on demand. Before a landlord changes the locks, he or she must mail or hand deliver to the tenant notice at least five calendar days prior to changing the locks. This initial notice must state (1) the earliest date that the landlord proposes to change the locks; (2) the amount of rent the tenant must pay to prevent the changing of the locks; and (3) the name and street address of the individual or office to whom the tenant can pay any delinquent rent in order to prevent the changing of the locks. If the landlord has given this required notice, then the landlord may change the tenant's door locks provided that the landlord places a notice on the tenant's front door stating (1) an on-site location where the tenant can go 24 hours a day to obtain a new key or a phone number that is answered 24 hours a day that the tenant can call to have a key delivered within two hours; (2) the fact that the landlord must provide the tenant a new key at any time of the day or night regardless of whether the tenant pays any of the delinquent rent; and (3) the amount of rent for which the tenant is delinquent.

What are the consequences for a landlord who wrongly evicts or locks out a tenant?

Landlords who fail to abide by these rules are subject to a civil penalty amounting to one month's rent plus an additional $500. Tenants can also sue for any damages arising out of a wrongful eviction.

What is a tenant who has been wrongly locked out required to do in order to regain access to the property?

The tenant is required to file a "complaint for reentry" in justice court in the precinct of the property. The complaint should detail the facts of the alleged wrongful lockout. The tenant will also be required to state these facts orally under oath before the justice court. If the justice agrees that the tenant has been wrongly locked out, the justice can require the landlord to allow the tenant to immediately reenter the property pending the resolution of the dispute.

What if the landlord refuses to comply with a justice court's order to allow the tenant to reenter the premises?

If the landlord refuses to comply, the tenant can file an affidavit with the court providing the name of the person refusing to comply with the order. The court then will summon the individual to come to the court to explain why they have refused to comply with the order. If the justice finds that the individual disobeyed the order, that person can be held in contempt of court and placed in jail.

If a police officer is present when a wrongful eviction occurs, can that officer be subject to civil liability?

Yes. The United States Supreme Court has held that law enforcement officers who are present at a wrongful eviction and fail to intervene on behalf of the tenant violate the 4th Amendment's prohibition against unreasonable seizures, which can lead to civil liability for the officer under federal civil rights laws.

<u>Interruption of Utilities</u>:

Can a landlord turn off a tenant's utilities?

No, except when necessary for bona fide repairs, construction, or emergency. This rule is the same whether the tenant pays the utility company directly or if the utilities are provided by the landlord as part of the tenant's rent. Until 2009, landlords had a limited right to interrupt utilities provided as part of the tenant's rent, but that is no longer the case.

Duty to Repair:

Are landlords required to make repairs to the property?

Landlords are required to make a diligent effort to repair or remedy a condition if the tenant provides the landlord with notice of the condition, the tenant is not delinquent in rent, and the condition materially affects the physical health or safety of an ordinary tenant. Landlords are not required to repair conditions caused by normal wear and tear or conditions caused by the tenant, a roommate of the tenant, a member of the tenant's family, or a guest of the tenant.

What if the landlord fails to make a necessary repair?

The tenant can terminate the lease or repair the condition and deduct the cost from his or her rent. Alternatively, the tenant can sue the landlord to obtain a court order directing the landlord to make the repair; obtain an order reducing the tenant's rent; obtain a judgment against the landlord for one month's rent plus $500; obtain a judgment for the tenant's actual damages; and obtain a judgment for court costs and attorney's fees.

Retaliation:

Can a landlord retaliate against a tenant if the tenant attempts to exercise a right in the lease, requests a repair, or complains to a governmental entity regarding a housing code violation?

No. For six months after any of these actions, a landlord may not evict the tenant, deprive the tenant of use of the premises, decrease services to the tenant, or increase the tenant's rent, unless the landlord can demonstrate that these are not in retaliation for the tenant's actions.

Resources:

What resources are available in my area for tenants who believe their landlord may be violating one of these laws?

- The Texas Young Lawyers Association has developed a guide called the Tenant's Rights Handbook which addresses many of these issues. A copy

of the guide can be downloaded at www.tyla.org/tasks/sites/default/assets/File/2009Tenants RightsPamphlet.pdf. If you do not have access to a computer, you can also call the Texas Young Lawyers Association at 800-204-2222, x1529 to obtain a copy.

- The Office of the Attorney General has information regarding tenants' rights on its webpage: www.oag.state.tx.us/consumer/tenants.shtml.

- Resources are also available to tenants statewide through the Texas Tenant Advisor's website at http://texastenant.org. This site has detailed information about your rights as a tenant, as well as information on how to respond to landlord issues and how to prevent them in the first place.

- Local resources are also available in the following cities:

    - Austin: Austin Tenant's Council, www.housing-rights.org, 512-474-1961.
    - Dallas: Texas Tenants Union, www.txtenants.org, 214-823-2733; and the Housing Crisis Center, www.hccdallas.org, 214-828-4244.
    - Houston: Tenants' Council of Houston, www.houstontenants.org, counseling@houstontenants.org.

Are there any resources available for landlords?

Yes. The Landlord Association provides information for landlords, organized by state, at its website: http://www.landlordassociation.org/. Landlords can also find helpful information from the Texas Apartment Association at www.taa.org.

NOTES

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