

**ENFORCEMENT:  
POSSESSION, ACCESS, CHILD SUPPORT AND PROPERTY  
DIVISION**

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**CHAPTER 34**



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## ENFORCEMENT: POSSESSION, ACCESS, CHILD SUPPORT AND PROPERTY DIVISION

### INTRODUCTION

The sheer length of the title should warn you that the accompanying paper will be tremendous in length and impossible to cover in a 30 minute presentation. Traditionally, each type of enforcement warrants its own 30 minute presentation. Unfortunately, we do not have that luxury 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.

### ENFORCEMENT AND CLARIFICATION PROCEEDINGS UNDER CHAPTER 9

You worked, agonized, researched, spent hours preparing the case for your client and have a decree in place. Now your client is back because the no-good ex will not abide by the terms of the decree. After you commiserate with your client, what is the next step? This paper explores several procedural steps your client may take pursuant to Chapter 9 of the Texas Family Code.

#### I. ENFORCEMENT OF DECREE

One of the most important aspects of enforcing a decree is the actual wording in the decree itself. If the divorce decree and other transfer documents are not prepared and executed properly, your client may not receive the money or claim the property that was awarded to him or her. Also, you want to make sure you give the Court all of the tools necessary to effectuate the order and possibly hold the other party in contempt if he/she does not comply.

##### A. Specific, Specific, Specific and Let Me Say It Again ... Specific

A decree must set out the division of property and each party's duties and obligations related to the division of property in clear, specific, and unambiguous terms. The parties must be able to determine from the decree the obligations they have under its terms. Although it involved child support, *Ex parte Slavin*, 412 S.W.2d 43 (Tex. 1967), is often cited as the cornerstone case that sets forth the requirements for drafting an enforceable divorce decree. The *Slavin* requirements for an order to be enforceable by contempt are that the language of the order must spell out the details of compliance in (1) clear, (2), specific,

(3) unambiguous, (4) certain terms, (5) in command language which does not rest upon implication or conjecture, and (6) which is not subject to more than one interpretation or meaning.

It does not matter if the decree embodies an agreed property division or a judge's ruling at the end of a trial. The provisions of an agreed decree are just as enforceable as a decree that memorializes the outcome of a trial. *McCray v. McCray*, 584 S.W.2d 279 (Tex. 1979).

Orders for the payment of a debt are not enforceable by contempt. This would violate Article I, Section 18 of the Texas Constitution (no debtors' prison). *Ex parte Yates*, 387 S.W.2d 377 (Tex. 1965). Also, a person cannot be held in contempt for failing to perform an act he is incapable of performing. *Ex parte Gonzales*, 414 S.W.2d 656 (Tex. 1967). Even if contempt is not available, you may still have contractual remedies available to enforce agreed decree. *Robbins v. Robbins*, 601 S.W.2d 90 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

Assets should be described with such specificity that a third party (such as a banker, broker, title company representative, auto dealer, etc.) who reads the decree will have sufficient information that the asset was awarded to your client. The following specific information should be included in each decree:

- 1) Full and complete legal descriptions of real property and oil and gas or mineral interests,
- 2) Vehicle identification numbers for automobiles, farm equipment, boats, watercraft, recreational vehicles, etc.,
- 3) Names of financial institutions, account numbers, types of accounts (such as checking, savings, IRA), and any identifying names (if not held in the names of the parties) for checking, savings and brokerage accounts,
- 4) Certificate numbers, accurate names and types of securities (common stock, preferred stock, bond, etc.) for securities such as stocks and bonds not held in brokerage accounts, and
- 5) Proper legal names of the carriers and accurate policy numbers for all life insurance policies.

When drafting the decree and the division and delivery of property, the **who, what, where, when** and **how** along with the *Slavin* text must be applied to the decree language for it to be enforceable. The following cases illustrate this point:

1. *In re Coppock*, 277 S.W.3d 417 (Tex. 2009)

Raymond Coppock and Gayle Magness, formerly Gayle Coppock, divorced in October 2003. The trial court's final decree of divorce incorporated a mediated settlement agreement between the parties which, among other things, permanently enjoined them from communicating with each other "in a coarse or offensive manner." Over the next two years, Gayle communicated numerous times with Raymond in a manner he considered to violate the decree. Raymond filed a motion to enforce the decree, and the trial court found Gayle in contempt for eighty-four separate violations of the decree for communicating with Raymond "in a coarse or offensive manner." The trial court confined Gayle. The Court of Appeals treated Gayle's petition for writ of habeas corpus as a petition for writ of mandamus and denied relief. The Texas Supreme Court ordered Gayle released on bond pending its review of her habeas corpus petition.

The Texas Supreme Court stated that the injunctive provision in the decree is less than clear, as what constitutes "coarse or offensive" communication, especially between warring spouses, is largely in the eye of the beholder.

The Texas Supreme Court stated that the decree of divorce does not contain sufficient command language to advise the parties that refraining from or engaging in the described conduct is mandatory. The divorce decree specifically provides:

"The Court finds that a permanent injunction of the parties should be granted ...

"The permanent injunction granted below shall be effective immediately and shall be binding on both parties ...

"a. Communicating with the other party in person or in writing in a vulgar, profane, obscene or indecent language or in a coarse or offensive manner."

On page 419 of the opinion, the Texas Supreme Court stated:

Although reciting that the injunction is 'binding on both parties,' the judgment does not order or mandate compliance. The order refers to a 'permanent injunction granted below' and lists twenty-one different behaviors, but there is no injunctive language commanding or ordering the parties not to engage in the described conduct.

The Texas Supreme Court next addressed the issue that the decree of divorce itself states that the parties' agreement, recited herein, is "enforceable as a contract." The Court then states:

Without decretal language making clear that a party is under order, agreements incorporated into divorce decrees are enforced only as contractual obligations, *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882 (Tex. 1984); *Ex parte Jones*, 163 Texas 513, 358 S.W.2d 370, 375 (1962) (orig. proceeding). Obligations that are merely contractual cannot be enforced by contempt. See TEX. CONST. art. I, Section 18 (No person shall ever be imprisoned for debt). *In re Green*, 221 S.W.3d 645, 648-49 (Tex. 2007) (orig. proceeding).

2. *Ex parte Choate*, 582 S.W.2d 625 (Tex.Civ.App.—Beaumont 1979, no writ).

A nunc pro tunc judgment partitioned the community property after granting the final divorce. The nunc pro tunc judgment set aside the following property to Juanita Choate:

- a) The house located at 2911 Nashville, Nederland, Jefferson County, Texas, more specifically described as Lot 19, Block 13, Helena Park IV subdivision to the City of Nederland, Jefferson County, Texas;
- b) All contents of home;
- c) The Oldsmobile automobile;
- d) 150 shares of Texaco stock, now held in the Texaco Savings Plan, in the name of Respondent.

Another paragraph of the nunc pro tunc order read as follows:

"It is decreed that both parties shall execute all instruments necessary to accomplish final execution and disposition of this judgment."

Alton Choate failed to execute any documents to convey the residence, the Oldsmobile automobile, or the 150 shares of Texaco stock. Juanita Choate filed a motion for contempt. Alton was found guilty of contempt, ordered to be confined in jail for a period of one day and until he purged himself of contempt. The contempt order required Alton Choate to do the following:

Sign and execute any required instruments necessary to convey 150 shares of Texaco

stock to Juanita Holley Choate, and sign and execute any required instruments necessary to transfer title of the 1978 Oldsmobile automobile from Respondent to Movant, Juanita Holley Choate.

Sign and execute a deed to the home located at 2911 Nashville, Nederland, Jefferson County, Texas, more particularly described in the judgment herein, said deed being necessary to convey title of the property from Respondent to Movant, Juanita Holley Choate.

The Court of Appeals observed that even in the contempt order authorizing Alton's imprisonment, there was no description of the particular action required of Alton. The Court ruled as to the order to sign the required instruments to convey the Texaco stock and the Oldsmobile that the contempt order had as its base only the language in the decree requiring the parties to "execute all instruments necessary to accomplish final execution and disposition of this judgment." Citing the *Slavin* case, the Court held,

"We are of the opinion that the first section of the order holding Alton in contempt is void. Neither the judgment nor the order holding him in contempt spelled out specifically just what Alton was to sign."

The Court further held that the contempt order requiring Alton to sign and execute a deed to the home was void and unenforceable by contempt. The Court explained that no particular type of deed was mentioned.

