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# Service of Civil Process

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

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# Service of Civil Process

Reference Number: CTAS-1295

These pages provide a very general overview of Tennessee law regarding service of civil process, to examine a few of the most serious concerns in more detail, and, most importantly, to offer information that may help sheriffs avoid exposure to the legal pitfalls and liabilities that may arise if the sheriff or sheriff's officers fail to provide effective, sufficient service and return of service of civil process.

## Definitions for Civil Process

Reference Number: CTAS-1296

The definitions below include commonly used terms related to service of process. Most are condensed or simplified when compared to their meanings as "legal terms of art." Nearly all are found in *Black's Law Dictionary*, 7<sup>th</sup> Edition (1999), where they are more fully defined.

**Action** – Any judicial proceeding which, if conducted to the court's final decision, will result in a judgment or decree. See also, "Suit."

**Attachment** – The procedure whereby the court takes control of specific property that is located in the court's jurisdiction.

**Body Attachment** - Locally used language for "Body Execution." See below.

**Body Execution** – A court's order to take a named person into custody, most often to bring the person before the court to pay a debt. Locally known as a "body attachment," it is most often used when child support has not been paid as ordered.

**Complaint** – The pleading that initiates a civil action. It states the basis for the court's jurisdiction, the basis for the plaintiff's claim, and the demand for relief, i.e., damages.

**Decree** – The judgment of a court of equity or chancery. See also, "Judgment."

**Execution** – The act of carrying out a court's order. Also, judicial enforcement of a money judgment, most often through seizure and sale of the judgment debtor's property.

**Fieri Facias** – Judicial writ directing the sheriff to satisfy a money judgment from the debtor's property. A form of execution usually referred to simply as an execution.

**Foreign Judgment** – Any judgment, decree, or order of a court of the United States or of any other court that is entitled to full faith and credit in Tennessee.

**Garnishment** – An order to a third party, such as an employer, to turn over a debtor's property (such as wages or bank accounts) held by the third party.

**Indemnity Bond** – A bond given by the plaintiff to protect the sheriff or other officer against all damages and costs in cases where there is a dispute regarding the title to the property upon which the sheriff is executing the levy.

**Injunction** – A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.

**Instanter Subpoena** – A writ commanding the person to whom it is directed to appear before the court immediately.

**Judgment** – The official decision of a court of law upon the rights and claims of the parties to an action.

**Judgment Creditor** – A person having a legal right to enforce execution of a judgment for a specific sum of money.

**Judgment Debtor** – A person against whom a money judgment has been entered but not yet satisfied.

**Levy** – The court ordered seizure and sale of real or personal property or the money obtained from the sale, usually in order to satisfy a judgment. See also, "Levy of execution."

**Levy of Execution** – See "Levy."

**"Not Found"** – A return of service that signifies the defendant is believed to have left the jurisdiction

for another county, state or foreign country.

"Not to Be Found in My County" – The return used when an officer cannot locate the defendant yet has no information about whether the defendant has left the jurisdiction.

Process – The means by which a defendant in a civil action is compelled to appear in court or through which a court compels compliance with its directives.

Proof of Service – An officer's written statement of what has been done under the process issued from the court for service. If service was made, the return must identify the person served and describe how service was accomplished. If process is returned unserved, the officer must state the reason service could not be effectuated. See also, "Return of Process."

Return of Process – See "Proof of Service."

Sale on Execution — The procedures whereby levied real or personal property is advertised and sold to satisfy a judgment. See also, "Sheriff's Sale."

Sheriff's Sale – See "Sale on Execution" above.

Subpoena – A writ that commands a person to appear before the court or other tribunal.

Subpoena Duces Tecum – A subpoena ordering the witness to appear and bring specified records or documents.

Suit – See "Action" above.

Summons – A writ or order commencing the plaintiff's action that directs the defendant to file an answer to the complaint and to appear in court.

Unlawful Detainer – The unjustified retention of real property by one who was there first lawfully, such as a tenant, but who then refuses to vacate the premises despite the termination of the lease and the landlord's demand for possession.

Writ – A court's written order commanding the addressee to do or refrain from doing some specified act.

Writ of Attachment – An order directing the sheriff to seize the defendant's property in order to satisfy a judgment.

Writ of Possession – A court's order directing an officer to take specified property out of the defendant's possession and deliver it to the plaintiff.

Writ of Restitution – A court's order to the sheriff, issued after a hearing, to remove the defendant (most often a tenant), by force if necessary, from the property and restore peaceful possession of the premises to the plaintiff (most often a landlord), and to make a return within 20 days of how the officer executed the writ.

Writ of Supersedeas – A writ or bond that suspends a judgment creditor's power to levy execution, usually pending appeal.

## Sheriff's Duty to Serve Civil Process

Reference Number: CTAS-1297

If confronted with the impending loss of your home, bank account, or personal belongings, how hard would you work to neutralize the threat? This question is relevant because the statutory duty of care for executing civil process in Tennessee demands that the sheriff:

Use, in the execution of process, a degree of diligence exceeding that which a prudent person employs in such person's own affairs.

T.C.A. § 8-8-201(10) (emphasis added).

While a sheriff's responsibility to serve civil process is not nearly as exciting as criminal law enforcement, nor as fraught with constitutional complications as jail operations, it *is* the means by which representatives of the sheriff's office are most likely to have contact with members of the business community, landlords, public and private organizations, civil attorneys, and many government agencies. Professional, competent service and execution of process enhances the reputation of the sheriff's office.

Conversely, disobedience of the command of the process, whether by negligence, ignorance, or indifference, not only harms the agency's reputation but may lead to an award of money damages or findings of contempt of court against the sheriff or the sheriff's deputies. T.C.A. § 8-8-207. It should be kept in mind that in many cases the acts of the deputy on the sheriff's behalf are deemed to be equivalent

to those of the sheriff. T.C.A. §§ 29-18-115(d)(1) and 29-20-205.

Sanctions and penalties for various missteps along the civil process pathway vary. The aggrieved party may recover full damages from the sheriff for the harm caused by failure to comply with the orders contained on the process. T.C.A. § 8-8-207. The law also provides for a \$125 penalty against a sheriff who fails to execute and make return of any process issued by a general sessions court or a court of record within the time frames specified by statute. T.C.A. § 25-3-105(a)(1) and (b)(1). A sheriff or deputy who neglects or refuses to execute any process governed by Title 29 of the Code, which governs detainers, *i.e.*, evictions, “shall forfeit \$250 to the party aggrieved . . .” T.C.A. § 29-18-116.

Congress has not laid down rules for service of process; hence, it is generally governed by state laws. *Amy v. City of Watertown*, 130 U.S. 301, 304, 9 S.Ct. 530, 531, 32 L.Ed. 946 (1889). The *Tennessee Code Annotated* and the Tennessee Rules of Civil Procedure set forth requirements for legally effective service of civil process. Title 8 of the Code enumerates the duties of the sheriff, but several other titles include further particulars for executing specific kinds of process. Among the Rules of Civil Procedure, Rule 4, “Process,” Rule 54, “Judgments and Costs,” and Rule 69, “Execution on Judgments,” are most relevant to understanding legal mandates to the sheriff regarding civil matters.

