

CHILD SUPPORT ENFORCEMENT AND POSSESSION

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Texas Tech University School of Law
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Texas Tech University
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PROFESSIONAL ACTIVITIES:

State Bar Of Texas
State Bar Of Texas Family Law Section
Tarrant County Bar Association
Tarrant County Family Law Bar Association
Eldon B. Mahon Inn of Court - Barrister (1999-2002, 2008-2009)
The Family Lawyer's Essential Tool Kit – coeditor - 2003 to present
Pro Bono Committee, State Bar of Texas Family Law Section 2005 to present
Co-Chairman, Pro Bono Committee, State Bar of Texas Family Law Section 2010 to present
Family Law Practice Manual Revision Committee, State Bar of Texas (2006-2009)
Family Law Council of the Family Law Section of the State Bar of Texas 2006 to present
Board of Directors, Tarrant County Family Law Bar Association (2007-2009)
Supreme Court of Texas Uniform Forms Task Force 2011 to present
Director - Texas Academy of Family Law Specialists 2011 to present
Trustee – Texas Family Law Foundation Board of Trustees 2012 to present
Adjunct Professor, Texas Christian University 2008 to present
Fellow, American Academy of Matrimonial Lawyers, 2014 to present

PROFESSIONAL AWARDS:

Recipient of the Eva Barnes Award, Tarrant County Family Law Bar Association 2012
Listed as a Texas Super Lawyer by *Texas Monthly Magazine* 2004 to present
Listed in *Fort Worth, Texas Magazine* as a Top Family Law Attorney 2004 to present

PUBLICATIONS

“Mediation: When is it Really Over?” (with Gary L. Nickelson) 2002 Advanced Family Law Course

“Characterization and Tracing on a Budget” (with Gary L. Nickelson)
2003 Marriage Dissolution Institute

“Family Law for Fun and Profit” (with Gary L. Nickelson) 2003 Advanced Family Law Course

“Dealing with the Not So Right Client” 2004 Marriage Dissolution Institute

“The ABCs of Trying the Simple or Complex” Case (with Gary L. Nickelson)
2005 Marriage Dissolution Institute

“Evidence” 2005 Marriage Dissolution Institute

“Using Outside Resources” (with Gary L. Nickelson) 2005 Advanced Family Law Drafting

“If You Can’t Get It Before the Factfinder, You Can’t Win - Effective and Practical Application
of the Rules of Evidence” 2006 Advance Family Law Course

“Summary Judgments” 2007 Marriage Dissolution Institute

“Possession Orders, Including Special Circumstances” (with G. Thomas Vick, Jr.)
2007 Advance Family Law Course

“Evidence & Discovery” 2008 Marriage Dissolution Institute

“Show Me the Money” Advanced Collection Methods 2008 Advance Family Law Course

“Courtroom Objections: Proper Methods of Objecting and Otherwise Protecting Your Client in
the Courtroom” (with Kimberly M. Naylor) 2009 Advance Family Law Course

“Creative Possession Schedules” (with Kimberly M. Naylor)
2010 Advance Family Law Drafting Course

“Venue, Standing and Jurisdiction” 2011 Marriage Dissolution 101

“Evidentiary Silver Bullets” State Bar College 13th Annual Summer School, 2011

“Case Law Update - SAPCR” (with Jack W. Marr) 2011 Advance Family Law Course

“Drafting Motions and Orders in Family Law Cases” 2011 Advanced Family Law Drafting
Course

“Characterization and Tracing” 2012 Marriage Dissolution 101

“Child Support Enforcement” 2012 Advanced Family Law Course

“Cross Examination of Experts” 2013 Sex, Drugs & Surveillance

“Common Law, Informal, and Putative Marriages” 2013 Marriage Dissolution Institute

“Child Support Enforcement” State Bar College 15th Annual Summer School, 2013

“Compelling Discovery” 2013 Advanced Family Law Course

“Evidence” 2014 Marriage Dissolution Institute

“Enforcement: Possession, Access, Child Support and Property Division” State Bar College 16th Annual Summer School 2014

SPEAKER AND LECTURER

Speaker at Family Law Essentials Seminar, presented by the Family Law Section
September 2003, Lubbock, TX

Speaker at 2003 Family Law Seminar, presented by the Family Law Section
October 2003, Wichita Falls, TX

Speaker at 2004 Marriage Dissolution Institute, April 2004, Fort Worth, TX

Speaker at 2004 Annual Meeting, June 2004, San Antonio, TX

Speaker at 2004 Family Law Boot Camp, presented by the Family Law Section
August 2004, San Antonio, TX

Speaker at LAU Seminar, presented by the Legal Assistants Division
September 2004, Fort Worth, TX

Speaker at Family Law Essentials for \$2000 or Free, presented by the Pro Bono Committee of
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Speaker at 2005 Marriage Dissolution Institute, April 2005, Galveston, TX

Speaker at 2005 Annual Meeting, June 2005, Dallas, TX

Course Director, Family Law Basic Training, by the Family Law Section, August 2005, Dallas,
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Speaker at 2005 Family Law Seminar, presented by the Family Law Section
September 2005, Eagle Pass, TX

Speaker at 2006 Advanced Family Law Course, August 2006, San Antonio, TX

Course Director, Family Law Essentials for \$2000 or Free, presented by the Pro Bono
Committee of the Family Law Section, April 2007, Mineral Wells, TX

Speaker at 2007 Marriage Dissolution Institute, May 2007, El Paso, TX

Speaker, Family Law Essentials for \$2000 or Free, presented by the Pro Bono Committee of
the Family Law Section, October 2007, Laredo, TX

Course Director, Family Law Essentials for \$2000 or Free, presented by the Pro Bono
Committee of the Family Law Section, April 2008, Wichita Falls, TX

Speaker at 2008 Advanced Family Law Course, August 2008, San Antonio, TX

Moderator of a panel at 2009 Marriage Dissolution Institute, April 2009, Fort Worth, TX
"Psychology of a Possession Order"

Moderator of a panel at the 9th Annual Family Law On The Front Lines, June 2009, San Antonio, TX, "When You Play, You May Pay! Paternity Fraud – The Newest Form of Birth Control"

Speaker, 2009 Advanced Family Law Course, August 2009, Dallas, TX

Course Director, Pro Bono Family Law Seminar, presented by the Family Law Section
October 2009, Eagle Pass, TX

Speaker, Parent-Child Relationships: Critical Thinking for Critical Issues, January, 2010,
Austin, TX

Course Director and Speaker, Pro Bono Family Law Seminar, presented by the Family Law
Section, September 2010, Sherman, TX

Course Director, 2010 Advanced Family Law Course, August 2010, San Antonio, TX

Speaker, 2010 Advanced Family Law Drafting Course, December 2010, Houston, TX

Speaker, 2011 Marriage Dissolution 101 Course, April 2011, Austin, TX

Speaker, State Bar College 13th Annual Summer School, July 2011, Galveston, TX

Speaker, 2011 Advanced Family Law Course, August 2011, San Antonio, TX

Speaker, 2011 Advanced Family Law Drafting Course, December 2011, Dallas, TX

Speaker, 2012 Marriage Dissolution 101, April 2012, Dallas, TX

Speaker, 2012 Advanced Family Law Course, August 2012, Houston, TX

Speaker, 2013 Sex, Drugs & Surveillance, January 2013, Houston, TX

Speaker, 2013 Marriage Dissolution Institute, April 2013, Galveston, TX

Course Director, Family Law Essentials Pro-Bono Seminar, presented by the Pro Bono
Committee of the Family Law Section, May 2013, Wichita Falls, TX

Speaker, State Bar College 15th Annual Summer School, July 2013, Galveston, TX

Speaker, 2013 Advanced Family Law Course, August 2013, San Antonio, TX

Speaker, 2014 Marriage Dissolution Institute, April 2014, Austin, TX

Speaker, State Bar College 16th Annual Summer School, July 2014, Galveston, TX

Speaker, 2014 Advanced Family Law Course, August 2014, San Antonio, TX

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CHILD SUPPORT ENFORCEMENT AND POSSESSION

I. INTRODUCTION

Traditionally, each type of enforcement warrants its own 30 minute presentation. Unfortunately, we do not have that luxury today so I have attempted to break these into individual sections within the paper. I hope you will find them helpful in your attempts to enforce divorce decrees and temporary orders.

II. CHILD SUPPORT POSSESSION AND ACCESS

All of us routinely receive phone calls from former clients and prospective clients wanting assistance in collecting child support or to enforce their court ordered visitation. While the basic concepts of child support collection and enforcement have remained constant, the law is occasionally revised and/or interpreted. Fortunately, we have several good resources that help us choose the correct remedy and help us properly request that proper remedy.