The drafting problems in the Choate case can be avoided by using language similar to that in Volume 3 of the *Texas Family Law Practice Manual Third Edition*, Chapter 23, which when adapted to the *Choate* case would read as follows:

IT IS ORDERED AND DECREED that ALTON CHOATE shall appear in the law office of Cindy V. Tisdale, 220 W. Pearl Street, Granbury, Texas, at 2:00 p.m. on April 1, 2013, and shall execute, have acknowledged, and deliver to CINDY V. TISDALE for the benefit of JUANITA CHOATE the following instruments:

- 1) Special Warranty Deed conveying the home located at 2911 Nashville, Nederland, Jefferson County, Texas, more specifically described as Lot 19, Block 13, Helena Park

- Four Subdivision to the City of Nederland, Jefferson County, Texas, in the form attached to this Decree of Divorce as Exhibit A;
- 2) Certificate of Title to the 1978 Oldsmobile automobile, VIN ABC123478XLJH938, in the form attached to this Decree of Divorce as Exhibit B;
- 3) Seller, Donor or Trader's Affidavit for the 1978 Oldsmobile automobile, VIN ABC123478XLJH938, in the form attached to this Decree of Divorce as Exhibit C;
- 4) Stock Transfer Certificate to convey the 150 shares of Texaco stock, now held in the Texaco Savings Plan, Plan No. 12345, in the name of ALTON CHOATE, whose employee and Social Security number is 123-45-6789, in the form attached to this Decree of Divorce as Exhibit D.

In the event the automobile has a lien against it and thus the original title is held by the lien holder, Alton Choate should be ordered to execute a power of attorney in favor of Juanita Choate in lieu of the car title.

3. *Ex parte McIntyre*, 730 S.W.2d 411 (Tex.Civ.App.—San Antonio 1987, no writ).

Leo McIntyre, Relator, was found guilty of contempt for refusing to surrender certain personal property items awarded to his wife in the decree of divorce. Pertinent language of the decree reads as follows:

It is therefore ORDERED and DECREED that Petitioner, MARIAN McINTYRE, shall receive, and is hereby awarded, as her sole and separate property, free from any claim of Respondent, LEO ROBERT McINTYRE, JR. and Respondent is hereby divested of an interest in and to, the property described in Schedule 1, which is attached hereto and made apart hereof.

Schedule 1 was captioned "PROPERTY AWARDED TO MARIAN McINTYRE" and contained a list of personal property items awarded to her, some of which were in the possession of Relator and were the items Relator refused to surrender to her. The Court of Appeals held that the decree of divorce divided the

property of the parties, but did not order Relator to deliver any personal property items to his wife or to undertake any action with regard to them. The decree of divorce did not contain “command” language as required by *Slavin*. Therefore, the Appellate Court found that the trial court erred in finding that the Relator was in contempt of court for failing to surrender the property items to his wife.

In order to cure the drafting problems and omissions found in *McIntyre*, a prudent attorney would specifically identify, in as much detail as possible, each item of property in husband’s possession that is awarded to wife and then order husband, using “command” language, to deliver the specifically listed property to a certain person, at a certain place, at a certain time. Would the following language be sufficient?

IT IS ORDERED AND DECREED that Petitioner, MINNIE MOUSE, shall receive, and is hereby awarded, as her sole and separate property, free from any claim of Respondent, MICKEY MOUSE, and Respondent is hereby divested of any interest in and to the following property:

One 46” Samsung HD television, model 6500, serial no. 772777, which is now in the possession of Respondent, MICKEY MOUSE, which shall be delivered to MINNIE MOUSE.

The answer is no. The above language does not state who shall deliver the TV to Minnie Mouse, when the TV shall be delivered to Minnie Mouse, or where the TV shall be delivered to Minnie Mouse, and thus would not be enforceable by contempt because it fails the *Slavin* requirements and the whom what, when, where and how approach. The following suggested language should be enforceable by contempt:

IT IS ORDERED AND DECREED that Petitioner, MINNIE MOUSE, shall receive, and is hereby awarded, as her sole and separate property, free from any claim of Respondent, MICKEY MOUSE, and Respondent is hereby divested of any interest in and to the following property:

One 46” Samsung HD television, model 6500, serial no. 772777, which is now in the possession of Respondent, MICKEY MOUSE, which shall be delivered to MINNIE MOUSE.

IT IS FURTHER ORDERED AND DECREED that Respondent, MICKEY MOUSE, shall deliver the 46” Samsung HD television, model 6500, serial no. 772777, to MINNIE MOUSE at her residence, 220 W. Main Street, Fort Worth, Texas 76101, at 6:00 p.m. on April 1, 2014.

**II. CHAPTER 9 TEXAS FAMILY CODE**

**A. Enforcement of Decree: Section 9.001**

- 1) A party affected by a decree of divorce or annulment providing for a division of property as provided by Chapter 7 may request enforcement of that decree by filing a suit to enforce as provided by this chapter in the court that rendered the decree.
- 2) Except as otherwise provided in this chapter, a suit to enforce shall be governed by the Texas Rules of Civil Procedure applicable to the filing of an original lawsuit.

1. *Brown v. Fullenweider*, 52 S.W.3d 169, 171 (Tex. 2011).

The agreement incident to divorce provided that the party was to pay his own attorney’s fees. No judgment was granted in favor of the attorney and against the client. They attorney sued his client for his fees in the court which granted the divorce. The client sought to dismiss the suit on jurisdictional grounds. After reviewing the provisions of the prior statute, Sections 3.70-3.77, Texas Family Code, the Supreme Court stated, “Suffice to say that no one contemplates that such proceedings would involve any issues other than those related to the division of the martial estate. An attorney’s claim against his client for fees is not such an issue.”

2. *Joyner v. Joyner*, 352 S.W.3d 746, 749 (Tex. App.—San Antonio, 2011, no pet.).

Any party affected by a divorce decree may seek to enforce the decree by filing an enforcement action.

3. Discussion

The plain reading of 9.001(a), “a party affected by decree of divorce or annulment providing for a division of property ... may request enforcement of that decree...,” may give standing to any other person affected by the trial court’s division of property such as children, other family members or even creditors.

Since the proceedings shall be as in civil cases generally, just mailing a copy of the motion to the attorney who represented the Respondent in the divorce does not constitute service. Personal service is required.



**B. Continuing Authority to Enforce Decree: Section 9.002**

The court that rendered the decree of divorce or annulment retains the power to enforce the property division as provided by Chapter 7.

Note that this section provides continuing jurisdiction, but not **exclusive**, continuing jurisdiction.

1. *Pearson v. Fillingim*, 332 S.W.3d 361, 364 (Tex. 2011).

The court that renders a divorce decree retains jurisdiction to clarify and enforce the property division within that decree.

2. *Provine v. Provine*, 312 S.W.3d 824, 830 (Tex. App.—Houston [1st Dist.], 2009, orig. proceeding).

The Family Code provides limited, post-judgment jurisdiction that may be invoked only in particular circumstances as compared to its ability to modify a judgment during its plenary power.

3. *Chavez v. McNeely*, 287 S.W.3d 840, 847 (Tex. App.—Houston [1st Dist.], 2009, no pet.).

Husband sued former wife for breach of contract in a court different from that which rendered the divorce decree. Wife argued that the Court lacked jurisdiction because the divorce court had exclusive jurisdiction. The Appellate Court held that the language in Sections 9.001 and 9.002 is permissive and not mandatory. Furthermore, if the legislature intended the divorce court to have exclusive jurisdiction, it could have done so by using clear statutory language.

**C. Filing Deadlines: Section 9.003**

- 1) A suit to enforce the division of tangible personal property in existence at the time of the decree of divorce or annulment must be filed before the second anniversary of the date the decree was signed or becomes final after appeal, whichever date is later, or the suit is barred.
- 2) A suit to enforce the division of future property not in existence at the time of the original decree must be filed before the second anniversary of the date the right to the property matures or accrues or the decree becomes final, whichever date is later, or the suit is barred.

1. *Stine v. Stewart*, 80 S.W.3d 586, 592 (Tex. 2002).

The Appellate Court held the two-year statute of limitations did not apply to an action brought by a third-party beneficiary of a contractual agreement

contained in a decree. The action brought by the third-party beneficiary is a breach of contract suit and is governed by the four-year statute of limitations. It is not an action to enforce a property division in a decree.

