

ID# 13121
MJ



July 30, 1991

MIKE DRISCOLL
county attorney

1001 Preston, Suite 634
Houston, Texas 77002-1891
713/221-5101
Fax # 713/225-8924

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RO-171

Hon. Dan Morales
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

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Opinion Committee

Attention: Madeleine B. Johnson
Chairman, Opinion Committee

RE: 1. MAY THE COUNTY CLERK CHARGE A FILING FEE, AT THE TIME OF FILING, FOR THE RELEASE OF JUDGMENT THAT IS TO BE PREPARED AND EXECUTED PURSUANT TO H.B. 2758?

2. SHOULD THE RELEASE OF JUDGMENT CREATED UNDER H.B. 2758 BE FILED IN THE COURT FILE AS WELL AS THE REAL PROPERTY RECORDS?

3. MAY THE COUNTY CLERK COLLECT A \$50.00 HANDLING FEE WHEN THE FUNDS TO SATISFY A JUDGMENT ARE DEPOSITED WITH THE REGISTRY OF THE COURT PURSUANT TO H.B. 2758?

Dear Sir:

The Act of May 17, 1991, H.B. 2758, 72nd Leg., R.S. (to be codified at Tex. Civ. Prac. & Rem. Code Ann. Section 31.008) authorizes a judgment debtor to pay the judgment owed to the court that rendered the judgment, in lieu of paying same to the judgment creditor, whose location is unknown to the judgment debtor. The County Clerk of Harris County has requested advice on the above-referenced questions which deal with the implementation of this new statutory provision.

Please furnish us with your opinion on the questions presented. A Memorandum Brief is enclosed. In that this statute

First Assistant: Marsha L. Floyd • Bureau Chiefs: James E. McKnight, Admin. Services, Jerry B. Schank, David R. Hurley • Division Chiefs: Dori A. Wind, Harold M. Streicher, Russell L. Drake, Mary J. McKerall, Donald W. Jackson, Rock W. A. Owens, Frank E. Sanders, Richard S. Hill

Hon. Dan Morales

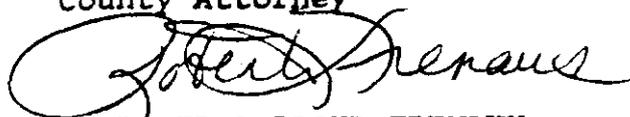
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becomes effective on September 1, 1991, we would appreciate your replying before that date.

Sincerely,

MIKE DRISCOLL
County Attorney

A handwritten signature in cursive script, appearing to read "Roberta Fremaux", written over the typed name of the signatory.

By ROBERTA LLOYD FREMAUX
Assistant County Attorney

MD:RLF
Enclosure

MEMORANDUM BRIEF

RE: 1. MAY THE COUNTY CLERK CHARGE A FILING FEE, AT THE TIME OF FILING, FOR THE RELEASE OF JUDGMENT THAT IS TO BE PREPARED AND EXECUTED PURSUANT TO H.B. 2758?

2. SHOULD THE RELEASE OF JUDGMENT CREATED UNDER H.B. 2758 BE FILED IN THE COURT FILE AS WELL AS THE REAL PROPERTY RECORDS?

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H.B. 2758, which is to be codified as Section 31.008, Tex. Civ. Prac. & Rem. Code Ann., sets forth a procedure whereby a judgment debtor, who does not know the location of his judgment creditor, may pay the entire amount of the judgment he owes into the Court Registry. In return, the judge or the clerk of the court shall execute a recordable release of judgment on behalf of the judgment creditor and issue the release to the judgment debtor. However, prior to being able to afford himself of this process of paying the judgment directly to the court, the judgment debtor must attempt to give the judgment creditor notice at his last address and only upon the judgment creditor failing to respond to said notice, may the judgment debtor proceed to pay the court the entire amount of the judgment.

Subsection (c) of H.B. 2758 provides that the court shall hold the amount paid by the judgment debtor and interest earned thereon in trust for the judgment creditor.

Subsection (d) of H.B. 2758 provides that the clerk of the court shall deposit the trust funds and any interest earned by the funds in the clerk's trust fund account and shall pay the funds and any interest earned by the funds to the judgment creditor or to the successors to the rights of the judgment creditor.

1. MAY THE COUNTY CLERK CHARGE A FILING FEE, AT THE TIME OF FILING, FOR THE RELEASE OF JUDGMENT THAT IS TO BE PREPARED AND EXECUTED PURSUANT TO H.B. 2758?

H.B. 2758 does not mention the filing of the release of judgment; rather, it merely states that the judgment debtor shall prepare the release of judgment and, upon payment by the judgment

debtor into the court registry of the entire amount owed, the judge or the clerk of the court is directed to execute said release on behalf of the judgment creditor and issue it to the judgment debtor. Thus, it would appear that the release of judgment envisioned by H.B. 2758 is a document that is part of the underlying action and is created by the judgment debtor. There does not appear to be any responsibility on the part of the county clerk with regard to the release for either its creation or its filing.