The purpose of this paper is to give a general overview of the relevant and most commonly used methods for collecting and enforcing child support and enforcing possession and access. However, I have also included some of the more obscure and seldom used collection methods that may be helpful in your practice. When meeting with your client, you should always explain to them all of their options as well as the possible consequences of each and every option. Often times, throwing the obligor in jail is actually **not** the ideal solution to your clients' problem.

III. CONTEMPT

The Texas Family Code provides a number of ways to enforce an Order for child support and possession and access. However, Texas Family Code §157.001 "Motion for Enforcement" is where every attorney should begin their enforcement case. That section provides in relevant part:

- (a) A motion for enforcement as provided in this chapter may be filed to enforce a final order for conservatorship, child support, possession of or access to a child, or other provisions of a final order.
- (c) The court may enforce a final order for child support as provided in this chapter or Chapter 158.

Before we move on, it is important for us to understand the two types of contemptuous conduct that exist, as

well as the two types of contemptuous punishments that a court can impose.

A. Direct Contempt

Direct contempt is conduct that occurs in the immediate presence of the Court. *Ex parte Gordon*, 584 S.W.2d 686, 688, (Tex. 1979) This would ordinarily entail refusing to follow an order issued from the bench, being disruptive, or unruly in the court room, or other conduct in direct view of the Judge that affronts him/her. The distinction between direct contempt and constructive contempt has important ramifications aside from the location where the act of contempt took place. The Supreme Court has stated

"This distinction has more significance than merely identifying the physical location of the contemptuous act, since more procedural safeguards have been afforded to constructive contemnors than to direct contemnors."

Ex parte Werblud, 536 S.W.2d 542, 546 (Tex.1976)

B. Constructive Contempt

Constructive contempt is contemptuous conduct outside the presence of the Court, such as the failure or refusal to comply with a valid court order. *Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979). This type of contempt is what Family Law practitioners traditionally encounter. Constructive contempt has been used to enforce child support obligations, medical expenses, possession and access, attorney's fees, and injunctions in a decree.

"Texas Courts have consistently held that alleged constructive contemnors are entitled to procedural due process protections before they may be held in contempt."

Ex parte Johnson, 654 S.W.2d 415, 420 (Tex. 1983).

C. Civil Contempt

Civil contempt is a remedy the Court can impose to obtain compliance with its prior Order. For example, in *In re Zandi*, 270 S.W.3d 76 (Tex. 2008), the trial court ordered the Respondent jailed until he remitted \$90,447.14 in child support arrearages, plus interest. This type of coercive order is frequently used in child support arrearage cases. A civil contempt order is often said to be one where the contemnor holds the keys to the jail. If the Court does impose incarceration for civil contempt, the Court must do so with specificity. Texas Family Code §157.166(c) provides, in relevant part:

If the enforcement order imposes incarceration for civil contempt, the order must state the specific conditions on which the respondent may be released from confinement.

D. Criminal Contempt

In contrast to civil contempt, which is coercive in nature, criminal contempt is punitive in nature. Simply put, "...criminal contempt is punishment for violating a prior order." *In re Scariati*, 988 S.W.2d 270, 272. (Tex.App.-Amarillo 1998, orig. proceeding). Criminal contempt is exemplified by a period of incarceration for a set amount of time which is unaffected by the party's performance of some future act. *Id.* If a Court imposes criminal contempt, it must also make specific findings. Texas Family Code §157.166(b) provides in relevant part:

If the order imposes incarceration or a fine for criminal contempt, an enforcement order must contain findings identifying, setting out, or incorporating by reference the provisions of the order for which enforcement was requested and the date of each occasion when the respondent's failure to comply with the order was found to constitute criminal contempt.

Texas courts have held that §157.166(b) is satisfied by:

- "1) copying the provisions for which enforcement was sought into the order;
- 2) attaching a copy of the order for which enforcement was sought as an exhibit and incorporating it by reference; or
- 3) giving the volume and page numbers in the minutes of the court where one can find the order for which enforcement was sought."

Ex parte Tanner, 904 S.W.2d 202, 205 (Tex. App. – Houston [14th Dist.] 1995, orig. proceeding.)

E. Contempt is NOT Required For Other Remedies

While other remedies besides contempt are discussed in later sections of this paper, it is important to understand that a finding of contempt is not necessary for the court to impose other enforcement remedies. Section 157.162 of the Texas Family Code addresses this issue:

- (a) The Movant is not required to prove that the underlying order is enforceable by contempt

to obtain other appropriate enforcement remedies.

- (b) A finding that the respondent is not in contempt does not preclude the court from awarding the petitioner court costs and reasonable attorney's fees or ordering any other enforcement remedy, including rendering a money judgment, posting a bond or other security, or withholding income.

Accordingly, while incarceration may be your ultimate goal, your case does not depend solely on your obtaining a finding of contempt.

IV. TIME LIMITS

A. Child Support

The legislature has provided two different statutes of limitations depending on the relief the obligee requests. One is for contempt and one is for a cumulative money judgment. The pertinent sections read as follows:

- (a) the court retains jurisdiction to render a contempt order for failure to comply with the child support order if the motion for enforcement is filed not later than the second anniversary of the date:

- (1) the child becomes an adult; or
- (2) on which the child support obligation terminates under the order or by operation of law.

- (b) The court retains jurisdiction to confirm the total amount of child support arrearages and render a cumulative money judgment for past-due child support, as provided by Section 157.263, if a motion for enforcement requesting a cumulative money judgment is filed not later than the 10th anniversary after the date:

- (1) the child becomes an adult; or
- (2) on which the child support obligation terminates under the child support order or by operation of law.

Tex. Fam. Code §157.005.

Before the 2005 revisions to this section, there was no time limit on confirming child support arrearages. This could easily lead to an abuse of the process. The time limit on confirmation of arrearages was originally ten years. The legislature then

abolished the time limit and again reversed that decision in 2005. The public policy behind the 2005 amendment that reinstated the ten-year time limit was to provide enough time to locate elusive, non-paying obligors while, at the same time, giving finality to a child support order that had not previously been sought to be enforced.

Please note: Only the motion to enforce the child support order must be filed within the ten-year period. There is *no requirement* that the enforcement order be rendered within that time frame.

There is no time limit for requesting a child support lien, levy, or writ of income withholding to enforce child support arrearages. The Texas Supreme Court made it clear that an administrative writ of withholding is an acceptable way to secure payment for a prior court-ordered child support liability.

The 1974 *divorce judgment* established Kenneth’s obligation to pay, and Shirley’s right to receive, \$160 per month in child support. The only issue that remained unresolved after 1974 was securing Kenneth’s compliance with the court’s order.

...

In this case, the administrative writ is a remedy for Kenneth’s repeated and continuing violation of the 1974 divorce decree that ordered him to pay specific amounts for his children’s support.

...

An administrative writ of withholding for delinquent child support does not seek to impose a legal liability on the obligor to support his children. Instead, it is one of several methods that the Family Code provides as a remedy to secure performance of a previously adjudicated liability.

In the Interest of A.D., 73 S.W.3d 244 (Tex. 2002).

B. Possession and Access

For possession and access the statute of limitations is a little more straightforward:

The court retains jurisdiction to render a contempt order for failure to comply with the order of possession and access if the motion for enforcement is filed not later than the sixth month after the date:

- (1) the child becomes an adult; or
- (2) on which the right of possession and access terminates under the order or by operation of law.

Tex. Fam. Code §157.004.

V. IS THE ORDER ENFORCEABLE?

The order you hope to enforce is the starting point of ANY motion to enforce child support or possession and access. While Texas Family Code §157.001 refers to enforcing a final order, it also applies to temporary orders. Texas Family Code §105.001(f) states that violations of temporary orders are enforceable under Chapter 157. Accordingly, take your time in drafting those temporary orders as well as your final order! A sloppy drafting job may cost your client the relief they thought they had.

A. Read the Original Order

To draft a successful motion for enforcement, you must carefully read the original order you are seeking to enforce. The original order must be specific in the obligations required of the person subject to the order. The person subject to the order must have notice of what he, or she, is supposed to do in the original order. *Slavin v. Slavin*, 412 S.W.2d 43 (Tex. 1967). *Slavin* is probably one of the most prolifically-cited and well-known cases regarding contempt motions. The *Slavin* case requires the what, when and where to be stated in the original order. The original order must specifically state **what** the person is to do, **when** he, or she, was supposed to do it, and **where** he, or she, was supposed to do it. Without telling the alleged contemtor what to pay, where to pay it, and when to pay it, he, or she, will have an argument to present to the court that they did not know, for instance, where the child support was to be paid, to whom the child support was to be paid, how much child support was to be paid, what day of each month the child support was to be paid, or when the support was supposed to end.