2. *Morales v. Morales*, 195 S.W.3d 188, 191 (Tex. App.—San Antonio, 2006, pet. denied).

In the divorce decree, Wife was to pay to Husband the sum of \$10,000 upon the earliest of the minor child turning 18 and graduating high school, the Wife remarrying or living with a man, or the Wife sells the marital residence. Wife remarried nine years later. Husband sued Wife for enforcement for the payment of the \$10,000. The Appellate Court held the two-year limitations provision applies to all enforcement actions including an action to reduce payments awarded under a divorce decree to a money judgment within two years from the date the party's right to those payments accrued.

3. *Dechon v. Dechon*, 909 S.W.2d 950 (Tex. App.—El Paso, 1995).

Husband and Wife divorced in 1971. The decree divided the parties' military retirement benefits. The issue was whether the decree divided gross benefits or net benefits and whether the two-year statute of limitations applied to the recovery or arrearages. The Appellate Court held that the two-year statute of limitations applies to all enforcement actions whether it is enforcement of an AID or a divorce decree.

4. *Jenkins v. Jenkins*, 991 S.W.2d 440, 445 (Tex. App.—Fort Worth, 1999, pet. denied).

Husband stopped making alimony payments pursuant to the Agreement Incident to Divorce (AID). The trustee in the ex-wife's bankruptcy proceeding sued husband to enforce the AID provisions 25 months after husband stopped making payments. Husband argued the two-year statute of limitations. The Appellate Court held the action by the trustee is not affected by the two-year limitations provision because the trustee sought a reduction of the specific monetary award in the AID to judgment rather than to enforce a property division. Thus, the trustee's claims were not governed by Section 9.003.

**Note:** The jurisdictions are divided when it involves enforcing a decree or an AID. Some jurisdictions follow the rule that all enforcements are alike and thereby governed by the two-year statute of limitations. Other jurisdictions view an enforcement of a property division and enforcement of an AID differently and that the ten-year statute of limitations applies to enforcement of an AID.

5. Arnold v. Eaton, 910 S.W.2d 181 (Tex. App.—Eastland, 1995, no writ).

In the decree, the court awarded to wife \$20,000 and secured this amount by an equitable lien against the parties' homestead. Husband was to pay the debt by a date certain, and if he did not, the property was to be sold. Ten years later, wife filed a motion for enforcement. The trial court determined that husband owed wife \$10,000 on the debt plus interest, ordered foreclosure on the lien, and attorney's fees. Husband appealed arguing that the enforcement was barred by limitations. The appellate court held that the \$20,000 debt and the lien were not tangible personal property and therefore not barred by this statute of limitations.

**D. Applicability to Undivided Property: Section 9.004**

The procedures and limitations of this subchapter do not apply to existing property not divided on divorce, which are governed by Subchapter C and by the rules applicable to civil cases generally.

1. McDougal v. Havlen, 980 S.W.2d 767 (Tex. App.—San Antonio, 1998).

Husband joined the Air Force in 1952. Husband and Wife married in 1953. Husband retired in 1972, and they were divorced in 1976. The decree of divorce was silent as to Husband's pension and had no residuary clause. The only asset mentioned in the decree was the marital home. The Appellate Court found the two-year statute of limitations did not apply because the property was in existence at the time of divorce.

**E. No Jury: Section 9.005**

A party may not demand a jury trial if the procedures to enforce a decree of divorce or annulment provided by this subchapter are invoked.

1. O'Neal v. Forehand, No. 13-08-457-CV (Tex. App.—Corpus Christi, July 2, 2009, memo. op.).

Wife sued her ex-husband for breach of contract, conversion and breach of fiduciary duties regarding his alleged refusal to comply with certain portions of the divorce decree. They signed an agreed order consolidating the case into the court of original jurisdiction over the divorce. Wife requested a jury trial. The ex-husband objected arguing that the case was actually an enforcement under Chapter 9 of the Texas Family Code. The trial court agreed and removed it from the jury docket. The Appellate Court stated that by agreeing to the motion to consolidate, she was invoking the provisions of the Family Code thereby waiving her right to a jury trial.

2. Kazerani v. Chong, No. 13-09-00448-CV (Tex. App.—Corpus Christi, December 30, 2010, memo. op.).

Chong countersued Kazerani for slander of title, quieting title and declaratory judgment pursuant to a piece of property which he was awarded in the decree of divorce. Kazerani maintained a lien on the property until he made all the payments ordered in the decree. The Appellate Court decided that these claims were determined by the outcome of the action to enforce the property division in the divorce decree. Therefore, she was not entitled to a jury trial.

**F. Enforcement of Division of Property: Section 9.006**

- 1) Except as provided by this subchapter and by the Texas Rules of Civil Procedure, the court may render further orders to enforce the division of property made in the decree of divorce or annulment to assist in the implementation of or to clarify the prior order.
- 2) The court may specify more precisely the manner of effecting the property division previously made if the substantive division of property is not altered or changed.
- 3) An order of enforcement does not alter or affect the finality of the decree of divorce or annulment being enforced.

1. Pearson v. Fillingim, 332 S.W.3d 361, 363 (Tex. 2011).

The parties' divorce decree divided the marital estate using two schedules, one for each party, and a residual clause awarding both parties a one-half interest in all property or assets not otherwise disposed of or divided. Husband did not appear nor was he represented. The decree divested Husband of one-half of his allegedly separate property oil and gas royalties. Nearly 25 years later, Husband filed a suit to clarify the decree that the oil and gas royalties were his separate property. The Trial Court determined the mineral rights were Husband's separate property. Wife appealed, and the Court of Appeals affirmed the Trial Court's ruling. The Supreme Court reversed the Court of Appeals stating that a court can only enter a clarification order if the decree is ambiguous. In this case, there was no ambiguity. The lower courts had no jurisdiction to modify the decree.

2. Hagen v. Hagen, 282 S.W.3d 899, 906 (Tex. 2009).

The decree of divorce divided husband's military benefits to be paid "if, as, and when" he received them.

After the divorce and his retirement, husband elected to receive VA benefits which reduced the amount of military retirement benefits to his former wife. Wife sought clarification and enforcement of the division of these benefits. The Trial Court found that husband's disability pay was not included in the division of property in the decree, and the military retirement should be divided as stated in the order. The Supreme Court held the Trial Court merely clarified the decree and did not modify it.

3. *DeGroot v. DeGroot*, 369 S.W.3d 918, 922 (Tex. App.—Dallas, 2012, no pet.).

Wife was awarded one-half of husband's 401(k) in the decree of divorce. A Qualified Domestic Relations Order (QDRO) was ordered but not signed by the Court. After the divorce, the husband withdrew the funds from his 401(k). By the time a QDRO was signed by the Court, there was no money left in the 401(k). The Trial Court awarded the former wife a money judgment equal to one-half of the QDRO amount and gave husband more than eight years to pay it. The Appellate Court reasoned that the liquidation of the account made it impossible for husband to comply with the decree; therefore, the Trial Court had the authority to enforce the division of property and to assist in the implementation of the prior order. The court may specify a more precise manner of effecting the property division as long as the substantive division is not altered or changed.

4. *Garcia v. Alvarez*, 367 S.W.3d 784, 788 (Tex. App.—Houston [14th Dist.], 2012, no pet.).

In the divorce decree, the husband and wife agreed that husband would make monthly payments until wife remarried or other specified events. Wife remarried, but she failed to tell husband. Husband filed suit seeking reimbursement from wife for the amount he paid her after her marriage. The Court held that reimbursement was a proper method of enforcing the parties' property division.

5. *Vats v. Vats*, 01-12-00255-CV (Tex. App.—Houston [1st Dist.], 2012, no pet.).

In the agreed divorce decree, each spouse was awarded a 50 percent interest in two pieces of real property located in India. The decree also had provisions as to the parties' agreement to sell the property in India. Wife filed an enforcement petition because, she alleged, husband failed to make a good faith effort to sell the property, and he impeded the sale of the property. The Trial Court "requested and authorized" a proper Indian court to sell the property within 90 days, and if not, to appoint a receiver in India. The Appellate Court did not believe this was a

substantial modification of the underlying order but instead a more precise manner of effecting the property division as set forth in the decree.

6. *In re Moore*, 06-11-00071-CV (Tex. App.—Texarkana, 2011, reh. den.).