Generally, effective service of process consists of a few seemingly simple steps:

1. Mark on all process the date it was received by the sheriff. T.C.A. § 8-8-201(a)(4); § 20-2-103(a).
2. Serve the process; execute all writs and other process legally issued and directed to the sheriff. T.C.A. § 8-8-201(a)(5)(A).
3. Make a timely, due return of the process, either personally or by a lawful deputy. T.C.A. § 8-8-201(a)(5)(A).

Judicial interpretation of the law surrounding service of process is generally well settled; many of the most cited cases reach back to Tennessee Supreme Court decisions from the 19th century.

However, the sheriff’s job is complicated by several factors. On one hand, the Rules of Civil Procedure supply detailed guidance for effective service. On the other, our state Supreme Court has held that, where a statute dealing with a particular type of judicial action contains specific provisions for process and service, that method is permissible and may be followed in lieu of the Rules. *State Board of Education v. Cobb*, 557 S.W.2d 276 (Tenn. 1977). Since statutes regarding specific kinds of judicial actions are spread throughout a multitude of Tennessee Code titles, and different laws enacted at different times occasionally appear to conflict, compliance can become complicated.

The legal terms related to process and its service are generally a product of English laws dating back to the 17th and 18th centuries. The words themselves are often arcane, antiquated, and do not blend easily with modern vocabulary. What, for instance, might a citizen envision when advised that the sheriff has left the office to carry out a “body execution,” or is off serving a “body attachment?” Fortunately, the legal expectation for carrying out that function is far less harsh than might be contemplated by a layperson.

Another impediment for the sheriff’s staff is the occasional confusion among the counties caused by variations in local customs about what name a particular kind of process is actually called. For example, the judicial order called a “writ of restitution” in one county may be called a “writ of possession” in another, despite the fact that service, execution, and the results of those actions are exactly the same in both cases.

## How a Dispute Becomes a Lawsuit: The Complaint and Summons

Reference Number: CTAS-1298

Problems related to the sheriff’s civil process duties most often arise because the process was improperly served, not served at all, or reflected an insufficient or inaccurate return.

All civil actions, whether equitable or legal, are commenced by filing a complaint with the clerk of the appropriate court. Rules 3 and 4.01, Tenn. R. Civ. P. When the civil complaint, *i.e.*, lawsuit, is filed, the clerk issues the required summons “forthwith.” As of July 1, 2005, a summons must be served within 90 days of the date issued, a far more relaxed rule than the prior limit of 30 days.

The summons is extraordinarily important. It gives the person to whom it is directed notice that he or she is being sued, explains the time limit within which an answer to the complaint must be filed, and warns the defendant that a default judgment will be rendered in the plaintiff’s favor if no answer is filed. Rule 4.03(1), Tenn. R. Civ. P. Clearly, the consequences can be grave if the return indicates that summons

was properly served when in fact it was not.

Rule 4 of the Tennessee Rules of Civil Procedure contains nine subsections and two addendums detailing the specific requirements for serving summons under nearly every imaginable circumstance, including, but not limited to, serving defendants within and outside the state, minors, incompetents, partnerships, corporations, the state or a state agency, the county or a municipality. Rule 4 also dictates requirements for personal service and service by mail, and mandates who is eligible to accept service in each eventuality. It is also important to know whether a state statute exists regarding the method and means of proper service since the statute overrides the rules of civil procedure.

## Return of Service

Reference Number: CTAS-1299

The return is made by the deputy who serves the process. It is simply a written statement that constitutes proof of service or otherwise explains what was done under the process issued by the court for service. *David v. Reaves*, 75 Tenn. 585, 590 (1881). The return must either indicate that the command of the process was fully carried out or honestly state the facts that prevented compliance. *Eaken v. Boyd*, 37 Tenn. 204 (1857).

Returns are to be made in ink "or some other nonerasable material or fluid." Failure to follow this directive does not invalidate the return, but any deputy who violates the statute commits a Class A misdemeanor and is liable to any person harmed by the violation. T.C.A. § 20-2-111.

An inaccurate, carelessly made, or untruthful return is a serious matter that can lead to a damaging outcome for the parties and for the officer who may be penalized monetarily or otherwise held liable for his or her breach of duty. The return must identify the person served and describe the manner in which service was accomplished. Rule 4.03, Tenn. R. Civ. P. If the officer alleges on the return that the defendant is a resident of the county evading service of process, there must be a showing that a "diligent inquiry" was conducted, or the return is subject to be found untrue. *Willshire v. Frees*, 201 S.W.2d 675, 184 Tenn. 523 (1947).

In addition to the above-mentioned penalties and liabilities, T.C.A. § 25-3-101 allows for a judgment by motion to be obtained by a plaintiff against the sheriff if the sheriff or his deputy:

1. Fail to make due and proper return of an execution;
2. Make a false or insufficient return; or,
3. Fail to pay over money collected on an execution.

The time limitations for service and return of process vary greatly depending on the nature of the process itself. Some, such as orders of protection, instant subpoenas, and orders for child custody transfer, are to be carried out immediately. Other forms of process, such as summons, may allow as much as 90 days for service.

Clearly, multitudinous legal mandates exist regarding what constitutes sufficient service and return of civil process, be they found in state statutes, the rules of civil procedure, case law, opinions of the attorney general, or some other legal authority or treatise. Sheriffs can seek guidance from their county attorney or some other attorney to assist in efforts to strictly comply with those mandates, and procedural details will not be examined at great length here.

## Avoiding Difficulties, Dilemmas, and Disasters

Reference Number: CTAS-1300

There are a number of limitations, boundaries, and prohibitions that, if respected, go a long way toward protecting sheriffs and deputies from legal liability, customer hostility, berating judges, indignant attorneys, public embarrassment, unnecessary confusion, and messy courtroom entanglements. Whether the sheriff's office serves 1,000 or 500,000 civil papers each year, it is the mistakes that invariably draw the most attention and are longest remembered. The following list is surely not all encompassing but contains a number of suggestions for avoiding the aforementioned unpleasant sorts of attention.

## Keep It Simple

Reference Number: CTAS-1301

Good faith efforts to ensure the integrity of the judicial process in matters not directly related to the sheriff's duties can become a very slippery slope. The sheriff's office may find itself dragged into a quagmire of confusion and controversy among the parties, the clerk's office, or the attorneys. The good news is the sheriff is not responsible for guaranteeing that the system work as it should. Read the process and follow the order to the sheriff contained thereon unless the order is illegal, too ambiguous to understand, or obviously erroneous. In those cases, the attorneys or clerk can be asked for clarification or a corrected order.