The same specificity requirements apply to an order for possession and access. The alleged contemtor must know exactly when the child is to be turned over, to whom the child is to be turned over and where the child is to be turned over.

Therefore, before you begin drafting your motion for contempt you must determine if the order is enforceable by contempt.

B. Plead with Specificity

A motion for enforcement must identify, with the requisite degree of specificity, the offenses of the alleged contemtor. If you are not specific, the obligor will have a valid defense to the motion. Therefore, if

the motion is not specific enough, the obligee may lose their remedy of contempt and only receive any other relief requested. Also, if a motion for enforcement is not correct, it will not support a subsequent commitment order. The requirements of the contents of the motion must be complied with or it is void. *Ex parte Barlow*, 899 S.W.2d 791 (Tex. Civ. App.—Houston [14th Dist.] 1995, no writ.). Furthermore, since a contempt action is quasi-criminal in nature, double jeopardy will attach as soon as the first witness is called. After that, if the Respondent brings the defect in the motion to the court’s attention, it will be too late to correct the defect.

Section 157.002 of the Texas Family Code sets out four basic requirements for a motion for enforcement:

- 1) **Identify** the violation:
Specifically set out the provision(s) allegedly violated. This means the what, when and where of the order to be enforced. You should identify the title and date of the order and use the **exact** language in the order.
- 2) **Specify** the violation:
Tell the court exactly what the obligor did or did not do that resulted in the violation. (The what, when and/or where he, or she, did not do).
- 3) **Request** relief:
Tell the court specifically what you want the court to do.
- 4) **Sign** the motion:

Most motions for enforcement list several violations. To complain about the non-payment of child support, it is not adequate to state that the child support was owed, where it was owed and to whom it was owed and that it was not paid. Instead, the motion must state, with specificity, each date the child support was due, how much child support was due, that it was not paid or not paid timely, how much was paid, if any, and when it was paid. Furthermore, a child support record from the child support agency should be attached in certified form to the motion so that the record is admissible as evidence of the payments made. Tex. Fam. Code §157.162.

However, keep in mind that filing a general motion and attaching a payment record from the registry is not sufficient for contempt, and arguably, not enough for a money judgment on arrears. The respondent could argue that the pleadings failed to put the obligor on notice of what relief the obligee is requesting. Simply stating “the respondent has failed to pay as ordered” and attaching the payment history to the motion as “proof” of such claim, will not be specific enough for contempt. Very few payment

histories have a running total of the amount owed, interest calculations, and all of the relevant dates.

An example of one count of failing to pay child support in a motion for enforcement may read as follows:

“On February 14, 2009, in Cause No. 1234, styled “In the Matter of the Marriage of John Doe and Jane Doe and In the Interest of Johnny Doe, A Minor Child” in the 325th Judicial District Court of Tarrant County, Texas, this honorable Court signed an order that states, in relevant part, as follows:

“IT IS ORDERED that JOHN DOE is obligated to pay and shall pay to JANE DOE child support of \$1200.00 per month, with the first payment being due and payable on March 1, 2009, and a like payment being due and payable on the first day of each month thereafter until the first month following the date of the earliest occurrence of one of the events specified below:

- 1) the child reaches the age of eighteen years or graduates from high school, whichever occurs later;
- 2) the child marries;
- 3) the child dies; or
- 4) the child’s disabilities are otherwise removed for general purposes.”

Next, you must set forth how the respondent violated the order. An example is as follows:

“Respondent has violated the order described above as follows:

“JOHN DOE, Respondent, is in contempt of court for failing to pay to Movant the full amount of child support due on each of the payment dates shown below:

Payment Due Date	Amount Due	Amount Paid	Date Paid	Accumulated Arrearages
4/1/2015	\$1,200	\$600	4/15/12	\$600
5/1/2015	\$1,200	\$00	N/A	\$1,800
6/1/2015	\$1,200	\$800	6/23/12	\$2,200
7/1/2015	\$1,200	\$300	7/4/12	\$3,100
TOTAL	\$4,800	\$1,700		\$3,100

In *In re Luebe*, 404 S.W. 3d 589 (Tex. App.—Houston [1st Dist.] 2010), the court stated that the motion for contempt gave sufficient notice to the obligor because the previous enforcement orders and a financial activity report provided by the Attorney General's Child Support Enforcement Division were attached to the motion. Collectively, these two documents met the requirements set forth in Texas Family Code §157.002. In a motion for enforcement of possession and access the requirements are similar. You should again specifically set out the provisions allegedly violated and you should identify the title and date of the order and again use the **exact** language of the order you are seeking to enforce. Then you must tell the court exactly what the alleged violator did or did not do that violates the order.

WARNING:

Many attorneys make the mistake of quoting only that portion of the possession schedule that states when Movant had the right to possess the child. In other words, they only quote the provision for first, third, and fifth Friday of each month.

Except as otherwise expressly provided in this Standard Possession Order, when MINNIE MOUSE resides 100 miles or less from the primary residence of the child, MINNIE MOUSE shall have the right to possession of the child as follows:

- Weekends—
On weekends that occur during the regular school term, beginning at the time the child's school is regularly dismissed on the first, third, and fifth Friday of each month and ending at the time the child's school resumes after the weekend.
On weekends that do not occur during the regular school term, beginning at 6:00 P.M. on the first, third, and fifth Friday of each month and ending at 6:00 P.M. on the following Sunday.

However, you will need more! This language only tells the court that the Movant had the right to possession; it does not tell the court that the Respondent was obligated to surrender the child. You must also include the provisions for surrendering the child.

Surrender of Child by MICKEY MOUSE—

MICKEY MOUSE is ORDERED to surrender the child to MINNIE MOUSE at the beginning of each period of MINNIE MOUSE'S possession at the residence of MICKEY MOUSE.

If a period of possession by MINNIE MOUSE begins at the time the child's school is regularly dismissed, MICKEY MOUSE is ORDERED to surrender the child to MINNIE MOUSE at the beginning of each such period of possession at the school in which the child is enrolled.

If the child is not in school, MINNIE MOUSE shall pick up the child at the residence of MICKEY MOUSE at 6:00 p.m., and MICKEY MOUSE is ORDERED to surrender the child to MINNIE MOUSE at the residence of MICKEY MOUSE at 6:00 p.m. under these circumstances.

Furthermore, when you identify the dates and times that the Respondent violated the order, go ahead and tell the court that it was the first, third, or fifth weekend of the month.

Violation 1. On Friday, June 20, 2015, the third Friday of the month, MICKEY MOUSE failed to surrender the minor child to MINNIE MOUSE at his residence at 6:00 p.m.

C. Venue and Jurisdiction

Venue in a motion for enforcement is controlled by Texas Family Code §157.001(d) which provides in relevant part as follows:

A motion for enforcement shall be filed in the court of continuing, exclusive jurisdiction.

This statute works in harmony with §155.002, which is the general statute for retaining continuing, exclusive jurisdiction. It provides as follows:

Except as otherwise provided by this subchapter, a court with continuing, exclusive jurisdiction retains jurisdiction of the parties and matters provided by this title.

Accordingly, a Texas court that rendered a decree of divorce or other final SAPCR order will be the appropriate court in which to file your motion for enforcement. However, jurisdiction can be lost if the child obtains a new home state. See Texas Family Code §155.003 – Exercise of Continuing, Exclusive Jurisdiction: and §155.004 – Loss of Continuing, Exclusive Jurisdiction.

D. Joinder of Claims and Remedies

Whether seeking contempt or not, a motion for enforcement does not need to be a “stand alone” law suit. It is permissible to file a motion for modification of a prior suit affecting the parent-child relationship order and join that with your motion for enforcement. This is expressly permitted by Texas Family Code §157.003 which provides as follows:

- (a) A party requesting enforcement may join in the same proceeding any claim and remedy provided for in this chapter, other provisions of this title, or other rules of law.
- (b) A motion for enforcement does not constitute an election of remedies that limits or precludes:
 - (1) the use of any other civil or criminal proceeding to enforce a final order; or
 - (2) a suit for damages under Chapter 42.