Wife was ordered to make mortgage payments in the decree. When she failed to make the payments, husband paid them. Husband then filed for enforcement seeking reimbursement of the payments. The Appellate Court held that the trial court's order of reimbursement was a proper function of the trial court's authority to enforce the decree.

7. *In re Kalathil*, 14-10-00933-CV (Tex. App.—Houston [14th Dist.], 2010, no pet., memo. op.).

Husband and wife entered into a mediated settlement agreement and an agreed decree of divorce. Wife filed a post-divorce petition to divide undisclosed property alleging that husband hid assets accumulated during marriage. Husband filed a motion for summary judgment alleging the court lacked jurisdiction and that wife's claims were barred by res judicata. The trial court denied husband's motion, and wife sought discovery from husband. The appellate court affirmed stating that the trial court had jurisdiction for a post-divorce division of previously undisclosed assets. Wife was entitled to pursue discovery.

8. *Sharp v. Sharp*, 314 S.W.3d 22, 25 (Tex. App.—San Antonio, 2009, no pet.).

The decree of divorce awarded wife 50 percent of husband's military retirement pay. Husband was retired at the time of divorce. Husband later received a 100 percent disability rating from the VA which entitled him to receive Combat-Related Special Compensation (CRSC) in lieu of full retirement pay. This resulted in a substantial decrease of wife's benefits. Wife filed a motion for clarification and contempt. The Court held that the decree was not ambiguous. It awarded Wife 50 percent of husband's military retirement pay. CRSC payments are not military retirement pay so wife was not entitled to those payments.

9. *Hawkins v. Hawkins*, No. 14-09-01000-CV (Tex. App.—Houston, December 28, 2010, mem. op.).

In the decree of divorce, the court ordered that after a certain date, wife was to have exclusive possession of the property. It further ordered husband to cooperate with the sale of the property and without limitation to execute any and all documents reasonably required to close the sale of the property. Wife filed a motion for enforcement and/or clarification requesting husband to sign a warranty deed and to sign insurance papers regarding the property. She contended that she

was due a refund from the insurance company. The trial court ordered husband to appear at wife's attorney's office to execute a warranty deed and to sign the insurance papers. The appellate court affirmed the portion of the order that required husband to sign the warranty deed stating that this was a proper directive to enforce the division of property. However, it reversed the portion of the order requiring husband to sign the insurance documents because the underlying order was silent as to the insurance refund. Therefore, the trial court was not authorized to clarify the order regarding this issue. It impermissibly effected a change in the substantive division of the property.

**G. Limitation on Power of Court to Enforce:  
Section 9.007**

- 1) A court may not amend, modify, alter, or change the division of property made or approved in the decree of divorce or annulment. An order to enforce the division is limited to an order to assist in the implementation of or to clarify the prior order and may not alter or change the substantive division of property.
- 2) An order under this section that amends, modifies, alters, or changes the actual, substantive division of property made or approved in a final decree of divorce or annulment is beyond the power of the divorce court and is unenforceable.
- 3) The power of the court to render further orders to assist in the implementation of or to clarify the property division is abated while an appellate proceeding is pending.

1. *Pearson v. Fillingim*, 332 S.W. 3d 361, 363 (Tex. 2011).

See annotations under Section 9.006 for facts of case. It is beyond the power of the court to amend, modify, alter, or change the division of property made or approved in the decree of divorce or annulment. A judgment finalizing a divorce and dividing marital property bars relitigation of the property division, even if the decree incorrectly characterizes or divides the property.

2. *Reiss v. Reiss*, 118 S.W. 3d 439, 442 (Tex. 2003).

Divorce decree awarded wife 50 percent of husband's retirement "if and when" he retired. Eighteen years after the divorce, husband retired. Wife filed suit to enforce decree by obtaining a valid Qualified Domestic Relations Order (QDRO) entitling her to 50 percent of his retirement, including sums accrued after the divorce. The trial court granted wife's

request, and husband appealed. The Supreme Court held that the husband's proper remedy was to have appealed the divorce court's incorrect characterization of the property. Since the husband did not appeal, the trial court correctly construed the divorce decree as awarding the wife 50 percent of husband's total retirement benefits. The issuance of the QDRO did not impermissibly amend, modify, alter or change the division of property in the decree of divorce.

3. *Shanks v. Treadway*, 110 S.W. 3d 444, 449 (Tex. 2003).

The divorce decree awarded wife 25 percent of the total sums of husband's retirement. Seventeen years after the divorce was granted, husband filed a motion to sign qualified domestic relations order (QDRO) requesting the court to calculate the wife's 25 percent interest in his retirement plans as of the date of divorce. Wife countered with her own proposed QDRO dividing the total amount of husband's retirement. Trial court initially signed both parties' QDROs, but then vacated its ruling and signed only the husband's QDRO. Wife appealed, and the Court of Appeals reversed concluding that the husband's QDRO impermissibly altered the substantive division of property made in the original divorce decree. The Supreme Court affirmed the Court of Appeals' ruling holding that the original decree was unambiguous, and that the trial court had no authority to enter an order altering or modifying the disposition of property. The husband's remedy was by direct appeal, and his failure to appeal bars a collateral attack on the judgment. The district court was without authority to enter a QDRO which altered the terms of the divorce.

4. *In re: W.L.W.*, 370 S.W. 3d 799 (Tex. App.—Fort Worth, 2012, reh. denied).

An agreed decree of divorce awarded husband certain stock together with all dividends, splits, and other rights and privileges in connection with it. The decree also contained a residuary clause that provided that any asset which was not disclosed or which was undervalued on the parties' inventory was awarded to the party not in possession. Wife filed a motion to clarify and to enforce property division alleging that the husband had failed to disclose or had undervalued the stock awarded to him in decree. The court held that the "residuary clause" was instead a permit to change the previous division of property. This violated Section 9.007 so the appellate court struck the "residuary clause."

5. *Garcia v. Alvarez*, 367 S.W. 3d 784, 787 (Tex. App.—Houston [14th Dist.], 2012, no pet.).

See the facts set forth in Section 9.006. There is no distinction between enforcing an AID and a decree of divorce.

6. *In the Interest of M.M.III, et. al.*, 357 S.W. 3d 841, 843 (Tex. App.—El Paso, 2012, no pet.).

The parties' divorce decree awarded wife 23.08 percent of husband's military retirement benefits plus one-half of all cost-of-living adjustments (COLAs). Fourteen years after the divorce, husband filed a motion to clarify the divorce decree arguing that the award of one-half of COLA benefits divided his future benefits which should be his separate property. The trial court denied the motion, and husband appealed. The appellate court held that the language in the decree was unambiguous regardless of whether the court intended to render such an order. Because the decree was unambiguous, the trial court had no authority to enter an order altering or modifying the original disposition of the property, and wife was to receive exactly what the court ordered.

7. *Gainous v. Gainous*, 219 S.W.3d 97, 108 (Tex. App.—Houston [1st Dist.], 2006, pet. den.).

Husband and wife were divorced by an agreed decree that provided each party was awarded one-half of husband's retirement plan. Neither party appealed. Shortly after the decree was entered, the trial court entered a Qualified Domestic Relations Order (QDRO) to effectuate the decree, but the QDRO expressly excluded the deferred retirement option plan (DROP) of husband's retirement plan from division. When husband became eligible to retire, he opted for the DROP program. This allowed him to continue as an active employee and still have an amount equal to his pension, plus continued contributions from his salary, credited to his DROP account. Wife filed a motion for enforcement or clarification contending that the QDRO reduced and materially altered the division of husband's retirement. Wife also alleged she was to receive one-half of four other benefits of the retirement plan. The trial court rendered take-nothing judgment against wife and she appealed. Appellate Court stated that Section 9.007 is jurisdictional and an order that violates it is void. The QDRO signed by the court changed the terms of the decree and was therefore void.

8. *Baker v. Donovan*, 199 S.W. 3d 577, 580 (Tex. App.—Houston [1st Dist.], 2006, pet. den.).

The divorce decree awarded wife 50 percent of husband's present accrued benefit as of the date of divorce in husband's military retirement system, "if, as

or when" payable to him. Fifteen years later, husband retired and began receiving retirement pay which included a portion designated as VA disability pay. Wife filed a petition to enforce and clarify the division of husband's military retirement benefits when he failed to pay wife her share of benefits. The trial court found the original decree required clarification and set the amount due to wife. Husband appealed because trial court failed to take into consideration his VA disability pay. The appellate court held that because husband did not appeal divorce court's award, asking the court to consider his disability pay at a later post-decree motion would have required the trial court to alter or change the substantive division of property. This request was beyond the power of the trial court.