The sheriff "*must look alone to the mandate in his hands*. If the judgment awarding such mandate is void, that is a matter to be taken advantage of by the defendant in the execution, and it is no part of the duty of the sheriff to protect [the plaintiff]." *Perdue v. Dodd, et als.*, 69 Tenn. 710 (Tenn. 1878). *See also McCoy v. Dail*, 65 Tenn. 137 (Tenn. 1873); *State, to Use of Josiah Grigsby v. Manly et al.*, 79 Tenn. 636 (Tenn. 1883); and *Shaw v. Holmes*, 51 Tenn. 692 (Tenn. 871). In other words, the sheriff has no dog in the judicial hunt, and "cannot know, nor is it his province to inquire, what arrangements have been made between the principal and his securities."

## Levy On Disputed Property

Reference Number: CTAS-1302

There is an important exception to the statutory mandates that a sheriff obey the command of the process virtually without question. When executing a levy, no sheriff is required to seize any property the title of which is disputed, or to sell the same after levy, unless the plaintiff will first give an indemnity bond and security to the officer. The bond then protects the sheriff against all damages and costs in consequence of the levy or sale. T.C.A. § 26-3-104. Protection extends only to disputes based on the claim of a third party and does not include the defendant's objections that the property is exempt from execution, the execution is void, and so forth. *Baker v. Agey*, 21 Tenn. 13 (1840); *Hunter v. Agee*, 24 Tenn. 57 (1844).

The most efficient way to address this issue is for the plaintiff's attorney to sign the indemnity bond, which requires no fee, at the time the levy order is sought. The plaintiff cannot be required to give an indemnity bond in advance. However, if none is given and a dispute over ownership of the property arises when the deputy goes to execute the levy, the deputy should suspend further action until the bond is given.

In the meantime, the judgment debtor may use the delay to remove, transfer, or abscond with the property designated for levy. It is unlikely the sheriff can spare personnel to wait at the scene for a bond to be given that may never actually arrive. The simple form below, adopted from a form used in Chancery Court for Knox County, is found at 16 Tenn. Prac., Debtor-Creditor Law and Practice § 19.04 (2005). The sheriff can perhaps enlist cooperation from the clerk's office to make it easily available to the plaintiff's attorney at the location where the levy order is filed.

### INDEMNITY BOND OF PLAINTIFF: T.C.A. § 26-3-104

We, the Attorney for the Judgment Creditor and Surety, indemnify the Sheriff of \_\_\_\_\_ County, Tennessee, and all the Sheriff's Deputies, and all and every person aiding the Sheriff in the premises, from harm, loss, damages, costs, suits, judgments and executions, that may at any time arise or be brought against the Sheriff or any of them for the levy or sale and that we shall pay any judgment that may be obtained against the Sheriff or any of them by virtue of the levy or sale.

\_\_\_\_\_  
Surety

THIS DAY \_\_\_\_\_ OF \_\_\_\_\_, 20\_\_\_\_.

## Warrantless Searches

Reference Number: CTAS-1303

"The service of civil process does not authorize a warrantless search of private property." *State of Tennessee v. Harris*, 919 S.W.2d 619, 625 (1995). Failing to respect that legal fact invites disaster on two fronts. First, suit may be filed in federal court alleging a violation of civil rights pursuant to 42 U.S.C. §1983. There is no cap on damages in such actions, and attorneys' fees are awarded to the prevailing plaintiff in addition to damages. Second, evidence of criminal conduct discovered under such circumstances is inadmissible in court, allowing the offender to escape prosecution even for serious felony

offenses. It is crucial to distinguish civil from criminal procedural rules here, and the ramifications for not doing so can be astonishingly harsh. For that reason, the limits on an officer's authority to enter or remain on the property are examined more comprehensively below.

The parameters are inflexible; the rule of law is that an officer attempting to serve civil process is permitted to go anywhere on the premises a (well behaved) member of the general public might be expected to go and no further. *State v. Marcus Ellis*, No. 01C01-9001-CR 00021, slip op. at 4, 1990 WL 198876, (Tenn. Crim. App., Nashville, Dec. 12, 1990).

The obligation to serve process indisputably gives officers the right to approach a dwelling and knock on the door. After all, the sheriff is required to "go to the house or place of abode of every defendant against whom the sheriff has process, before returning on the same that the defendant is not to be found." T.C.A. § 8-8-201(a)(8). An individual has no expectation of privacy in the area in front of his residence that leads from the street to the front door, and what an officer sees while standing on the sidewalk between the street and door is not protected. *State v. Baker*, 625 S.W.2d 724, 727 (Tenn. Crim. App. 1981).

However, the Fourth Amendment to the United States Constitution and Article I, Section 7, of the Tennessee Constitution protect a citizen of this state from unreasonable searches and seizures of his dwelling and the curtilage that adjoins the dwelling. *State v. Prier*, 725 S.W.2d 667, 671 (Tenn. 1987); *Welch v. State*, 154 Tenn. 60, 289 S.W. 510 (1926).

Therefore, any significant departure from an area where the public is impliedly invited "exceed[s] the scope of the implied invitation and intrude[s] upon a constitutionally protected expectation of privacy." *Id.* (quoting *State v. Seagull*, 95 Wash.2d 898, 632 P.2d 44, 47 (Wash.1981) (en banc)). And, while an officer attempting to serve process does have the right to go to the intended recipient's home or "place of abode," the officer may not enter the home itself without consent. Op. Tenn. Atty. Gen. No. 01-148 (September 24, 2001).

If it is obvious that no one is home, the deputy is at liberty to await the arrival of the residents. The deputy is not authorized to peer in windows or prowl around private, occupied, or fenced property. In *Harris*, the court pointedly stated: "Moreover, nothing in the law justifies the sheriff's proceeding down the lane behind a residence for over a hundred yards to serve civil process even if the sheriff had believed that Harris was 'hiding' from service." *Harris*, 919 S.W.2d at 623. "Consequently, the warrantless search of appellant's property and the resulting seizure of (over 100) marijuana plants was unconstitutional. Any statements made by appellants must likewise be suppressed." *Id.* at 624-625.

Although it may represent the deputy's diligence, or may simply be an innocent effort to determine whether the property is inhabited or abandoned, walking around the exterior of a dwelling or attempting to gaze inside a window constitutes a search, and, "[e]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *State v. Lakin*, 588 S.W.2d 544, 547 (Tenn. 1979) (quoting *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924)). Tennessee courts have consistently held that police entry upon private, occupied, fenced land without a warrant and absent exigent circumstances is unreasonable, and evidence obtained as a result of such a search must be suppressed. *State v. Prier*, 725 S.W.2d 667 (Tenn. 1987).