E. Notice of and Setting the Hearing

The Texas Family Code has set out specific statutes for both the setting of a hearing on motion for enforcement as well as how the notice is to be provided. The provisions for setting a hearing are governed by §157.061 of the Texas Family Code. It provides, in relevant part:

- (a) On filing a motion for enforcement requesting contempt, the court shall set the date, time, and place of the hearing and order the respondent to personally appear and respond to the motion.
- (b) If the motion for enforcement does not request contempt, the court shall set the motion for hearing on the request of a party.
- (c) The court shall give preference to a motion for enforcement of child support in setting a hearing date and may not delay the hearing because of a suit for modification of the order requested to be enforced has been or may be filed.

In reviewing the statute, two aspects become readily apparent:

- 1) If contempt *is* requested, the court shall order the respondent to personally appear.
- 2) If contempt *is not* requested and simply enforcement is sought, the court does not

need to personally order the respondent to appear.

In terms of setting a motion for enforcement, subsection (c) instructs the court to give preference to a motion enforcing child support.

The requirements for the notice of hearing for a motion for enforcement is governed by Texas Family Code §157.062. In relevant part, this section provides as follows:

- (a) The notice of hearing must include the date, time, and place of the hearing.
- (b) The notice of hearing need not repeat the allegations contained in the motion for enforcement.
- (c) Notice of hearing on a motion for enforcement of an existing order providing for child support or possession of or access to a child shall be given to the respondent by personal service of a copy of the motion and notice not later than the 10th day before the date of the hearing.
- (d) If a motion for enforcement is joined with another claim:
 - (1) the hearing may not be held before 10 a.m. on the first Monday after the 20th day after the date of service; and
 - (2) the provisions of the Texas Rules of Civil Procedure applicable to the filing of an original lawsuit apply.

The length of time a respondent is entitled to receive depends squarely upon what relief is actually sought. If the motion is seeking to enforce a possession and access order or child support, the respondent is entitled to at least 10 days notice before any hearing is held. If a motion for enforcement is joined with other claims, such as a motion to modify, a hearing may not be held until the first Monday after the 20th day of service. The statute also makes clear that if a motion for enforcement is joined with another claim under subsection (2) of §157.062, the Texas Rules of Civil Procedure also apply. This appears to create a potential conflict between when the relief sought in the motion for enforcement can be heard and when the relief sought with any other claim can be heard. Because the Texas Rules of Civil Procedure clearly apply to any lawsuit, the responding party would be entitled to not less than 45 days notice of the trial.

Texas Rule of Civil Procedure 245 – Assignment of Cases for Trial provides in part as follows:

The Court may set contested cases on written request of any party, or on the court’s own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties.

This rule has been held to constitute a constitutional right. In *Custom-Crete, Inc. v. K-Bar Servs.*, 82 S.W.3d 655, 659 (Tex. App. – San Antonio 2002, no pet) the court held:

“A trial court’s failure to comply with Rule 245 in a contested case deprives a party of its constitutional right to be present at the hearing, to voice its objections in an appropriate manner, and results in a violation of fundamental due process. Failure to give the required notice constitutes lack of due process and is grounds for reversal.”

Accordingly, reading Texas Family Code §157.062 in conjunction with Texas Rule of Civil Procedure 245 would appear to prevent any claims not related to the enforcement motion to be heard in a manner other than that which a normal case would proceed.

F. Have Your Orders Ready

It is important to understand the difference between a contempt order and a commitment order. Following a finding of contempt and incarceration, both orders are required and should be ready to submit to the Court. The Supreme Court in *Ex parte Hernandez*, 827 S.W.2d 858, (Tex. 1992), explained the difference and held as follows:

We conclude that the judgment of contempt against Hernandez cannot serve as an order of commitment because it contains no directive to the sheriff or appropriate officer, and that without an order of commitment Hernandez is not validly confined. We therefore order Hernandez discharged. It is well established that both a written judgment of contempt and a written order of commitment are required by due process to imprison a person for civil constructive contempt. A commitment order is the warrant, process or order by which a court

directs a ministerial officer to take custody of a person. The order containing this directive need not take a particular form and may be a separate order issued by the court, an attachment or order issued by the clerk at the court’s direction, or included in the contempt judgment. *Id.* At 858.

Thus, since both orders must be prepared, it would be highly beneficial to have them prepared prior to the hearing in order for the judge to sign at the conclusion of your hearing. The failure to have this done ahead of time can be fatal to the validity of your orders. In *In re White*, 2006 WL 1000228 (Tex. App. – Dallas), the failure to timely present an order resulted in the court granting a writ of habeas corpus. In *White*, an all day contempt hearing for violations of the decree of divorce was held on a Friday, following which Ms. White was remanded to the custody of the Dallas County Sheriff. A written commitment order was not presented to the court until the following Monday. This three day delay was **fatal** to the validity of the contempt order. The Dallas Court held:

Accordingly, we hold both the Friday, March 10, 2006 oral order and the Monday, March 13, 2006 written order to be void for lack of due process.

Texas Family Code §157.166 addresses what is required to be contained in any enforcement order. This section provides as follows:

- (a) An enforcement order must include:
 - (1) in ordinary and concise language the provisions of the order for which enforcement was requested;
 - (2) the acts or omissions that are the subject of the order;
 - (3) the manner of the respondent’s noncompliance; and
 - (4) the relief granted by the court.
- (b) If the order imposes incarceration or a fine for criminal contempt, an enforcement order must contain findings identifying, setting out, or incorporating by reference the provisions of the order for which enforcement was requested and the date of each occasion when the respondent’s failure to comply with the order was found to constitute criminal contempt.

- (c) If the enforcement order imposes incarceration for civil contempt, the order must state the specific conditions on which the respondent may be released from confinement.

In terms of some of the additional requirements of subsection (b) and (c) of §157.166, please refer to the civil contempt and criminal contempt section addressed previously in this paper. The Court in *In the Interest of M.K.R., a minor child*, 216 S.W.3d 58 (Tex. App. – Fort Worth, 2007) addressed the reasoning for the specificity required in an enforcement order and wrote:

The purpose of the specificity requirements is to notify the offender of how he has violated the provision of the relevant order and how he can purge himself of contempt, to notify the sheriff so that he can carry out enforcement, and to provide sufficient information for an adequate review.

Id. At 65.

Additionally, it is important to note that if the conditions imposed by an order for civil (coercive) contempt are incapable of being performed, the order is not going to be upheld. The Supreme Court in *Ex parte Dustman*, 538 S.W.2d 409, (Tex. 1976) concisely wrote:

“An order of contempt imposing a coercive restraint is void if the condition for purging the contempt is impossible of performance.”

Id. at 409.

G. Attorney General – Necessary Party

Before filing the motion for enforcement, make sure you take the time to review the court’s file to determine if the Attorney General is involved in the case. Even if you do not find an intervention by the Office of the Attorney General, you must still notify them of the proceeding and serve them with a copy of the motion. This is especially important now that the law requires the Attorney General to review all child support cases and orders in the State of Texas.

H. Clarification of Prior Order

As discussed earlier, the order you are trying to enforce must be specific. If, however, your order is not specific, your motion for enforcement may provide an opportunity to rectify that problem. The court has the authority to clarify any of its orders so long as the court does not change the substance of the order. Tex. Fam. Code §§157.421, 157.423, *McGehee v. Epley*, 661

S.W.2d 924 (Tex. 1983). Every motion for enforcement, whether or not it requests contempt, should request clarification of any part of that order the Court finds not specific enough to be enforced by contempt.

If a portion of the prior order is clarified, the court shall provide a reasonable time for compliance of the clarified order before enforcing it by contempt or any other manner. Tex. Fam. Code §9.008.

I. Attorney’s Fees

If the court finds that the respondent has failed to make child support payments, the court **shall** order the respondent to pay the movant’s reasonable attorney’s fees and all court costs in addition to the arrearages. (Emphasis added)

Tex. Fam. Code §157.167(a).

Furthermore, if the attorney’s fees were specifically awarded in conjunction with a child support enforcement action, then the award of attorney’s fees and court costs may be enforced by contempt. Tex. Fam. Code §157.167(a).

If the court finds that the respondent has failed to make child support payments, the court **shall** order the respondent to pay the movant’s reasonable attorney’s fees and all court costs in addition to the arrearages. Fees and costs ordered under this subsection may be enforced by any means available for the enforcement of child support, including contempt. (Emphasis added)

Tex. Fam. Code §157.167(a).

Lastly, if the court finds that the enforcement of the order (for possession and access) was necessary to ensure the child’s physical or emotional health or welfare, the fees and costs ordered under this subsection may be enforced by any means available for the enforcement of child support, including contempt, but not including income withholding. Tex. Fam. Code §157.167(b).