#### **H. Clarification Order: Section 9.008**

- 1) On the request of a party or on the court's own motion, the court may render a clarifying order before a motion for contempt is made or heard, in conjunction with a motion for contempt or on denial of a motion for contempt.
- 2) On a finding by the court that the original form of the division of property is not specific enough to be enforceable by contempt, the court may render a clarifying order setting forth specific terms to enforce compliance with the original division of property.
- 3) The court may not give retroactive effect to a clarifying order.
- 4) The court shall provide a reasonable time for compliance before enforcing a clarifying order by contempt or in another manner.

1. *DeGroot v. DeGroot*, 369 S.W.3d 918, 924 (Tex. App.—Dallas, 2012, no pet.).

See facts under Section 9.006. Husband contended that the Court's clarifying order in which he had to make payments to wife for more than eight years constituted a retroactive order prohibited by this section. The Appellate Court rejected this argument stating that this was not a clarifying order but a proper enforcement of the Court's prior order.

2. *Macias v. Macias*, 13-09-00351-CV (Tex. App.—Corpus Christi-Edinburg, 2010, pet. denied).

The divorce decree divided husband's military retirement benefits by awarding wife 50 percent of his disposable retired pay as a result of his service and 40 percent of all cost-of-living increases (COLA). Eight years later, husband retired and filed a motion to clarify the division of his military retirement benefits

contending that the wife was entitled to only 40 percent of benefits earned during the marriage. The trial court denied husband's motion, and the Appellate Court affirmed. The decree's terms awarding 40 percent of the disposable retired pay and COLA increases were unambiguous. There was no limit to the benefits earned only during marriage. Since the terms were plain and unambiguous, the trial court was without authority to modify the decree through a clarification proceeding.

3. *Guerrero v. Guerra*, 165 S.W. 3d 778, 783 (Tex. App.—San Antonio, 2005, no pet.).

The divorce decree awarded each party a share of the other's retirement benefits pursuant to a formula set out in decree. The formula required the benefits to be paid "if, as and when" they were paid. It went on to state that the partition of the retirement benefits was made in accordance with the "after acquired" property theory concerning division of pension and retirement benefits. Seventeen years later, wife filed a motion to clarify with respect to the exact amount husband was to receive of her retirement. Husband also filed a motion to clarify and a motion seeking a Qualified Domestic Relations Order. The trial court found the formula in the decree dividing the retirement to be ambiguous and awarded husband 24.69 percent of wife's retirement benefits received by her at her retirement. Wife appealed complaining only as to the valuation date for retirement asserting that the court should use the date of divorce not date of retirement. The appellate court held that while a trial court may not modify a property division in a divorce decree, if it is ambiguous, the trial court may enter a clarifying order to enforce compliance with the original division of property. The appellate court held that inclusion of "after acquired" language without it being defined or clearly explained created an ambiguity regarding the valuation of the wife's retirement benefits justifying the trial court's entry of a clarification order.

4. *McKnight v. Trogdon-McKnight*, 132 S.W.3d 126 (Tex. App.—Houston [14th Dist.], 2004).

The agreed divorce decree stated that the marital home would be sold, husband could have the house appraised, husband could purchase the home for the appraised value, husband could have the first right of refusal on purchasing the home, wife had the sole right to determine the price at which the house would be listed for sale, and appointing a receiver if the property failed to sale or if either party refused to cooperate. Wife filed a clarification motion requesting the court to order the home be listed with a designated real estate broker for sale to a third party thereby precluding husband from exercising his option of purchasing the home as ordered in the decree. The appellate court held

the underlying decree was not ambiguous. Since there was no ambiguity, the trial court had no authority to change the terms of the decree by way of a clarifying order.

5. *Wright v. Eckhardt*, 165 S.W.3d 778, 783 (Tex. App.—Corpus Christi, 2000, no pet.).

A latent ambiguity in the decree authorized a clarification which provided that the wife was to receive the husband's Navy retirement pay when his name was added to the Navy retirement list. The husband had been reserving "fleet reserve pay" which is also retirement. The appellate court held that the wording of regarding husband's name being added to the Navy retirement list was a latent ambiguity authorizing the trial court to enter an order of clarification.

6. *Zeolla v. Zeolla*, 15 S.W.3d 239, 242 (Tex. App.—Houston [14th Dist.], 2000, pet. denied).

The divorce decree awarded to wife a specific sum of husband's retirement if he retired at age 65. Husband retired at age 57 and decided to draw an early retirement resulting in the wife receiving nothing. Wife sought a clarification of the decree, and the court held that absence of the language regarding retirement at an earlier age was a latent ambiguity. The court also held that all subsections of Section 9.008 pertain to contempt actions; therefore, a court may not give retroactive effect to a clarifying order in such a way as to subject a party immediately to contempt.

**I. Delivery of Property: Section 9.009**

To enforce the division of property made in a decree of divorce or annulment, the court may make an order to deliver the specific existing property awarded, without regard to whether the property is of special value, including an award of an existing sum of money or its equivalent.

1. *DeGroot v. DeGroot*, 369 S.W.3d 918, 924 (Tex. App.—Dallas, 2012, no pet.).

See facts under Section 9.006. Husband withdrew all of the 401(k) of which wife had been awarded to 50 percent in the decree. Wife brought an enforcement action, and the trial court ordered husband to pay to wife an amount equal to one-half of the monies withdrawn. The appellate court affirmed stating that a court may order property to be delivered, but when delivery of property awarded in the decree was no longer an adequate remedy, the court may render a money judgment for damages caused by the failure to comply.

2. *In re the Marriage of Malacara*, 223 S.W.3d 600, 603 (Tex. App.—Amarillo, 2007, no pet.).

The parties divorced in 1987, and the decree and agreement incident to divorce awarded to husband all the personal property in his possession. The parties also agreed that all community property not listed would be owned by them as co-tenants. Wife sued husband in 2004 for a division of the community property retirement earned by husband during the marriage. Husband argued that benefits were personal property awarded to him so the court could not grant wife judgment for monies already received by him since his retirement in 1991. The court held that because the parties' agreement regarding co-tenancy of ownership of community property not listed in the decree effectively awarded wife a share in husband's retirement benefits, the court was authorized to enforce the division of that property by an order to deliver the specific existing property awarded. It also awarded to wife a share in the retirement payments of husband and granted a judgment to the wife for monies paid to husband from the retirement that he did not share with co-tenant wife.

3. *Fowler v. Fowler*, 02-07-274-CV (Tex. App.—Fort Worth, 2008).

One option available to the trial court to enforce the property division would be to order a party to deliver the specific property awarded.

#### **J. Reduction to Money Judgment: Section 9.010**

- 1) If a party fails to comply with a decree of divorce or annulment and delivery of property awarded in the decree is no longer an adequate remedy, the court may render a money judgment for the damages caused by that failure to comply.
- 2) If a party did not receive payments of money as awarded in the decree of divorce or annulment, the court may render judgment against a defaulting party for the amount of unpaid payments to which a party is entitled.
- 3) The remedy of a reduction to money judgment is in addition to the other remedies provided by law.
- 4) A money judgment rendered under this section may be enforced by any means available for the enforcement of judgment for debt.

1. *DeGroot v. DeGroot*, 369 S.W.3d 918, 924 (Tex. App.—Dallas, 2012, no pet.).

See facts under Section 9.006. Husband withdrew all of the 401(k) of which wife had been awarded to 50

percent in the decree. Wife brought an enforcement action, and the trial court ordered husband to pay to wife an amount equal to one-half of the monies withdrawn. The appellate court affirmed stating that a court may order property to be delivered, but when delivery of property awarded in the decree was no longer an adequate remedy, the court may render a money judgment for damages caused by the failure to comply.

2. *Hoell v. Hoell*, 13-11-00733-CV (Tex. App.—Corpus Christi-Edinburg, 2012, no pet.).

The appellate court upheld the trial court's ruling that the former wife was entitled to a money judgment against her former husband. He ceased making payments to her under a provision of the parties' agreed divorce decree which required him to provide monetary assistance for a period not to exceed two years and to supplement her income in order to alleviate the burden of insufficient funds with which to pay the parties' debt. Husband paid for one year then stopped. He sued for clarification requesting, *inter alia*, that the court order was void due to vagueness. The former wife counter-sued for contempt and enforcement. The court agreed with husband that the order was vague and clarified his monthly obligations but declined to hold the order void. The court also awarded the former wife a monetary judgment for the unpaid payments to which the former wife was entitled to receive.