## Never on Sunday

Reference Number: CTAS-1304

The general rule is that civil process shall not be executed on Sunday. The exception to the rule is where it appears the parties to be sued are leaving the county or state or are about to remove themselves or their property beyond the court's jurisdiction. T.C.A. §§ 20-2-104, 105, and 106. Other exceptions are orders of protection, T.C.A. § 36-3-601 *et seq.*, and a few other types of extraordinary process.

## No Shopping Allowed

Reference Number: CTAS-1305

No sheriff or deputy may purchase, either directly or indirectly, any property for sale under process of law, *i.e.*, from a sheriff's sale. Any such purchase shall be absolutely void. T.C.A. § 8-8-206. Interestingly enough, the prohibition applies to sheriffs but to no other law enforcement officers or agencies. Additionally, an officer cannot bid at his own execution sale even if the bid is placed purely for the benefit of a third party. *Chambers v. State*, 22 Tenn. 237 (1842).



## Service of Process by an Employee of a Party Is Prohibited

Reference Number: CTAS-1306

In any civil action where an officer is a salaried or commissioned employee of a party to the suit and serves a summons, writ, process or other proceeding, said officer commits a Class C misdemeanor. T.C.A. § 8-8-216. Any process served in a civil action in violation of the statute is void. T.C.A. § 8-8-217.

## Witnesses and Parties

Reference Number: CTAS-1307

Witnesses and parties to a suit cannot be served with any "writ, process, warrant, order, judgment, or decree in any civil cause" except as to a subpoena to testify as a witness while attending, going, or coming from the place of suit. T.C.A. § 24-2-105; *Hinkle v. Cravens*, 219 Tenn. 253 (1966). The privilege extends to corporate officers who come to testify as witnesses, and they cannot be served with process in a suit against the corporation. *Sewanee Coal, Coke & Land Co. v. W.W. Williams & Co.*, 120 Tenn. 339, 107 S.W.2d 968 (1907) (A resident of another state or county, who has in good faith come to testify as a witness, is exempt from service of process for the commencement of a civil action, either against him in his individual capacity or against a corporation of which he is an officer or agent.).

The travel exemption allows one day for every 30 miles of travel, which illustrates the fact that the privilege has been in effect since 1794. The privilege holds even where the individual has come from a foreign jurisdiction. *Sofge v. Lowe*, 131 Tenn. 626 (1915); *Purnell v. Morton Live Stock Co.*, 156 Tenn. 383 (1928).

## Serving a Company

Reference Number: CTAS-1308

When serving a company by certified mail, the letter must be addressed to a specific corporate officer, a managing or general agent, or another agent authorized to receive service of process on the company's behalf. Service cannot be accomplished by merely mailing a copy of the summons and complaint to the company to be received along with the general mail sorted by lower-level employees. *Taylor v. Stanley Works*, 2002 WL 32058966 (E.D. Tenn. 2002); Fed. R. Civ. P. 4(h)(1).

## Service of High-Risk Process

Reference Number: CTAS-1309

It is easy to be lulled into complacency when one spends months or years serving civil process without serious incident, so it is important to remember and honor the fact that several Tennessee sheriff's deputies have lost their lives or been seriously injured fulfilling that duty. Civil actions are not necessarily conducive to civilized conduct on the part of those involved, and an officer cannot afford to maintain a casual attitude when there is no way to know what waits on the other side of a closed door.

Although service of any kind of process can lead to confrontation, some kinds of legal disputes engender such fierce emotion that they are more likely to instigate irrational or violent reactions, especially from the respondent and the respondent's loved ones.

## Child Custody Transfer Orders

Reference Number: CTAS-1310

These orders are surely the most disturbing judicial orders deputies execute. They are often distressing for everyone present, including the officers charged with the duty to effect the transfer. Custody transfer orders require the sheriff to take physical custody of a child and place that child in the hands of the party directed by the court.

The transfer may be ordered pursuant to a judicial determination that the child has been abandoned or is subjected to or threatened with abuse. T.C.A. § 36-6-219(a). It may be initiated by an order for immediate physical custody, issued because the petitioner has properly registered a foreign decree, and

the petition has been verified pursuant to T.C.A. §§ 36-6-229 through 234. Or, where a petition seeking enforcement of a custody determination is filed and the petitioner files a verified application, the court may issue a warrant for immediate physical custody if the child is in imminent danger of serious physical harm or is about to be removed from Tennessee. T.C.A. § 36-6-235(a).

A warrant to take physical custody of a child is enforceable throughout the state and may authorize officers to enter private property to take custody. If required by exigent circumstances, officers may make a forcible entry at any hour. T.C.A. § 36-6-235(e). The officer must serve the respondent with the petition, warrant, and order immediately after the child is taken into physical custody. T.C.A. § 36-6-235(d).

Below are a few guidelines for facilitating child custody transfers that may help protect the child's physical and emotional safety while minimizing the problems likely to be encountered during the transfer process.

1. Coordinate the transfer closely with the party taking physical custody in order to confirm the child's identity and make the transfer as quickly as reasonably possible. The person taking custody should wait nearby but out of the respondent's sight so as to avoid confrontation.
2. Never send a lone officer to execute a warrant for physical custody. Ideally, the transfer should be facilitated by a team of no fewer than three officers. It may take two or more to restrain the respondent and at least one more to transport the child to the petitioner.
3. Act quickly and efficiently. Officers should not allow the respondent to engage them in discussion or argument. While the respondent may consent to a peaceful surrender for the sake of the child, and negotiations to that end are desirable, they should be not be prolonged.
4. If the child is to be transported in a sheriff's vehicle, he or she must be properly restrained by a seatbelt or in an age and size appropriate child safety seat.
5. Young children may be consoled by a small stuffed animal, doll, or book. Officers should calmly reassure and comfort the child, who may appear calm while suffering severe emotional shock. Some agencies have found it helpful to use at least one female officer where available, as many children feel less threatened if there is a female presence.

## Writs of Restitution

Reference Number: CTAS-1311

Writs of restitution are commonly known as evictions; they are another kind of process that brings with it significant and inherent risks to officer and public safety during execution. They are also among the very few civil orders that mandate use of force, where necessary, to achieve service. T.C.A. § 29-18-127.

The sheriff has not obeyed or executed a writ of restitution until he or she delivers actual possession of the premises to the plaintiff and leaves the plaintiff in quiet possession. If the tenant does not yield possession peacefully, it is the officer's duty to remove him from the premises, and the writ is not executed until he does so. *Farnsworth v. Fowler*, 31 Tenn. 1, 55 Am. Dec. 718 (1851).

The officer executing the writ is responsible only for overseeing the procedure and keeping the peace until it is finished and the plaintiff is restored to peaceful possession. Officers should not act as the plaintiff's movers. Plaintiffs are responsible for the removal and storage of the tenant's belongings.

However, it is not uncommon for a plaintiff to direct that movers simply take the tenant's property to the edge of the roadway. In either case, there may be items removed from the premises that pose a hazard to public safety, e.g., weapons, incendiary devices, firearms, prescription medications or toxic chemicals. Such items should be inventoried, secured, and held for further disposition in accordance with law. Some items of obvious value, such as cash, should also be inventoried and secured.