Assuming arguendo, that a copy of the release of judgment is filed in the court file [based on the fact that it memorializes an action taken by the judge (or the clerk of the court, on the judge's behalf)], Section 118.052, Tex. Loc. Gov't. Code Ann. (Vernon 1988) sets forth those fees that a county clerk shall collect for services rendered in a civil court action. A review of same does not present any fees that would appear to be applicable to the release, were it to be filed in the court file, insomuch as it is neither an original action nor an action other than an original action nor a service rendered after judgment in an original action, as delineated in Section 118.052. Further, those fees set forth in subsection (3) of Section 118.052, titled "Other Fees", do not appear to be applicable to the release either. Finally, the fees set forth in Sections 118.053, 118.056 and 191.007, Tex. Loc. Gov't. Code Ann. (Vernon 1988) do not appear to be applicable to the release of judgment created under H.B. 2758. Consequently, it appears the county clerk is not entitled to a filing fee for the release of judgment, as set forth in H.B. 2758. Further, even if a copy of the release of judgment is ultimately filed in the court file, there is no apparent authority for the county clerk to assess a fee for the inclusion of a copy of this document in the court file.

H.B. 2758 does provide that either the judge or the clerk of the court shall execute the release of judgment on behalf of the judgment creditor and issue the release to the judgment debtor. Arguably, the clerk of the court that indeed executes a release of judgment is entitled to a fee for said execution. In that such fee is neither prescribed by H.B. 2758 nor the above-mentioned sections, it would appear that the clerk of the court is authorized to charge a "reasonable fee" for this service, pursuant to Section 118.011, Tex. Loc. Gov't. Code Ann. (Vernon 1988).

**2. SHOULD THE RELEASE OF JUDGMENT CREATED
UNDER H.B. 2758 BE FILED IN THE COURT FILE AS
WELL AS THE REAL PROPERTY RECORDS?**

As stated above, a review of H.B. 2758 does not indicate any requirement that the release of judgment be filed in either the court file or the Real Property records. Further, insomuch as the release is issued directly to the judgment debtor, it would appear that it is in his discretion whether the release is filed in the

court file of the underlying case, the Real Property records of any particular county or in either place(s). There does not appear to be any responsibility on the part of the clerk of the court to make this determination nor any requirement that the clerk of the court take any affirmative action whatsoever with regard to the release of judgment. However, should a copy of the release of judgment be, in fact, filed in the court file as a memorialization of the act of execution and issuance taken by the judge (or the clerk of court), this would not automatically require the clerk of the court to file the release of judgment in the Real Property records of the county where the release was issued or any other county for that matter.

As an analogy to this situation, let us assume that the judgment creditor in the underlying case had obtained an abstract of judgment from the clerk of the particular court wherein the underlying debt was established. This abstract of judgment could be obtained from the justice of the peace court, the clerk of the county court or the clerk of the district court. If said abstract had not been filed in the Real Property records of any county, then there would be no reason to file the release of judgment in the Real Property records of any county. Conversely, since an abstract of judgment may be filed in any county of the state, if the judgment creditor had obtained an abstract of judgment for the underlying debt, it would be the responsibility of the judgment creditor to determine which counties, if any, the abstract of judgment should be filed in as well as the judgment creditor's responsibility to take the necessary steps to effectuate such filing(s). Likewise, it would be the responsibility of the judgment debtor to ascertain in which counties, if any, the release of judgment should be filed to counteract the previous filing(s) of the abstract of judgment by the judgment creditor. Certainly, it is not the responsibility of the clerk of the court issuing the abstract of judgment or the release of judgment to make such a filing decision(s) on behalf of either the judgment creditor or the judgment debtor.

**3. MAY THE COUNTY CLERK COLLECT A \$50.00
HANDLING FEE WHEN THE FUNDS TO SATISFY A
JUDGMENT ARE DEPOSITED WITH THE REGISTRY OF THE
COURT PURSUANT TO H.B. 2758?**

H.B. 2758 does not make any specific provision for the clerk of the court to receive a fee for the retention of the deposited judgment monies until such time as they are paid out to the judgment creditor or his successors. However, since H.B. 2758 does refer to the judgment monies deposited as "trust funds", it would appear that Attorney General Opinion JM-434 would be applicable to this situation.

In Attorney General Opinion JM-434, the former Attorney General responded to a request from Harris County concerning the collection

of a fee by the county clerk for the administration of trust funds under former art. 2558(a), V.T.C.S., now, Section 117.055, Tex. Loc. Gov't. Code Ann. (Vernon 1988). The Attorney General opined that the \$50.00 fee provided for the handling of County Clerk Trust Funds could not be collected until such time as the expense of handling the trust funds had been incurred. As stated in the opinion, this required that the county clerk wait until such time as the litigation involved was completed before assessing the administration fee as the clerk of court's services in administering the funds would be completed at that time and, further, the party responsible for the payment of the fee would have then been designated by the court hearing the matter.

Applying this to the factual situation created by H.B. 2758, while apparently the clerk of the court holding the deposited funds in entitled to collect a fee for the administration of the judgment funds while they are on deposit in the court registry, such fee would not be due and owing until such time as the funds are released from the registry of the court, i.e., at that time when the clerk of the court has completed the performance of the services of administering the judgment funds that underlie the imposition of such a fee.

CONCLUSION

H.B. 2758 does not appear to require the release of judgment created therein to be filed in the court file from which it arises. Should same be filed in the court file as a result of the fact that it memorializes an action taken by the judge (or the clerk of the court in his place), there is no apparent statutory authority for the county clerk to collect a fee for such a filing. Further, the question of whether the release of judgment should be filed in the court file and the Real Property records as well is a determination that is the responsibility of the judgment debtor and is not the responsibility of the county clerk. Finally, it would appear that the county clerk is entitled to a fee for the administration of the judgment monies that are placed in the registry of the court as "trust funds", but said fee is not owed to the county clerk until such time as the services that the fee is based upon have been provided by the county clerk.