3. *Dade v. Dade*, 01-05-00912-CV (Tex. App.—Houston [1st Dist.], 2007, no pet.).

Husband was awarded an interest in wife's retirement plan and obtained a QDRO for a specific amount. The plan administrator rejected the QDRO because only a percentage of benefits would be acceptable. The second QDRO stated husband was to receive a certain percentage, but he received substantially less money than the specific amount awarded to him in the decree. Husband then earned that wife had retired, and he filed a motion for turnover of assets. The trial court granted husband a judgment in the amount of the difference between that which he received via the second QDRO and the amount specifically awarded to him in the decree. The appellate court affirmed. Since the trial court found that husband had not received the pension benefits awarded to him in the decree and that wife now had possession of those funds, it was acting within its discretion to award a money judgment to husband.

4. *In re Malacara*, 223 S.W.3d 600, 603 (Tex. App.—Amarillo, 2007, no pet.).

The parties divorced in 1987, and the decree and agreement incident to divorce awarded to husband all the personal property in his possession. The parties also agreed that all community property not listed would be owned by them as co-tenants. Wife sued husband in 2004 for a division of the community property retirement earned by husband during the marriage. Husband argued that benefits were personal property awarded to him so the court could not grant wife judgment for monies already received by him since his retirement in 1991. The court held that because the parties' agreement regarding co-tenancy of ownership of community property not listed in the decree effectively awarded wife a share in husband's retirement benefits, the court was authorized to enforce the division of that property by an order to deliver the specific existing property awarded. It also awarded to wife a share in the retirement payments of husband and granted a judgment to the wife for monies paid to husband from the retirement that he did not share with co-tenant wife.

5. *Jenkins v. Jenkins*, 991 S.W.2d 440, 445 (Tex. App.—Fort Worth, 1999, pet. denied).

See facts under Section 9.003. The court held that a party who does not receive money awarded in a decree may sue the other party for a money judgment in the amount of unpaid payments. This remedy of a reduction to a money judgment is in addition to the other remedies provided by law.

**K. Right to Future Property: Section 9.011**

- 1) The court may, by any remedy provided by this chapter, enforce an award of the right to receive installment payments or a lump-sum payment due on the maturation of an existing vested or nonvested right to be paid in the future.
- 2) The subsequent actual receipt by the non-owning party of property awarded to the owner in a decree of divorce or annulment creates a fiduciary obligation in favor of the owner and imposes a constructive trust on the property for the benefit of the owner.

1. *Schneider v. Schneider*, 5 S.W.3d 925, 930 (Tex. App.—Austin, 1999, no pet.).

Wife was awarded a portion of her husband's military retirement benefits contingent upon his retirement. Wife was also awarded a survivor annuity benefit. The husband attempted to limit wife's interest in the survivor annuity benefit to the amount of

disposable retired pay awarded to her in the decree. The military refused to recognize his request. Husband filed for clarification of the decree and sought to impose a constructive trust on all retirement plan benefits wife may receive in excess of the amount she was awarded in the decree. The appellate court held that a constructive trust under Section 9.011 arises after the actual, not the potential, receipt by the non-owning party of property awarded to the owner in a divorce decree.

2. *Jeffcoat v. Jeffcoat*, 886 S.W.3d 567, 570, (Tex. App.—Beaumont, 1994, no pet.).

Husband's retirement benefits were not divided in the divorce decree. The trial court partitioned the future retirement payments owed to both parties and appointed the husband as a constructive trustee for the benefits owed to the wife because the payments were made directly to the husband. The appellate court held that this section specifically provides that subsequent receipt by a party of property awarded to the other spouse created a fiduciary obligation in favor of the property's rightful owner. It also imposed a constructive trust on the property for the benefit of the owner.

**L. Contempt: Section 9.012**

- 1) The court may enforce by contempt an order requiring delivery of specific property or an award of a right to future property.
- 2) The court may not enforce by contempt an award in a decree of divorce or annulment of a sum of money payable in a lump sum or in future installment payments in the nature of debt, except for:
  - 3) a sum of money in existence at the time the decree was rendered; or
  - 4) a matured right to future payments as provided by Section 9.011.
  - 5) This subchapter does not detract from or limit the general power of a court to enforce an order of the court by appropriate means.

1. *In re Green*, 221 S.W.3d 645, 648 (Tex. 2007).

Husband filed a writ of habeas corpus because his imprisonment for contempt of court arising from his failure to pay contractual spousal maintenance. The Supreme Court ordered Relator released finding that the parties' contractual agreement to pay alimony was not the same as maintenance under Chapter 8 of the Family Code.



2. *In re Watson*, 01-05-169-CV (Tex. App.—Fort Worth, 2005, no pet.).

Husband filed a writ of habeas corpus because of his imprisonment for failure to pay attorney's fees awarded to wife in the divorce that was characterized as a child support obligation. The appellate court held that the payment of attorney's fees was not enforceable by contempt.

3. *Ford v. Ford*, 14-99-00246-CV (Tex. App.—Houston [14th Dist.], 2000, no pet.).

The divorce decree ordered husband to pay wife part of an IRA and to be responsible for the payment of any resulting income tax obligations. Husband did not comply, and wife sued for enforcement requesting that husband be held in contempt. The trial court denied wife's motion, and she appealed. The appellate court stated that the husband could not be held in contempt for nonpayment of the debt.

#### **M. Cost: Section 9.013**

The court may award costs in a proceeding to enforce a property division under this subchapter as in other civil cases.

1. *In re Slanker*, 365 S.W.3d 718 (Tex. App.—Texarkana, 2012).

The couple divorced in 2010, and husband appealed. The appellate court reversed the judgment as to the property division and remanded for a new trial. While the case was awaiting a new trial on property division, the court entered an order requiring husband to pay \$5,000 to retain an expert to value the business. Husband filed a mandamus with regarding to paying this fee. Although the appellate court stated that a trial court may order the payment of expert fees to be paid from community property, in this particular case, there was no testimony or evidence before the court ordered such. In the absence of evidence of the reasonableness of the fee or that community property in husband's sole possession was to pay for it, the trial court abused its discretion in awarding expert fees.

2. *Parliament v. Parliament*, 860 S.W.2d 144, (Tex. App.—San Antonio, 1993).

Husband and wife had an agreement regarding their divorce except for how much of husband's retirement was community property. They agreed on the percentage each was to receive of the community property portion and that he was to receive all of his separate property portion, but husband had received a lump sum retirement benefit that they could not agree on how much was community. Wife hired experts to trace and testify about the community property portion. The trial court divided the lump sum retirement benefit

and ordered that husband to reimburse the experts' fees to wife. Husband appealed. The appellate court found that since this was a divorce proceeding and not an enforcement proceeding, this section did not apply. The appellate court reversed and rendered the portion of the judgment requiring husband to pay expert fees.

#### **N. Attorney's Fees: Section 9.014**

The court may award reasonable attorney's fees in a proceeding under this subchapter. The court may order the attorney's fees to be paid directly to the attorney, who may enforce the order for fees in the attorney's own name by any means available for the enforcement of a judgment for debt.

1. *Norris v. Scheffler*, 11-10-00191-CV (Tex. App.—Eastland, 2011, no pet.).

After the divorce, wife filed an enforcement action seeking to enforce the property division. After a hearing on the motion, the trial court entered an order attempting to enforce the decree as requested by wife and granted wife her attorney's fees. However, the effect of the enforcement was to amend, modify, alter or change the underlying order so the appellate court reversed and rendered. As for the order granting the attorney's fees to wife, the appellate court reversed and remanded to the trial court. This section does not require that the claimant prevail on her claims to receive attorney's fees. The only requirement is that they be reasonable. However, if a trial court awards attorney's fees under this section, the court must state on the record or in its judgment good cause to substantiate the award if they are awarded to the nonprevailing party.

2. *McKnight v. Trogdon-McKnight*, 132 S.W.3d 126, 132 (Tex. App.—Houston [14th Dist.], 2004, no pet.).