Some articles or substances discovered during removal of the tenant's belongings, such as child pornography or controlled substances, may have criminal implications and must be dealt with accordingly.

The proliferation of methamphetamine labs is a relatively new danger confronted by those whose duty it is to oversee or carry out evictions. Officers should be acquainted with signs that such a lab is present so the appropriate authorities can be summoned to perform decontamination procedures.

Tenants faced with the execution of a writ of restitution sometimes become agitated, hostile or belligerent, and may call for reinforcements amongst their relatives and friends, whereupon the situation usually deteriorates rapidly. In such cases, it may be prudent for officers to withdraw to a safe distance until their own reinforcements arrive. Often the mere show of force effectively deters further disruption.

If tenants or other persons on the scene become threatening, assaultive, or otherwise engage in violent

conduct, and efforts to encourage reasonableness are unsuccessful or clearly futile, the officer should not hesitate to use restraints or other force as required to stabilize the situation and restore safety and order.

Occasionally an officer arriving to execute a writ of restitution discovers an unattended child or adult occupants who are intoxicated, disabled, infirm, or mentally ill. A person who cannot leave the premises safely, attend to his or her own needs, or avoid risk of serious harm if left unattended should never be abandoned. If no responsible person is available to take charge of such an individual, the appropriate social services or other agency must be contacted for assistance. An officer who abandons an obviously incompetent individual who subsequently comes to serious harm may be found culpable for negligence.

While unrelated to public or officer safety, it is worth mention that a surprising number of actions filed related to writs of restitution arise because the deputies and plaintiff's movers enter the wrong residence and remove the property while the owner or occupant is away. Even if the property is put back in place undamaged and no locks, doors, or fixtures are broken in the process, this is an error with considerable tort liability and constitutional implications. A claim for damages by the indignant, embarrassed owner, whose constitutional rights to privacy and due process have been violated, is almost certain to follow.

## Orders of Protection

Reference Number: CTAS-1312

"In America, early settlers held European attitudes towards women. Our law, based upon the old English common-law doctrines, explicitly permitted wife-beating for correctional purposes. However, certain restrictions did exist and the general trend in the young states was toward declaring wife-beating illegal. For instance, the common-law doctrine had been modified to allow the husband 'the right to whip his wife provided that he used a switch no bigger than his thumb' -- a rule of thumb, so to speak." Del Martin, *Battered Wives* Volcano Press, 1976, page 31.

Societal attitudes toward domestic violence have changed dramatically, and Tennessee laws related to it are modified almost yearly. Each revision has placed a greater burden on the law enforcement community to protect alleged victims, and the liability for failure to do so can be tremendous where an order of protection has been issued by the courts and served by the sheriff.

For law enforcement officers, domestic disputes and domestic violence are among the most difficult and dangerous situations to address. Some individuals seem to repeatedly manipulate the justice system for their own vindictive purposes, wasting valuable resources. Others petition the courts for protective orders, then fail to appear and testify, having returned to the alleged abuser. Officials may therefore become cynical and reluctant to take action.

However, in 2002, 3.1 percent of all male homicide victims and almost one-third of all female homicide victims in the United States were killed by a former or current "intimate partner." U.S. Department of Justice, Bureau of Justice Statistics, *"Homicide Trends in the U.S."* Domestic violence results in nearly 2 million injuries and 1,300 deaths nationwide each year. Centers for Disease Control and Prevention, National Center for Injury Prevention and Control; 2003. Additionally, there have been a number of cases, in Tennessee and other jurisdictions, in which domestic conflict culminated in the murder of the perpetrator's own or estranged partner's children.

## Definitions for Orders of Protection

Reference Number: CTAS-1313

For Orders of Protection, the following definitions will apply:

**Petitioner** — The victim; the plaintiff; "the person alleging domestic abuse, sexual assault or stalking in a petition for an order for protection." T.C.A. § 36-3-601(6).

**Respondent** — The defendant; the perpetrator; "the person alleged to have abused, stalked or sexually assaulted another in a petition for an order for protection." T.C.A. § 36-3-601(9).

**Petition for Order of Protection** — A standardized form filed with the court that provides relevant information about the petitioner, the respondent, their children, the domestic situation, and what events took place that led to the request for an order of protection. The petition asks that the court direct Respondent not to threaten, assault, contact, or stalk Petitioner.

**Ex Parte Order of Protection** — A temporary, emergency order issued when the court finds there is good cause to believe there is an immediate and present danger Petitioner will be victimized by Respondent. An ex parte order is issued immediately, without giving Respondent notice or an

opportunity to be heard.

**Order of Protection** — An order issued after a hearing in which the court finds there is sufficient proof that Petitioner’s allegations of domestic abuse, stalking or sexual assault are true, and that Petitioner needs to be shielded by the law from the Respondent. The order is valid for a defined period, not to exceed one year. For purposes of this chapter, such orders will be called “standard orders of protection” or “standard protective orders.”

**Sexual Assault Victim** — Any person, regardless of the relationship with the perpetrator, who has been subjected to, threatened with, or placed in fear of any form of rape, including aggravated rape (T.C.A. § 39-13-502), rape (T.C.A. § 39-13-503), aggravated sexual battery (T.C.A. § 39-13-504), sexual battery (T.C.A. § 39-13-505), sexual battery by an authority figure (T.C.A. § 39-13-527), statutory rape (T.C.A. § 39-13-506), or rape of a child (T.C.A. §§ 39-13-522, 33-3-601(9)).

**Stalking Victim** — Any person, regardless of the relationship with the perpetrator, who has been subjected to, threatened with, or placed in fear of the offense of stalking. T.C.A. §§ 36-3-601(11), 39-17-315.

## Legislative Intent

Reference Number: CTAS-1314

In 1995, our legislature took the somewhat unusual step of codifying (enacting as part of the Tennessee Code) its intent regarding application of state statutes related to domestic abuse:

The purpose of this part is to recognize the seriousness of domestic abuse as a crime and to assure that the law provides a victim of domestic abuse with enhanced protection from domestic abuse. A further purpose of this chapter is to recognize that in the past law enforcement agencies have treated domestic abuse crimes differently than crimes resulting in the same harm but occurring between strangers. Thus, the general assembly intends that the official response to domestic abuse shall stress enforcing the laws to protect the victim and prevent further harm to the victim, and the official response shall communicate the attitude that violent behavior is not excused or tolerated.

T.C.A. § 36-3-618.