If the court finds that the respondent has failed to comply with the terms of an order providing for the possession of or access to a child, the court **shall** order the respondent to pay the movant’s reasonable attorney’s fees and all court costs in addition to any other remedy. (Emphasis added)

Tex. Fam. Code §157.167(b).

VI. REMEDIES

Most motions for enforcement include a request to hold the respondent in contempt for the alleged violations of the court's order. Contempt actions under the Texas Family Code can be either in the form of civil contempt, criminal contempt, or both. Each has its own purposes and goals, and often both are requested in motions for enforcement.

A. Criminal Contempt

As discussed briefly above, the main goal of a criminal contempt is to punish the contemtor for violating the terms of the prior order pertaining to child support.

If the court grants the relief of criminal contempt, the contempt order should specify the determinate sentence (e.g., "Respondent is sentenced to 180 days in the Tarrant County Jail for violating this Court's prior order dated February 14, 2009, by failing to pay child support on April 1, 2015."). The order should also identify the dates of noncompliance, how many violations occurred, and whether the sentences run concurrently or consecutively. *In Re Burcie*, No. 2-08-221-CV, 2008 Tex. App. LEXIS 5859 (Tex. App.—Fort Worth 2008, orig. proceeding.) (mem. op.). In *Burcie*, the motion had an exhibit attached that listed all the dates child support was due, payments made, and the payments missed. When the court found the obligor to be in contempt and subsequently ordered to jail, a copy of the exhibit was attached to the order as a detail of the violations. The court of appeals granted the writ of habeas corpus because an order for contempt must specify how the obligor disobeyed the court's order. In this case, the exhibit showed both the months the obligor did not pay along with the months the obligor paid in full. *Id.* In the contempt order, you should just pick a few dates that the obligor did not pay to use as the basis of the punishment.

In most cases, the court orders less than six months incarceration for contempt. However, if the movant requests more than 180 days in jail and/or more than a \$500.00 fine, this rises to the level of a "serious sentence" in which the respondent can request a jury trial. *Ex Parte Sproull*, 815 S.W.2d 250 (Tex. 1991); *In Re Baker*, 99 S.W.3d 230 (Tex. App. Eastland—2003, no pet.) In most motions for enforcement, the movant requests the respondent to be held in contempt and jailed for a period of six months for each separate violation. If this is the case, be certain to state whether the movant wants the sentences to run concurrently or consecutively. If the time is to run concurrently, and the period of time requested for incarceration is less than six months, the respondent may not receive a jury trial. However, if the time is to run consecutively, or if the motion is silent on this point, the respondent could request and receive a jury

trial. If you want to avoid allowing the respondent the option of a jury trial, **always** request the jail time to run concurrently.

B. Civil Contempt

Instead of, or in addition to, criminal contempt, the court can also hold the respondent in civil contempt. The purpose of a civil contempt is remedial in nature. The main difference between civil and criminal contempt is that, in civil contempt, a respondent can purge him/herself of the contempt. This usually involves the payment of all, or a specified amount, of child support. If the court orders civil contempt, the acts required to purge the contempt should be specifically stated in the order. For example, the court could order the contemtor "confined until such time as the arrearage confirmed herein is paid in full." Once paid, the contemtor is released from jail and no longer subject to civil contempt.

If the court orders a civil contempt such that the respondent is jailed until he/she complies with certain conditions, those conditions must be specific enough to notify the contemtor of the exact actions he/she must take so that the contemtor knows how to comply. *Ex Parte Garcia*, 831 S.W.2d 1 (Tex. App.—El Paso 1992, no writ).

C. Appointment of an Attorney

If the movant is requesting the respondent to be incarcerated for either civil contempt, criminal contempt, or both, the respondent is entitled to have an attorney appointed to represent him or her. Texas Family Code §157.163 outlines the process for informing a respondent of the right to an attorney. This section also sets forth the requirements for obtaining court-appointed counsel. Texas Family Code §157.164 governs the payment of the court-appointed counsel.

A habeas corpus will more than likely be granted if the contemtor was not informed of the right to counsel and did not **knowingly and intelligently** waive that right. *In re Bishop*, 2010 WL 374573 (Tex. App.—Houston [14th Dist.] February 4, 2010, orig. proceeding) (mem. op.).

D. Community Supervision

If a respondent is found in contempt and sentenced to jail, the court may suspend the sentence as long as the respondent complies with certain conditions. Tex. Fam. Code §157.211. The conditions imposed on the respondent may include:

- 1) reporting to a community supervision officer;
- 2) allowing a community supervision officer to visit the respondent at the respondent's home or elsewhere;

- 3) obtaining counseling on financial planning, budget management, conflict resolution, parenting skills, alcohol or drug abuse, or other matters causing the respondent to violate the order;
- 4) paying child support and arrearages;
- 5) paying court costs and attorney's fees;
- 6) seeking employment assistance services through the Texas Workforce Commission; and,
- 7) participating in mediation or other services to alleviate conditions that prevent the respondent from obeying the court's order.

The initial period of community supervision may not exceed ten years. Tex. Fam. Code §157.212. The court may continue the community supervision past ten years to “the earlier of:

- a) the second anniversary of the date on which the community supervision first exceeded 10 years; or
- b) the date on which all child support, including arrearages and interest, has been paid.”

Id.

The case of *In re Zandi*, 230 S.W.3d 76 (Tex. 2008) requires that an order suspending a contempt finding and resetting the case for review at a later date

shall inform the respondent that the community supervision may be subject to revocation. The initial opinion in *Zandi* appeared to require new service of process on the respondent before the review hearing. After an amicus curiae brief was filed, the Texas Supreme Court, in a supplemental hearing, clarified its position on this matter by finding that any such order would be sufficient if the initial order sets out the terms by which the obligor can comply and avoid incarceration. The original order in *Zandi*, granting community supervision, suspended the jail sentence for six months for “review and status.” This did not put the obligor on notice that he was subject to possible incarceration.

E. Motion to Revoke Community Supervision

Unfortunately, quite often a respondent who has been placed on community supervision fails to live up to the conditions required in the supervision plan. When this happens, you can ask that the community supervision be revoked. A motion to revoke community supervision must be verified. Tex. Fam. Code §157.214. If the motion itself alleges a prima facie case for the revocation of suspension of the community supervision, an arrest warrant may be issued. Tex. Fam. Code §157.215. Once the respondent is arrested, a non-jury hearing must be held

no later than the third working day after the date the court becomes available, but in no case should it be more than seven working days after arrest. Tex. Fam. Code §157.216. Unlike in a motion for enforcement and contempt, the respondent does not have the affirmative defense of inability to pay. *In re B.C.C.* 187 S.W. 3d 721 (Tex. App.—Tyler 2006, no pet.). However, it is imperative to note that the probation violations do not automatically become additional acts of contempt. The contemtor may be punished for the contemptuous acts in the probation judgment, but not for the probation violations occurring after the judgment. *Ex Parte Whitehead*, 908 S.W.2d 68 (Tex. App.—Houston [1st Dist.] 1995).

If a subsequent compliance hearing is ordered, the obligor must have notice of the subject matter, possible consequences, or allegations that will be considered at that compliance hearing. Failure to provide this notice to the obligor will render a revocation order void. *In re Bishop*, 2010 WL 374573 (Tex. App.—Houston [14th Dist.] February 4, 2010, orig. proceeding) (mem. op.)

F. “To Contempt or Not To Contempt” (Alternatives to Contempt)

Before filing an enforcement action that requests contempt, several factors should be considered. Obviously, people need to pay their child support and allow possession of the child, and if they do not, they should be held accountable. But, is incarceration always the answer?

Upon being served with a motion for contempt requesting jail time, some respondents do everything within their power to raise the money to at least pay something toward the arrearages. Jail is a great incentive for people to pay. If the respondent does not pay, then it appropriately punishes them for the violation. If the respondent is held in contempt but the jail sentence is suspended, they have incarceration “hanging over their head” as an incentive to pay.

However, if I had a dollar for every time I have heard an obligor say, I can't work and pay my child support if I'm in jail, I'd be retired and playing poker full time in Las Vegas. Unfortunately, there is some truth to that statement. Most respondents cannot pay their child support if he or she is in jail. The decision to ask for contempt is especially important if the respondent will lose their job if incarcerated or the obligee desperately needs the money. As such, it becomes imperative for us as lawyers to consider all of the ramifications of filing a contempt action for child support. Again, this issue must be thoroughly discussed with your client. This is a case-by-case analysis that you should cover with your client while reviewing all possible avenues for compliance. A well known adage holds especially true here: “Be careful what you ask for, you just might get it.”