See Section 9.008 for more details regarding this case. Wife brought a clarification action with regards to the property division of the decree. The trial court granted the motion, but the effect of the clarification was actually a modification of the property division. The trial court also awarded wife attorney's fees. The appellate court reversed the "clarification" order. Since the trial court had no authority to enter the order to clarify, it abused its discretion in awarding attorney's fees.

3. *Jenkins v. Jenkins*, 991 S.W.2d 440, 450 (Tex. App.—Fort Worth, 1999, pet. denied).

See Section 9.003 for more details about this case. The AID included alimony payments from husband to wife. Husband stopped making the payments, and wife filed for bankruptcy. Subsequently, husband filed a

motion to clarify and enforce the divorce decree, and the trustee intervened seeking to enforce the AID. Wife counterclaimed regarding items of personal property in the decree. The trial court awarded the trustee \$107,000 in past-due payments; \$17,000 in future alimony payments; attorney's fees to the trustee; denied husband's motions; and denied wife's counterclaim. However, the trial court awarded to wife her attorney's fees for the motion she lost. The appellate court reiterated that the only requirement under this section is for the attorney's fees to be reasonable. The statute does not require wife to prevail; however, when a trial court awards attorney's fees to a nonprevailing party, the court must state on the record or in its judgment the good cause substantiating the award.

**O. Jurisdiction for Qualified Domestic Relations Orders: Section 9.101**

- 1) Notwithstanding any other provision of this chapter, the court that rendered a final decree of divorce or annulment or another final order dividing property under this title retains continuing, exclusive jurisdiction to render an enforceable qualified domestic relations order or similar order permitting payment of pension, retirement plan, or other employee benefits divisible under the law of this state or of the United States to an alternate payee or other lawful payee.
- 2) Unless prohibited by federal law, a suit seeking a qualified domestic relations order or similar order under this section applies to a previously divided pension, retirement plan, or other employee benefit divisible under the law of this state or of the United States, whether the plan or benefit is private, state, or federal.

1. *Gainous v. Gainous*, 219 S.W.3d 97, 106 (Tex. App.—Houston [1st Dist.], 2006, pet. denied).

See Section 9.007 for details about this case. The court that rendered the divorce decree (or other final order dividing property) also retains "continuous, exclusive jurisdiction to render an enforceable QDRO (or similar order)..."

2. *In re Clayton*, 09-05-412-CV (Tex. App.—Beaumont, April 20, 2006, no pet.) (memo. op.).

After the divorce, husband filed several motions, including one to clarify or amend the QDRO, in a different district court than the one the divorce was decided. Wife filed a motion to transfer to the original divorce court, and the trial court granted the motion.

Husband appealed. Appellate court stated the transfer was proper because the original divorce court had continuing, exclusive jurisdiction over that matter.

3. *In re Matter of Jones*, 154 S.W.3d 225, 228 (Tex. App.—Texarkana, 2005, no pet.).

In 1980, the parties were divorced. The decree described how the retirement was to be divided. About 24 years later wife tried to receive her portion of husband's retirement which resulted in four QDROs. The trial court's fourth QDRO awarded wife seven forty-sevenths (7/47) of husband's retirement funds, and husband appealed this QDRO. Husband argued that when the trial court signed the second QDRO, that was the final judgment, and the plenary power of the trial court terminated before the fourth QDRO was signed. The appellate court stated that the court retained jurisdiction to enter the QDRO permitting payments of retirement benefits when they became payable. This section allows the court to create a QDRO if one does not exist or to correct language in a QDRO. It does not permit the court to substantively change the property division. Section 9.103 allows creation of a QDRO, Section 9.104 allows correction of a QDRO that is defective, and Section 9.001 allows clarification of a QDRO that is ambiguous. The appellate court concluded that the fourth QDRO in this case was actually a clarification of the first QDRO. The fourth QDRO clarified the benefit division of the first QDRO after husband's retirement date occurred and the exact formula became known.

**P. Procedure: Section 9.102**

- 1) A party to a decree of divorce or annulment may petition the court for a qualified domestic relations order or similar order.
- 2) Except as otherwise provided by this code, a petition under this subchapter is governed by the Texas Rules of Civil Procedure that apply to the filing of an original lawsuit.
- 3) Each party whose rights may be affected by the petition is entitled to receive notice by citation and shall be commanded to appear by filing a written answer.
- 4) The proceedings shall be conducted in the same manner as civil cases generally.

1. *Gainous v. Gainous*, 219 S.W.3d 97, fn12 (Tex. App.—Houston [1st Dist.], 2006, pet. denied).

In a footnote, the appellate court noted that wife argued some provisions in the QDRO were void because there was no evidence that service by citation was obtained before the QDRO was signed. The court stated that they presume service of citation occurred,

and the burden is on the party claiming no service to prove otherwise.

2. Reiss v. Reiss, 118 S.W.3d 439 (Tex. 2003).

Husband and wife married in 1956. Husband started working with a company in 1957. Couple divorced in 1980, and husband retired in 1998. The decree awarded to wife 50 percent of husband's retirement benefits. After husband's retirement, wife moved for a QDRO under this section which the court granted, and the appellate court upheld. (Note: It's never too late to ask for a QDRO!)

**Q. Prior Failure to Render Qualified Domestic Relations Order: Section 9.103**

A party may petition a court to render a qualified domestic relations order or similar order if the court that rendered a final decree of divorce or annulment or another final order dividing property under this chapter did not provide a qualified domestic relations order or similar order permitting payment of benefits to an alternate payee or other lawful payee.

1. Sparks v. Watson, 04-06-00200-CV (Tex. App.—San Antonio, 2007, no pet.).

Parties were divorced in 1981. Wife received a portion of his retirement benefits as "a result of his past and current employment." Husband retired in 1991 and began receiving his pension benefits. In 2004 (yes, 13 years later), wife filed a petition for enforcement of property division and for issuance of a qualified domestic relations order. The trial court granted wife's petition giving her a money judgment and entered a QDRO giving wife the percentage of his current monthly pension benefit. Husband appealed. The appellate court confirmed stating that the QDRO was consistent with the terms of the original divorce decree.

2. Clakley v. Richardson, No. 09-04-222-CV (Tex. App.—Beaumont, December 9, 2004, no pet.).

Parties were divorced in 2003. In 2004, wife filed a motion for enforcement, and husband countered with a motion to enter a QDRO. The trial court signed the QDRO submitted by husband. Neither party filed a motion for clarification of the decree. Later, the court signed an order on motion for Clarification. The appellate court found there was no ambiguity in the decree, and the trial court's order altered the property division. By the trial court signing the QDRO which was consistent with the decree and proper in this case, it was at odds with the clarification order. Therefore, the clarification order was reversed, but the QDRO was affirmed.

3. Vaughn v. Vaughn, No. 03-04-00030-CV (Tex. App.—Austin, May 12, 2005, ).

Husband and wife had an agreed divorce decree. In the decree, wife was to receive a portion of husband's retirement accounts. The parties could not agree on the language of the QDRO, and it was not signed until more than one year later after a contested hearing. By the time wife received her benefits under the QDRO, the market had fluctuated significantly, and she lost a large sum of money than if she received her benefits at the time of divorce. Wife complained on appeal the late QDRO should have taken this fact into account and awarded her the same amount that she would have received on the date of divorce. The appellate court affirmed the signing of the QDRO stating that the decree did not indicate wife would be awarded a percentage of the units or a percentage of the market value of the plan as of the date of divorce. The decree also stated that the distributions made to the wife from husband's retirement would be "more particularly defined in a Qualified Domestic Relations Order." The appellate court viewed the QDRO as a clarifying order to the decree. Since the decree was silent on that issue, the QDRO clarified it.

4. In re Marriage of Jones, 154 S.W.3d 225 (Tex. App.—Texarkana, 2005, no pet.).

See Section 9.101 for facts on this case.

**R. Defective Prior Domestic Relations Order: Section 9.104**

If a plan administrator or other person acting in an equivalent capacity determines that a domestic relations order does not satisfy the requirements of a qualified domestic relations order or similar order, the court retains continuing, exclusive jurisdiction over the parties and their property to the extent necessary to render a qualified domestic relations order.

1. Marshall v. Priess, 99 S.W.3d 150 (Tex. App.—Houston [14th Dist.], 2002, no pet.).

After QDROS were signed and court had lost plenary power, husband filed a Motion to Enter Amended Qualified Domestic Relations Order to fix the problems in the first QDRO. Appellate court said the second QDRO signed by the trial court was really just a clarification and not an amendment or modification.