## Parties Who May Petition for an Order of Protection

Reference Number: CTAS-1315

With the exceptions added in 2005 to include sexual assault and stalking victims, state law requires that the petitioner have some past or present link of a domestic or familial nature with the respondent, though it may be indirect. The statute does not include acquaintances, neighbors, business associates and others who do not fall into the specified categories, which include:

1. Adults or minors who are current or former spouses;
2. Adults or minors who live together or who have lived together;
3. Adults or minors who are dating or who have dated or who have or had a sexual relationship; as used herein “dating” and “dated” do not include fraternization between two individuals in a business or social context;
4. Adults or minors related by blood or adoption;
5. Adults or minors who are related or were formerly related by marriage; or
6. Adult or minor children of a person in a relationship described above.

T.C.A. § 36-3-601(5)(A - F).

## Venue: Where the Petition May Be Filed

Reference Number: CTAS-1316

The petition may be filed in the county where the Respondent lives; or, in which the domestic abuse, stalking, or sexual assault happened; or, if the Respondent is not a Tennessee resident, in the county where the victim lives. T.C.A. § 36-3-602(d).

# Ex Parte Protective Orders and Standard Orders of Protection

Reference Number: CTAS-1317

An ex parte order is issued by the court without giving Respondent notice or an opportunity to tell his or her side of the story. It is a temporary order. There must be a hearing within 15 days after Respondent is served with the ex parte order. Respondent must be given at least five days notice of the hearing date. T.C.A. § 36-3-605.

If, at the hearing, the court finds by a preponderance of the evidence that the victim's allegations are true, the court can extend the order for up to one year. The victim can return each year to ask that the order be extended for another year. A new hearing is required for each extension. T.C.A. §§ 36-3-605 and 36-3-608.

## Serving the Order

Reference Number: CTAS-1318

Rules for serving ex parte and standard protective orders are identical, with one exception: To effect proper service, the deputy must:

1. Personally read the order to Respondent and leave a copy with him or her, or
2. If Respondent is not a Tennessee resident, the order can be served by mail on the appropriate secretary of state, who must then promptly send a certified copy to Respondent by registered or certified return receipt mail, along with written notice that service was so made. If Respondent refuses to accept delivery of the registered or certified mail, his or her refusal is the same as delivery and constitutes service.

T.C.A. § 20-2-215.

However, if Respondent was served with a copy of the petition, notice of hearing, and any ex parte order issued, and the court rules that the ex parte order be extended to a standard order of protection, *that* order shall be served by:

1. Delivering a copy of the order of protection to Respondent or Respondent's lawyer, or
2. By the clerk mailing it to Respondent's last known address. If the address "cannot be ascertained upon diligent inquiry," the certificate of service shall so state. Service by mail is complete upon mailing.

T.C.A. § 36-3-609(d); §§ 20-2-215, 216.

Because violating a protective order is now a crime rather than merely civil contempt, it is absolutely *essential* that the deputy serving the order comply with every detail of the rules of service. It is *never* acceptable to leave the order with a third party who promises to give it to the Respondent.

## TCIC and NCIC

Reference Number: CTAS-1319

Entry into the Tennessee Crime Information System (TCIC) and Transmission of Information to the National Crime Information Center (NCIC).

Each time a court issues, modifies, or dismisses a protective order, the local law enforcement agency is to immediately enter the order, modification, or dismissal in the Tennessee Crime Information System "and take any necessary action to immediately transmit it to the National Crime Information Center." T.C.A. § 36-3-609(e).

When an order is served, the entry is updated to include the court appearance date. If, at the time of the hearing, an ex parte order is extended into a standard protective order, the updated entry will include the order's expiration date (usually one year from the date of the order), the judge's name, and any additional relevant information, such as whether the order allows "social contact."

"Social contact" is sometimes specified in the order, usually to allow Respondent to interact with Petitioner for the purpose of arranging visitation with minor children or other communication related to the welfare of the couple's children. Orders that permit "social contact" are often later modified to prohibit all contact

if the court finds Respondent is using that proviso as an excuse to further harass Petitioner.

## Scope, Duration, and Enforceability of Protective Orders

Reference Number: CTAS-1320

The order is valid and enforceable in any county in Tennessee. T.C.A. § 36-3-606(e). It may:

1. Direct Respondent not to commit domestic abuse, stalk or sexually assault Petitioner or petitioner's minor children;
2. Prohibit Respondent from calling, e-mailing, writing, or communicating with Petitioner, directly or indirectly;
3. Prohibit the Respondent from stalking the Petitioner, as defined in § 39-17-315;
4. Give Petitioner possession of the residence and evict the Respondent;
5. Require Respondent to provide suitable housing for Petitioner if respondent is the sole owner or lessee of the residence;
6. Award temporary custody of or establish temporary visitation rights with their minor children;
7. Award support to Petitioner if the parties are legally married and award child support for Respondent's children;
8. Require Respondent to get treatment or counseling for anger management or substance abuse;
9. Place the care, custody, or control of any animal residing in the household in the care, custody or control of the Petitioner or in an appropriate animal foster situation;
10. Direct the Respondent to immediately and temporarily vacate a residence shared with the petitioner, pending a hearing on the matter; or
11. Direct the Respondent to pay the Petitioner all costs, expenses and fees pertaining to the Petitioner's breach of a lease or rental agreement for residential property if the Petitioner is a party to the lease or rental agreement and if the court finds that continuing to reside in the rented or leased premises may jeopardize the life, health and safety of the Petitioner or the Petitioner's children.

T.C.A. § 36-3-606(a).

## The Duty to Arrest a Respondent Who Violates an Order of Protection

Reference Number: CTAS-1321

Law enforcement officers generally have considerable discretion about whether to make an arrest in a given situation and are usually protected from liability if the decision not to arrest results in harm to a member of the general public. However, Tennessee does *not* allow officer discretion when it comes to arresting individuals who violate protective orders. Arrest is *mandatory*.

Illustrating how inflexible state law is on the matter, the attorney general's office issued an opinion that "a law enforcement officer, having observed the commission of a felony, may choose not to arrest or charge the offending party, *except when the officer has probable cause to believe that a suspect has violated an order of protection.*" Op. Tenn. Atty. Gen. No. 01-119 (July 27, 2001).

In other words, while an officer has discretion to ignore a felony committed right before his or her eyes, that option does not exist if the misconduct violates a valid order of protection, regardless of whether it would otherwise constitute a misdemeanor, or no criminal offense at all. If Petitioner or Petitioner's property come to harm after an officer fails to arrest the violator, the county is subject to liability for damages. *Matthews v. Pickett County*, 996 S.W.2d 162 (Tenn. 1999); *Hudson v. Hudson*, 2005 WL 2253612 (W.D. Tenn. 2005).

On the other hand, if the law enforcement agency fails to notify TCIC and NCIC that an order has been dismissed or of its expiration date, and the former Respondent is wrongfully arrested, the prospect of legal liability again rears its ugly head. That is one of many reasons it is so important that such orders be correctly served and that modifications and other required information be correctly entered in the

Tennessee and National Crime Information Systems.