G. Judgment for Arrearages

In a hearing for enforcement, the court will set the amount of the child support arrearages that need to be paid. This may be paid in a lump sum or in installments.

Chapter 157 of the Texas Family Code dictates the rules for money judgments. A request for judgment for child support arrears is usually coupled with a motion for contempt. An advantage of a judgment for arrearages is that the judgment is not limited by the personal property exemptions of the Texas Property Code. The only property that cannot be reached by a child support judgment is a homestead. Tex. Prop. Code §42.005. A cumulative money judgment is not a new cause of action, but rather it is an accumulation of all the judgments that arise by operation of law under Texas Family Code §157.261(a).

Remember that a motion for a cumulative money judgment must be filed on or before ten years from the date the child support obligation terminates. The motion should be filed in the court of continuing, exclusive jurisdiction. Tex. Fam. Code §157.001(d).

Just like a motion for contempt, a motion for money judgment **must**

- 1) state the provisions of the original order that were violated (§157.002(a)(1));
- 2) state the alleged violations (§157.002(a)(2));
- 3) state the relief requested (§157.002(a)(3));
- 4) state the amount of child support owed, the amount paid, and the amount due (§157.002(b)(1)); and
- 5) be signed by the movant or the movant's attorney (§157.002(a)(4)).

A motion for money judgment **may** include (1) a copy of the payment history (§157.002(b)(3)); and (2) a statement that additional violations may occur on dates between the date the motion is filed and the hearing date (§157.002(e)).

Unlike a motion for contempt requesting incarceration, a motion seeking a cumulative money judgment does not have to set out in detail every payment owed and missed. Totals would be sufficient for a request for a money judgment.

Please note that, after January 1, 2010, child support arrearage payments are calculated differently. For all payments received after January 1, 2010, the payment will go to the principal first and then the interest. Act of May 28, 2009, 81st Leg., R.S., S.B.No. 865, §18(to be codified as an amendment to Tex. Fam. Code §157.268).

If the movant is only requesting a cumulative money judgment and not a contempt, Texas Family Code §157.065 allows service by First-Class Mail. If

the respondent was ordered to provide the court and the state case registry with a current mailing address under Chapter 105 of the Texas Family Code, the movant only needs to send a notice of the hearing and a copy of the motion to the last-recorded address. If you serve a respondent by First-Class Mail, you have to file with the court a certificate of service showing the date of the mailing and the name of the person who sent the notice. Tex. Fam. Code §157.065.

Interest for child support arrears is accumulated on payments that are 31 days late or more. Tex. Fam. Code §157.266. Pre-judgment interest on child support arrearages are mandatory and not discretionary. *Medrano v. Medrano*, 810 S.W.2d 426 (Tex. App.—San Antonio 1991, no writ). Interest arrearages dated through December 31, 2001 are calculated at the rate of twelve percent. After January 1, 2002, the interest rate is calculated at six percent. *In re A.R.J.*, 97 S.W.3d 833 (Tex. App.—Dallas 2003, no pet.).

A final money judgment for unpaid child support shall include the following:

- (1) unpaid child support not previously confirmed;
- (2) the balance owed on previously confirmed arrearages or lump sum or retroactive support judgments;
- (3) interest on the arrearages; and
- (4) a statement that it is a cumulative judgment.

Tex. Fam. Code §157.263.

H. Child Support Liens

Pursuant to Texas Family Code §157.312, failure to pay child support as ordered may result in a child support lien. By operation of law, a child support lien arises by operation of law when any child support payment is delinquent. Tex. Fam. Code §157.312(d). Every child support payment that is not timely made is a judgment. Tex. Fam. Code §157.261. There is no requirement that you receive a child support cumulative money judgment before filing a child support lien. A child support lien may issue “regardless of whether the amounts have been adjudicated or otherwise determined.” Tex. Fam. Code §157.312(d). A lien can attach to all the property owned by the obligor except a homestead. Tex. Fam. Code §157.317.

The contents of the lien must include the following eleven elements, as set out in Texas Family Code §157.313:

- (1) the name and address of the person to whom the notice is being sent;
- (2) the style, docket or cause number, and identity of the tribunal of this or another state having continuing jurisdiction of the child support action and, if the case is a Title IV-D case, the case number;
- (3) the full name, address, and, if known, the birth date, driver’s license number, social security number, and any aliases of the obligor;
- (4) the full name and, if known, social security number of the obligee;
- (5) the amount of the current or prospective child support obligation, the frequency with which current or prospective child support is ordered to be paid, and the amount of child support arrearages owed by the obligor and the date of the signing of the court order, administrative order, or writ that determined the arrearages or the date and manner in which the arrearages were determined;
- (6) the rate of interest specified in the court order, administrative order, or writ or, in the absence of a specific interest rate, the rate provided for by law;
- (7) the name and address of the person or agency asserting the lien;
- (8) the motor vehicle identification number as shown on the obligor’s title if the property is a motor vehicle;
- (9) a statement that the lien attaches to all nonexempt real and personal property of the obligor that is located or recorded in the state, including any property specifically identified in the notice and any property acquired after the date of filing or delivery of the notice;
- (10) a statement that any ordered child support not timely paid in the future constitutes a final judgment for the amount due and owing, including interest, and accrues up to an amount that may not exceed the lien amount; and,
- (11) a statement that the obligor is being provided a copy of the lien notice and that the obligor

may dispute the arrearage amount by filing suit under Section 157.323.

The lien shall be verified unless the Title IV-D agency is using it. Tex. Fam. Code §157.313(c)(e).

1. Time Periods

A child support lien is effective until “all current support and child support arrearages, including interest, any costs and reasonable attorney’s fees, and any Title IV-D service fees ... have been paid ...” Tex. Fam. Code §157.318(a).

2. Where to File Liens

The lien shall be recorded with the county clerk’s office. Within twenty-one days of the filing, the obligee shall then provide a copy of the lien to the obligor by first class or certified mail at the last known address. Tex. Fam. Code §157.314(c). A child support lien on real property has to be renewed every **ten** years. Tex. Fam. Code §157.318(d). For purposes of establishing priority of liens, a renewed lien dates back to the date of the original lien. *Id.* This change applies only to child support liens on real property filed after May 26, 2009. *Id.*

A child support lien may attach to a retirement plan, life insurance proceeds, cash surrender value in life insurance policies, claims owed to the obligor for personal injury or negligence, or an inheritance given to the obligor. Tex. Fam. Code §157.316-317. A child support lien may also be filed against mutual funds, 401k accounts and money market accounts. There are three mutual fund clearing houses that process the majority of the bank mutual fund transactions in the United States. Filing a lien with all three of these funds increases the obligee’s chances of obtaining money the obligor is holding in a stock account. The mutual fund clearing houses are:

Fidelity Investments
 Enterprise Processing Services
 100 Crosby Parkway
 Covington, Kentucky 41015
 Fax (800) 974-9684

Legal Department
 Pershing, L.L.C.
 1 Pershing Plaza
 Jersey City, New Jersey 07399
 Tel: (800) 443-4342
 Fax: (201) 413-4799

CIT Group/Consumer Finance, Inc.
 715 S. Metropolitan Avenue
 Oklahoma City, OK 73108
 Tel: (800) 621-1437

Fax: (405) 553-4790

Brokerage houses like Edward Jones are not a member of these clearing houses and will require the filing of a separate lien. If you know where the obligor banks, ask where the department for the liens and levies is for the brokerage accounts. Bank brokerage operations are set up under different corporate identities from the banks. For example, delivery to Bank of America does not necessarily mean you have service on the Bank of America brokerage department.

3. Effect of Lien Notice

If a person who has actual notice of the lien possesses any nonexempt property of the obligor that may be subject to the lien, that person is prohibited from turning over, releasing, selling, transferring, encumbering, or conveying the property unless a release of lien has been signed by the claimant, or a court has released the lien after notice to the claimant. A person who violates this provision may be joined as a party to a foreclosure action and is subject to the same penalties provided for the obligor. Tex. Fam. Code §157.319.

4. Property to Which Lien Attaches

Texas Family Code §157.317 states the property to which a child support lien can attach:

(a) a child support lien attaches to all real and personal property not exempt under the Texas Constitution or other law, including:

- (1) an account in a financial institution;
- (2) a retirement plan, including an individual retirement account; and
- (3) the proceeds of a life insurance policy, including the proceeds from a life insurance policy or annuity contract and the proceeds from the sale or assignment of life insurance or annuity benefits, a claim for compensation, or a settlement or award for the claim for compensation, due to or owned by the obligor; and
- (4) property seized and subject to forfeiture under Chapter 59, Code of Criminal Procedure.