An arrest for violating a protective order may be made *with or without* a warrant. A law enforcement officer shall arrest Respondent without a warrant if:

1. The violation took place in the officer's jurisdiction;
2. The officer reasonably believes Respondent has violated or is violating the order; and
3. The officer verifies that an order of protection is in effect, which can be through telephone/radio communication with the appropriate law enforcement department.

T.C.A. § 36-3-611(a)(1-3).

Even if Respondent is violating an ex parte order and not a standard order of protection, the officer is required to make an arrest, *but only if* Respondent "has been served with the ex parte order or otherwise has acquired actual knowledge of the order." T.C.A. § 36-3-611(b). The term "actual knowledge" means Respondent has direct, clear knowledge of information that would lead a reasonable person to inquire further. *Black's Law Dictionary*, 7<sup>th</sup> Edition. Otherwise, an ex parte order cannot be enforced by arrest.

## Ex Parte Orders and "Actual Knowledge"

Reference Number: CTAS-1322

Although an ex parte order is effective for only a matter of days, this is often the time during which emotions run high and violence or increased harassment are most likely to erupt. At what point is Respondent deemed to have actual knowledge? If the deputy reads the order to Respondent over the phone, is it in effect? What if the deputy gives oral notice of the order's existence and requirements, but does not have a copy to give Respondent at that time? What is the deputy's duty if, when serving an ex parte order, Petitioner is on the premises, and Respondent refuses to leave?

First, let us look at the issue of "actual knowledge." If the ex parte order has been personally served, Respondent, of course, has actual knowledge. If it has not, Respondent may be deemed to have actual knowledge when he is put on notice of its existence and general requirements by a law enforcement officer.

*EXAMPLE:* Officer Bob responds to a call and arrives at the scene to find Respondent Bubba duct-taping love notes all over Petitioner Patty's front door. Patty advises Officer Bob she was granted an ex parte order of protection against Bubba, her former boyfriend, two hours earlier. Officer Bob calls his dispatcher and verifies that the judge did indeed issue an ex parte order, which has not yet been served. Officer Bob informs Bubba that the order has been issued and Bubba is to stay away from Patty until the hearing; and directs Bubba to leave the premises. Brimming with *actual knowledge*, Bubba stumbles off into the night to seek solace at his favorite bar.

Two hours later, Officer Bob is again called to Patty's house, and there's Bubba, drawing big red hearts on the vinyl siding. It is his house, and he insists on his right to decorate it. Anyway, no one has given him any piece of paper that says he can't be in his own blankety-blank yard. At this point, Officer Bob arrests Bubba and hauls him away to jail. Of course, Officer Bob could and should have arrested Bubba on the *first* call *if* he had been able to verify the protective order was personally served on Bubba earlier that day.

Some officers are concerned when they serve an ex parte order of protection and realize Petitioner is on the premises. If Respondent has previously assaulted Petitioner, vandalized Petitioner's property, or otherwise threatened or harmed Petitioner, it is foreseeable that Respondent may be at it again by the time the deputy reaches the end of the driveway. The best practice is for the deputy to ensure Respondent is away from the premises before the deputy departs the scene. If, after the order is served, Respondent becomes belligerent or threatening, or refuses to leave, the order is being violated and the duty to arrest arises.

It is a crime and contempt of court to violate an order of protection and Respondent may be found guilty of both. T.C.A. § 36-3-610. Op. Tenn. Atty. Gen. No. 05-183 (December 22, 2005).

A critical change in Tennessee law took effect July 1, 2005. Under the old law, a Respondent arrested for violating the protective order was charged with contempt, a civil offense that carries a penalty of only 10 days in jail and a \$50 fine. At the time of arrest, the magistrate set bond pending the hearing, which was to be conducted within 10 days, and Petitioner was required to appear and show cause why the contempt order should be issued. Of course, if Respondent committed a crime in the process of violating the protective order, *e.g.*, burglary, vandalism, assault, he or she could be prosecuted for that criminal act.

As of July 1, 2005, a knowing violation of a protective order became a crime in and of itself, a Class A misdemeanor carrying a sentence of up to 11 months and 29 days in jail. Furthermore, the new law directs that such a sentence is to be consecutive to any other sentences resulting from the same factual allegations, unless the judge specifically directs otherwise. T.C.A. § 36-3-612(g).

It is important to reiterate that the new criminal penalty applies only to orders of protection issued after a hearing, *not* to ex parte orders. Op. Tenn. Atty. Gen. No. 05-183 (December 22, 2005).

Once Respondent is arrested, the magistrate must consider certain factors and set conditions of release. Upon release, Respondent is given written notice of the conditions, which may include orders to stay away from Petitioner, not to possess or use alcohol, not to possess a firearm or other weapon, or other directives. T.C.A. §40-11-150(a-b). If a law enforcement officer later has probable cause to believe Respondent has violated any condition of release, the officer *shall* arrest Respondent, without a warrant, regardless of whether the officer actually witnessed Respondent committing the violation. T.C.A. §40-7-103(b).

## Domestic Violence Victim Notification

Reference Number: CTAS-1323

An order of protection is a form of civil process. Violating the order can be a civil offense, a criminal offense, or both. Op. Tenn. Atty. Gen. No. 05-183 (December 22, 2005). When releasing a defendant charged with domestic violence related offenses, including stalking, *violating an order of protection*, or any assaultive offense, the jailer is required to provide the victim with notice. The table below details the statutory requirements. T.C.A. § 40-11-150(f-h).

Protected Victim	Family or Household Member (Includes current or ex-spouse; adult or minor who lives or has lived with defendant; adult or minor related/formerly related by blood/marriage; adult/minor dating/dated in past or having/had a sexual relationship; adult/minor child of anyone described above).
Who Notifies Victim of Release	Law enforcement agency with custody of Defendant shall initiate notification whether or not victim requests it.
Time Frame for Notification	Notification is to be made at the time of Defendant's release.
Measures Required to Contact Victim	"Use all reasonable means to immediately notify the victim."
Information to be Given to Victim	Notice that Defendant is being/has been released; address and phone # of nearest shelter and counseling center.
Delay Release Until Victim Notified?	Statute prohibits delay.
Other Duties	Send/give victim copy of conditions of release. Must also provide copy of the conditions to Defendant.
Hold Required Before Bail/Release	Twelve hours from time of arrest. Judge may order release in less time if he or she determines that sufficient time has, or will have, elapsed for the victim to be protected.

## The Public Duty Doctrine

Reference Number: CTAS-1324

### Mary Matthews v. Pickett County

*Mary Matthews v. Pickett County*, 996 S.W.2d 162 (Tenn. 1999), is the most cited Tennessee case regarding liability for failure to arrest a Respondent who violates an order of protection.

The court held that an order of protection creates a special duty to protect the victim named on the order and that special duty includes protection of the victim's property. The complainant can win personal injury *and* property damages if the Petitioner shows that the deputies breached their duty to arrest the Respondent when the Respondent violated an order of protection, and that the Petitioner was harmed as a result.