(a-1) A lien attaches to all property owned or acquired on or after the date the lien notice or abstract of judgment is filed with the county clerk of the county in which the property is located, with the court clerk as to property or

claims in litigation, or, as to property of the obligor in the possession or control of a third party, from the date the lien notice is delivered to that party.

(b) A lien attaches to all non-homestead real property of the obligor but does not attach to a homestead exempt under the Texas Constitution or the Property Code.

a. *Financial Institutions*

- A child support lien may be filed on a financial institution that is holding money for an obligor. Tex. Fam. Code §157.3145. This includes banks and credit unions. The lien applies to all accounts that are in the obligor's name or in which the obligor has a beneficial interest. Tex. Fam. Code §157.311(1)(A).
- A child support lien may be delivered to the institution's registered agent, main business address or an address designated by the financial institution to accept liens. The statute does not require service, only delivery. The lien does not have to be filed with the clerk's office. The lien is effective even if the institution's main office is not in Texas. Tex. Fam. Code §157.3145(b). Most banks have a garnishment department and would prefer to have the lien delivered to that specific department. You should contact the financial institution to find out where they want the lien delivered.
- A child support lien served on a financial institution freezes the account. No other transactions can be made on that account. Tex. Fam. Code §157.319.

b. *Motor Vehicles*

If the lien is recorded on the title of a particular vehicle, that child support lien only attaches to that specific vehicle. Tex. Fam. Code §157.316(b). To be able to record the lien on the title, the court order enforcing the child support obligation (not a child support lien but an enforcement order or money judgment) must include the vehicle identification number of the vehicle and order the obligor to surrender the title to the obligee for recording. *Id.* The obligee may then send a certified copy of the order and the application for title to:

Texas Department of Transportation
Operations Branch
4000 Jackson Ave.
Austin, TX 78731
Tel: (512) 302-2378

A new title should be issued for the vehicle that reflects the lien on the title. The problem with this relief is that the obligor has to surrender the title to the obligee. If the obligor has not paid his child support to this point, this is probably a futile effort. A writ of execution on a judgment to retrieve the vehicle after a judgment would probably be more worth your time.

5. Foreclosure

Texas Family Code Section 157.323 allows for a foreclosure on a child support lien. The foreclosure must be filed in the court in which the lien notice was filed, the district court of the county in which the property is located, or the court of continuing jurisdiction. *Id.*

If the court finds that a child support arrearage is owed, the court shall render a judgment against the obligor. The court shall then order an authorized official to levy execution to satisfy the lien, costs, and attorney's fees. This satisfaction occurs by selling any property on which a lien is attached or ordering anyone in possession of nonexempt property or cash owned by the obligor to dispose of the property as the court may order. Tex. Fam. Code §157.323.

6. Contest of Child Support Lien

In order to acquire the issuance of a lien, the only order the obligee needs is the original order setting child support. If a timely contest to the amount of arrearages in the child support lien is filed, the court has jurisdiction to make a determination of arrearages. Tex. Fam. Code §§157.323(a)(c).

I. **Child Support Levy**

A child support lien freezes a financial account, but a levy is still required to be able to obtain the money in the account. A judgment, or administrative determination of child support arrears, is required to file a child support levy. Tex. Fam. Code §157.327(a). An administrative determination of child support arrears occurs when the arrearages are determined by an administrative or judicial writ of withholding under Chapter 158 of the Texas Family Code.

1. How to File

A levy is delivered in the same way a child support lien is delivered. You must send a copy of the lien to the obligor at the same time you send the levy to the financial institution. Tex. Fam. Code §157.328.

2. Time Periods

A child support levy can be delivered anytime there is a child support judgment or upon rendition of an administrative determination of arrearages. Tex. Fam. Code §157.327(a).

3. Contest of Levy

A person with an interest in the financial account, including the obligor, must file an objection to the Notice of Levy within 10 days from the date of its receipt. Tex. Fam. Code §157.328(b). The contest of the levy is the same as the contest of a child support lien that is described more thoroughly under that subsection in this paper.

4. Payment of the Levy

If the obligor does not contest the levy, the financial institution shall pay the money to the obligee not earlier than the 15th day nor later than the 21st day after delivery of the levy. Tex. Fam. Code §157.327(b)(2). The financial institution that receives the levy is obligated to contact any other person that has an interest in the account so that they have an opportunity to file a contest. If a financial institution does not honor the levy, that entity becomes liable for the amount equal to the property held by the institution, not to exceed the total amount of arrearages. Tex. Fam. Code §157.330.

J. **QDRO**

Just like using a qualified domestic relations order to effect a property division, a QDRO may be used on a *qualified* plan to secure payment of child support. However, like a property division, the QDRO must be accepted by the plan administrator. The details of drafting an acceptable QDRO for the payment of child support or child support arrears goes beyond the scope of this paper. Just bear in mind that this remedy is available.

K. **Delivery of Property**

Turnover orders are governed by Section 31.002 in the Texas Civil Practices and Remedies Code.

(a) A judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that:

- (1) cannot readily be attached or levied on by ordinary legal process; and
- (2) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.

(b) The court may:

- (1) order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control, together with all documents or records related to the property, to a designated sheriff or constable for execution;
 - (2) otherwise apply the property to the satisfaction of the judgment; or
 - (3) appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.
- (c) The court may enforce the order by contempt proceedings or by other appropriate means in the event of refusal or disobedience.
- (d) The judgment creditor may move for the court's assistance under this section in the same proceeding in which the judgment is rendered or in an independent proceeding.
- (e) the judgment creditor is entitled to recover reasonable costs, including attorney's fees.
- (f) A court may not enter or enforce an order under this section that requires the turnover of the proceeds of, or the disbursement of, property exempt under any statute, including Section 42.002 of the Property Code. This subsection does not apply to the enforcement of a child support obligation or a judgment for past due child support.
- (g) With respect to turnover of property held by a financial institution in the name of or on behalf of the judgment debtor as customer of the financial institution, the rights of a receiver appointed under Subsection (b)(3) do not attach until the financial institution receives service of a certified copy of the order of receivership in the manner specified by Section 59.008, Finance Code.

1. Requirements

To utilize this turnover statute, a party must have one of the following:

- a) an ordinary debt remedy of judgment under Texas Family Code Section 157.264;

- b) a judgment determination through a child support lien determination under Texas Family Code Section 157.323; or
- c) a judicial or administrative writ of withholding in Chapter 158.

2. How to File

An application, and the granting of a turnover order, is an *ex parte* proceeding and does not require notice to the obligor. *Ross v. 3D Tower Limited*, 824 S.W.2d 270, 272 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *Sivley v. Sivley*, 972 S.W.2d 850, 861 (Tex. App.—Tyler 1998, no pet.), citing *Ex Parte Johnson*, 654 S.W.2d 415, 418 (Tex. 1983). Before granting a turnover order, the court must first find that nonexempt assets exist that cannot be reached by ordinary means. For child support purposes, this includes everything except a person's homestead. Tex. Civ. Prac. & Rem. Code § 31.002(a). After the order is signed, a copy of the application and order must be mailed to the obligor.

3. How to Use a Turnover Order

The following assets may be assets to be listed in a turnover order:

- * Rental income. *Copher v. First State Bank of Pittsburgh*, 825 S.W.2d 738, 740 (Tex. App.—Fort Worth 1993, no writ).
- * The right to litigate. A turnover order gives the obligee the right to act as the obligor in a contract dispute to litigate an interest and recover any monies.
- * Accounts receivable owed to the obligor. *Ross v. 3D Tower Limited*, 824 S.W.2d 270, 272.
- * Inheritance rights of the obligor. This comes into play if the obligor is an executor of an estate and makes the decision not to make a distribution. A turnover order allows the obligee to act as executor and distribute assets.

4. Attorney's Fees

The court may award attorney's fees for representing an obligee in obtaining a turnover order. Tex. Civ. Prac. & Rem. Code § 31.002(e). A turnover order may also be utilized in securing attorney's fees awarded by the court for child support enforcement.

L. Posting of a Bond

The court can order the obligor to post a bond if there is an expectation that future child support payments will not be made. If those payments are not made, the court can forfeit the bond.

M. License Suspension

Chapter 232 of the Texas Family Code sets out the methods of suspension of a professional, or recreational, license to secure compliance of a court order. License suspension for failure to pay child support may only be obtained if the obligor had previously been given the opportunity to pay the child support arrears and failed to do so.

This provision **does not** apply only to a driver license. It can apply to **any** type of license issued by any licensing authority specifically defined in Texas Family Code Section 232.002. This includes the following licenses:

- * hunting
- * fishing
- * medical
- * legal
- * real estate
- * plumbers
- * private security
- * certified public accountant
- * engineer
- * psychologist
- * nurse
- * barber
- * social worker
- * Texas Alcoholic Beverage Commission
- * lottery ticket sales agent

Once the order suspending the license is obtained, a copy must be sent to the licensing authority who will, in turn, notify the obligor.

1. Time to File

The suspension of the obligor's license may be obtained for failure to pay child support under the following conditions:

- (1) the obligor owes child support in an amount equal to or greater than the total support due for three months under a support order;
- (2) has been provided an opportunity to make payments toward the overdue child support under a court-ordered or agreed repayment schedule; and
- (3) has failed to comply with the repayment schedule.

Tex. Fam. Code §232.003.

2. What Should be Filed

The petition for suspension of a license shall state that the suspension is required under Section 232.003. It shall also state:

- (1) the name and, if known, social security number of the individual;
- (2) the name of the licensing authority that issued a license the individual is believed to hold; and
- (3) the amount of arrearages owed under the child support order or the facts associated with the individual's failure to comply with:
 - (A) a subpoena; or
 - (B) the terms of a court order providing for the possession of or access to a child.

Tex. Fam. Code §232.005.

A copy of the record of child support payments kept by the Title IV-D registry, or the local registry, may also be attached to the petition. A copy of the order or agreed payment plan that was violated should also be attached. This action will simply make the obligee's job easier. In *In Re C.G.*, 261 S.W.3d 842, 850 (Tex. App.—Dallas 2008, no pet.) the obligee argued that Section 232.0004 which requires a three-month delinquency in child support payments was a separate and independent ground sufficient to grant a license suspension. The Dallas Court of Appeals disagreed finding there was no prior court order or agreed repayment plan placed into evidence.

Also, make sure to review Section 232.006 as specific language is required in the notice to the obligor.

3. Hearing and Order

The obligor may request a hearing and a motion to stay suspension. This request must be filed no later than the 20th day after the date of service on the obligor. Tex. Fam. Code §232.007(a). The license suspension shall be stayed pending the hearing. Tex. Fam. Code §232.007(b)(3).

If the obligor proves the elements of the case as set out in Section 232.003, the court **shall** render an order suspending the obligor's license unless the obligor proves that all arrearages and current child support have been paid; shows good cause for the failure to abide by the court's order; or proves an affirmative defense under Section 157.008(c). Tex. Fam. Code §232.008.

4. Stay of Suspension

Just like civil contempt, a person can reinstate that license by performing certain acts. The order may be stayed conditioned on the obligor's compliance with a repayment schedule. Tex. Fam. Code §232.008(b).

5. Revocation of Stay

If the obligor does not comply with the repayment plan, the obligee, the child support enforcement agency, the court, or the title IV-D agency may file a motion to revoke. The obligor must receive notice of the hearing on the motion to revoke no less than 10 days before the hearing date. The motion must specifically state how the obligor failed to comply with the repayment plan. Tex. Fam. Code §232.012. If the obligor is not in compliance with the repayment plan, the court **shall** revoke the license. *Id.*

N. Writ of Execution

1. Personal Property

The relevant statutes are as follows:

- Texas Rule of Civil Procedure 622. Execution—An execution is a process of the court from which it is issued. The clerk of the district or county court or the justice of the peace shall tax the costs in every case in which a final judgment has been rendered and shall issue execution to enforce such judgment and collect such costs. The execution and subsequent executions shall not be addressed to a particular county, but shall be addressed to any sheriff or any constable within the State of Texas.
- Texas Rule of Civil Procedure 630. Execution on Judgment for Money—When an execution is issued upon a judgment for a sum of money, it must specify in the body thereof the sum recovered or directed to be paid and the sum actually due when it is issued, and the rate of interest upon the sum due. It must require the officer to satisfy the judgment and costs out of the property of the judgment debtor subject to execution by law.
- Texas Rule of Civil Procedure 649. Sale of Personal Property—Personal property levied on under an execution shall be offered for sale on the premises where it is taken in execution, or at the courthouse door of the county, or at some other place if, owing to the nature of the property, it is more convenient to exhibit it to purchasers at such a place. Personal property susceptible of being exhibited shall not be sold unless the same be present and subject to the view of those attending the sale, except shares of stock in joint stock or

incorporated companies, and in cases where the defendant in execution has merely an interest without right to the exclusive possession in which case the interest of defendant may be sold and conveyed without the presence or delivery of the property. When a levy is made upon livestock running at large on the range, it is not necessary that such stock, or any part thereof, be present at the place of sale, and the purchaser at such sale is authorized to gather and pen such stock and select there from the number purchased by him.

- Texas Rule of Civil Procedure 650. Notice of Sale of Personal Property—Previous notice of the time and place of the sale of any personal property levied on under execution shall be given by posting notice thereof for ten days successively immediately prior to the day of sale at the courthouse door of any county and at the place where the sale is to be made.
- Texas Property Code § 42.005. Child Support Liens—Sections 42.001, 42.002, and 42.0021 of this code (regarding exempt property) do not apply to a child support lien established under Subchapter G, Chapter 157 of the Texas Family Code.

The rule is simple: Personal property exemptions do not apply to child support obligations. In *Dryden v. Dryden*, 97 S.W.3d 863 (Tex. App.—Corpus Christi 2003, no pet.), the obligor tried to argue that Property Code §42.005 violated the Texas Constitution's protection of a debtor's personal property from execution for debt. The Corpus Christi Court of Appeals held

“...[I]t has long been held that the obligation to support one's child is not a debt, but a natural and legal duty.”

Id. at 866. Since child support is not a debt, the Legislature may allow the collection of child support against the obligor's personal property. *Id.*

2. Acquiring a Writ of Execution

The District Clerk prepares and issues the writ of execution based on the judgment. A writ of execution is valid for thirty, sixty, or ninety days upon the request of the creditor. Tex. Rule of Civ. Pro. §629. If the writ will be executed in the county in which it was issued, the District Clerk will forward it to the sheriff's department. Otherwise, the clerk will return the writ to the obligee's attorney for forwarding to the sheriff of the county where the property is located. A private process server cannot serve a writ of execution. After

the sheriff's office seizes the property, they are to hold the property for ten days to allow the obligor to attempt to reclaim it through payment. If the property is not reclaimed, it is sold at auction. After the costs for execution and sale have been deducted, the remaining proceeds are paid to the obligee.

O. Make-Up Visitation

The court may order additional periods of possession or access to compensate for the denial of court-ordered possession or access. The additional periods must be of the same type and duration as those of the possession or access that was denied, and they may include weekend, holiday, and summer possession or access. Tex. Fam. Code §157.168(a)(1)(2).

The additional periods of possession must occur on or before the second anniversary of the date the court finds that court-ordered possession or access has been denied. Tex. Fam. Code §157.168(a)(3).

The court may not enter an order for make-up visitation that grants possession of the child "until further order of the court." *In re Parks*, 264 S.W.3d 59, 61, n.1 (Tex. App. – Houston [1st Dist.] 2007, orig. proceeding).

Perhaps the most important thing to remember about make-up visitation is that the person denied possession or access is entitled to decide the time of the additional periods, provided they are of the same type and duration as those of the possession or access denied. Tex. Fam. Code §157.168(b).

VI. CONTRACTUAL ENFORCEMENT

Even if the order is not specific enough for contempt, the obligee may still have other contractual remedies available. *Robbins v. Robbins*, 601 S.W.2d 90 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

VII. CONCLUSION

Trying to obtain compliance with a court order may seem like a difficult task, but, thankfully, the Texas Family Code provides us with both practical and persuasive means to do so. The provisions outlined in the code are not difficult to follow, but they do require attention to detail. Such detail must be taken not only with the prior order and the substance of the motion, but also to the contempt order and commitment order. The pleadings for enforcement actions, particularly those asking for the remedy of contempt, are among the most technically critical pleadings that we family lawyers draft. If you have any issues in the preparation of your pleadings or orders, always refer to the Texas Family Law Practice Manual. This six volume set has been prepared, and is maintained, with an amazing level of sophistication and detail. Lastly, remember your motion to enforce does not succeed, or fail, based

on whether or not contempt is granted. Other remedies are usually available.