The public duty doctrine gives officers immunity for injuries caused by breach of a duty owed to the general public.

**EXAMPLE:** Officer Bob pulls over drunk driver and recognizes Buddy, who is only a few blocks from home. Officer Bob lets Buddy go on his promise to go straight home, but Buddy heads for another



bar, running over Valerie Victim on the way. Officer Bob clearly breached his duty to protect the public at large, but Valerie Victim will not win her lawsuit against Officer Bob or the county *because she was not a foreseeable victim*. When Officer Bob breached his duty to protect the public by failing to arrest Buddy, he did not know this *particular* Victim was a block away and could be harmed by his failure to act.

The public duty doctrine did not protect the officers in *Matthews* because the order was not issued to protect the public at large but *solely to protect Mary Matthews*, whose calls for help indicate she relied on the court's order to keep her safe from Winningham. Her reliance created a special duty exception to the public duty doctrine, an exception that applies when a public official undertakes to protect an individual, and that person relies on the official to do so.

The special duty exception creates a special relationship between the parties, in this case the government and Ms. Matthews. The officers had a duty protect her by arresting Winningham if there was reason to believe he had violated a valid order of protection. The court held that if the breach of that duty allowed Winningham freedom to burn down Ms. Matthews' house, the deputies and the county are liable for her harm.

The Tennessee Supreme Court makes it clear by this ruling that, if the government violates its special duty to safeguard a party named by an order of protection, and the individual is harmed as a result, compensation can be awarded for personal injury *and* property damage.

## Sheriff's Fees for Service of Process

Reference Number: CTAS-1326

The sheriff is entitled to collect fees for performing various duties related to serving civil process, and they are specified in T.C.A. § 8-21-901(a)(1). Fees differ depending on factors such as the specific type of process and whether service was completed or merely attempted. It should be noted that the \$2 data processing services fee the sheriff is to collect must be "allocated by the sheriff's county for computerization, information systems and electronic records management costs of the sheriff's office." The funds are to be earmarked within the general fund and reserved for those purposes. T.C.A. § 8-21-901(a)(5)(B).

As of January 1, 2006, Tennessee's court clerks are permitted in many instances to collect costs in the form of a flat fee at the time services are requested. TCA § 8-21-401(a). Unfortunately, the legislature made no similar provisions for county sheriffs, who are not permitted to demand fees in advance, TCA § 8-21-102; § 8-21-901(a), and who, in some instances, are entitled to a fee for each *attempt* at services, as in the case of collecting money to satisfy a judgment under T.C.A. § 8-21-901(a)(2)(B)(i). Op. Tenn. Att. Gen. No. 02-113 (October 10, 2002). A rare exception to the rule is where the process to be served is coming from another county. T.C.A. § 8-8-202.

Since clerks are charged with collecting and distributing fees, and sheriff's fees cannot be calculated or collected in advance, procedures under the new law may not be as streamlined for the clerks as anticipated.

Clerks maintain records of all sums of money they receive and disburse. TCA § 18-2-101(a). In all cases, the clerk prepares the bill of fees and costs. TCA §§ 8-21-104; 18-1-105(a)(4). Costs are part of the *final judgment* in a case. TCA § 20-12-101; Tenn. R. Civ. Pro. 69; Op. Tenn. Att. Gen. Nos. 99-003 (January 19, 1999) and 02-072 (June 3, 2002).

Among other responsibilities, the clerk of a trial court is required to collect all costs incident to litigation, including sheriff's fees. Op. Tenn. Att. Gen. No. 02-072 (June 3, 2002).

Additionally, when selling real or personal property, the clerk must "collect the sheriff's fee, plus the sheriff's fee for each additional defendant in proceedings to sell real estate." TCA § 8-21-401(i)(7). For receiving and paying over all taxes, fines, forfeitures, fees and penalties, the clerk is entitled to commissions that vary between 5 percent and 10 percent. TCA § 8-21-401(h).

The court decides whether to award costs and against whom. However, if costs *are* awarded and any money is received, the sheriff's fee ranks very high on the priority list. In cases where the amount collected is not enough even to pay the whole litigation tax and costs, the state tax should be paid before payment to officers and witnesses. Op. Tenn. Att. Gen. No. 92-10 (February 19, 1992), citing *State v. Stanley*, 71 Tenn. 524, 526 (1879). And in turn, payments of costs to officers of the court take priority over witness fees and other costs. *Id.*, citing *Locke v. McFalls*, 35 Tenn. 674 (1856); Op. Tenn. Att. Gen. No. 80-286 (June 9, 1980).

Sheriffs may rightfully be concerned that since clerks can now collect their fees "up front" in many cases,

there will be little incentive to pursue collection of sheriff's fees beyond one billing. However, motivation may be found in a state law captioned "Liability for Failure to Collect or Account," which holds that court clerks, county trustees, sheriffs and other officers who fail to collect "every fee" that "the county may be entitled to, and which, by the exercise of reasonable diligence could have been collected" is "individually liable to the county for the amount that should have been collected . . ." TCA § 8-22-105.

See Service of Process under Specific Fees Authorized for additional information.

## Tennessee Code Quick Reference for Service of Civil Process

Reference Number: CTAS-1325

Laws regarding service of process are found among several volumes of the Code, and this is by no means an exhaustive list. However, it may be useful as a starting point for further research.

T.C.A. § 8-8-201	Duties of the Sheriff
T.C.A. § 8-8-202	Advance Fees for Service of Out of County Process
T.C.A. § 8-8-207	Disobedience of Process
T.C.A. § 8-8-216	Service of Process by Employee Prohibited
T.C.A. § 8-21-901	Sheriff's Fees
T.C.A. § 8-22-105	Liability for Failure to Collect or Account
T.C.A. § 25-3-105	Penalties for Failure to Return Process
T.C.A. § 26-1-402	Duties of Executing Officer to Make Sufficient Return
T.C.A. § 26-3-104	Indemnity Bond of Plaintiff Where Title of Levied Property Is in Dispute
T.C.A. § 26-3-101 et seq.	Levy of Execution
T.C.A. § 26-3-117	Costs to Be Paid by Plaintiff for Transport/Storage of Levied Property
T.C.A. § 26-5-101 et seq.	Sale on Execution (Sheriff's Sale)
T.C.A. § 26-6-101 et seq.	Foreign Judgments and Their Authentication
T.C.A. § 29-15-114	Writ of Possession for Land in Ejectment Action
T.C.A. § 29-18-101 et seq.	Forcible Entry and Detainer (Evictions)
T.C.A. § 29-30-101 et seq.	Recovery of Personal Property
T.C.A. § 36-6-219	Child Custody - Temporary Emergency Jurisdiction and Order Enforcement
T.C.A. § 36-6-227	Child Custody - Recognition and Enforcement of Foreign Decrees

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