2. Mullins v. Mullins, 202 S.W.3d 869 (Tex. App.—Houston [1st Dist.], 2006, pet. denied).

Husband and wife divorced, and a QDRO was signed by the court. The plan administrator determined the first corrected QDRO did not satisfy their requirements, and the trial court signed a second

corrected QDRO. Wife appealed claiming this second QDRO modified the division of property. The appellate court struck a supplemental clerk's record from the appeal which contained the letter from the plan administrator. Without this letter, there was nothing in the record to show the first QDRO was submitted to and rejected by the plan administrator. Therefore, the trial court did not have jurisdiction without evidence in the record to show the amended QDRO was necessary.

3. *In re N.T.P.*, No. 04-11-00898-CV (Tex. App.—San Antonio, December 31, 2012, no pet. hist.).

Husband sought a clarification of the domestic relations order (DRO) dividing his military retirement. Wife appealed. The appellate court disagreed with wife that there must be a finding the original order was not specific enough to be enforceable by contempt or a finding by the plan administrator that it qualified as a DRO before a clarification order could be entered. There is nothing in the Family Code that requires a finding by the plan administrator as a prerequisite to clarification order.

4. *In re A.E.R.*, No. 2-05-057-CV (Tex. App.—Fort Worth, February 16, 2006, no pet. hist.) (memo. op.).

The trial court signed a domestic relations order (DRO), and husband appealed contending that the court did not have jurisdiction to enter the DRO because it changed the terms of the order. The DRO required husband to name wife as a former spouse beneficiary entitled to benefits under the Armed Forces Survivor Benefit Plan. The appellate court reversed. Although this section allows the correction of a defective QDRO, the decree did not specify that she be named a former spouse beneficiary under the Armed Forces Survivor Benefits Plan; therefore, this was an impermissible modification of the decree of which the trial court did not have jurisdiction.

5. *In re Marriage of Jones*, 154 S.W.3d 225, (Tex. App.—Texarkana, 2005, no pet.).

See Section 9.101 for details on this case.

**S. Amendment of Qualified Domestic Relations Order: Section 9.1045**

- 1) A court that renders a qualified domestic relations order retains continuing, exclusive jurisdiction to amend the order to correct the order or clarify the terms of the order to effectuate the division of property ordered by the court.

- 2) An amended domestic relations order under this section must be submitted to the plan administrator or other person acting in an equivalent capacity to determine whether the amended order satisfies the requirements of a qualified domestic relations order. Section 9.104 applies to a domestic relations order amended under this section.

1. *Gottfried v. Gottfried*, 14-10-00645-CV (Tex. App.—Houston [14th Dist.], 2011, pet. denied).

See Section 9.014 for details on this case. A clarified or amended QDRO may be necessary (1) if the plan administrator rejects the prior QDRO, (2) to correct the prior order, or (3) to clarify the terms of the order to effectuate the division of property ordered by the court. The court concluded that the QDRO was not ambiguous and could be implemented by the plan administrator. Nothing in the record suggested an amended QDRO was necessary.

2. *Vanloh v. Vanloh*, 03-08-00017-CV (Tex. App.—Austin, 2008, no pet.).

The parties divorced in 1996, and the court signed a QDRO two years later awarding wife 50 percent of husband's gross monthly annuity under the Civil Service Retirement System as of the date of the divorce. When husband retired 10 years later, he filed a motion for clarification and requested the issuance of an amended QDRO. The trial court granted husband's motion and amended the QDRO by awarding wife 50 percent of husband's high-3 average salary as of the date of divorce. The court also ordered that any salary adjustments occurring after the date of divorce were not to be included in the wife's share. Wife appealed contending that this was an improper amendment because it changed the actual, substantive division of property in the decree. The appellate court affirmed stating that the amended QDRO just clarified the method of calculating wife's 50 percent share of husband's retirement, but it did not make actual, substantive changes. (The actual language in the order changed from:

“Nancey Ellen Vanloh is entitled to 50% of Sidney W. Vanloh's gross monthly annuity under the Civil Service Retirement System as of June 3, 1996.”

to:

“Nancey Ellen Vanloh is entitled to receive 50 percent of Sidney W. Vanloh's high-3 average salary as of June 3, 1996, which is the date of divorce. The marriage began on

December 19, 1965. Any salary adjustments occurring after the date of divorce (June 3, 1996) but before Sidney W. Vanloh retired are not to be included in computing Nancey Ellen Vanloh's share."

3. McCaig v. McCaig, 12-06-00374-CV (Tex. App.—Tyler, 2007, pet. denied).

The divorce decree awarded to wife one-half of any and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise in husband's retirement plan together with all increases thereof, the proceeds therefrom and any other rights existing by reason of husband's employment. The QDRO restricted the award to the date the parties' divorced. Husband retired eight years later, and wife found out about the retirement two years after that. Wife filed a motion to modify and clarify the QDRO. The trial court denied wife's motion. The appellate court reversed stating that the trial court lacked jurisdiction to change the property division encapsulated in the decree with the QDRO. The QDRO was therefore void, and the trial court should have amended the QDRO to effectuate the division of property ordered in the decree.

4. In re N.T.P., No. 04-11-00898-CV (Tex. App.—San Antonio, December 31, 2012, no pet. hist.).

See Section 9.104 for details about this case. Nothing in this section requires a finding that the original DRO was not enforceable by contempt as a prerequisite to clarification of the order.

**T. Liberal Construction: Section 9.105**

The court shall liberally construe this subchapter to effect payment of retirement benefits that were divided by a previous decree that failed to contain a qualified domestic relations order or similar order or that contained an order that failed to meet the requirements of a qualified domestic relations order or similar order.

**U. Attorney's Fees: Section 9.106**

In a proceeding under this subchapter, the court may award reasonable attorney's fees incurred by a party to a divorce or annulment against the other party to the divorce or annulment. The court may order the attorney's fees to be paid directly to the attorney, who may enforce the order for fees in the attorney's own name by any means available for the enforcement of a judgment for debt.

1. In re the Marriage of Spahn, No. 10-09-00254-CV, No. 06-15572-CV (Tex. App.—Waco, June 16, 2010, no pet.)(memo. op.).

The trial court ordered husband to pay wife's attorney's fees. This was based on a live pleading of a motion to sign a qualified domestic relations order. The appellate court reversed. Although 9.106 allows a court to award attorney's fees, it is limited to proceedings brought under that subchapter. A motion to sign is not included in Chapter 9, Subchapter B.

**V. Procedure for Division of Certain Property Not Divided on Divorce or Annulment: Section 9.201**

- 1) Either former spouse may file a suit as provided by this subchapter to divide property not divided or awarded to a spouse in a final decree of divorce or annulment.
- 2) Except as otherwise provided by this subchapter, the suit is governed by the Texas Rules of Civil Procedure applicable to the filing of an original lawsuit.

1. Brown v. Brown, 236 S.W.3d 343 (Tex. App.—Houston [1st Dist.], 2007, no pet.).

During the divorce trial, the court used the parties' inventories and their testimony to divide the community property. Wife had a 401(k) and a pension plan. The decree of divorce only divided the 401(k). Neither party appealed the decree, but 34 days later, husband sought a post-divorce division of the pension plan, bonuses earned by wife that she failed to disclose, and to increase the amount of the wife's 401(k) he was to receive which he contended was worth more than she disclosed. The trial court awarded 40 percent of the pension plan to husband but decided the rest of the issues were disposed of in the decree. Husband appealed. The appellate court stated that it was husband's burden to prove that the trial court was incorrect when it decided the 401(k) and bonuses were already addressed in the decree. Although husband contended that there was more money than was divided, it was his burden to bring forth that evidence which he did not do. As for the court awarding to husband 40 percent of the pension plan, husband argued that the court did not adequately take into consideration wife's failure to disclose that asset. A single factor does not require the court to allocate that particular asset in favor of one party or another. The division of that asset was within the court's discretion.

2. Wilson v. Wilson, No. 09-07-484-CV (Tex. App.—Beaumont, July 17, 2008, no pet. hist.)(memo. op.).

Husband and wife divorced in 2004. After the divorce, the IRS refunded \$86,282.92 for a tax year in which the parties were married. Husband cashed the check and kept the money. Wife filed a post-divorce division of property suit. The trial court divided the refund 50/50. Wife appealed claiming the division of the tax refund should not be equal because husband engaged in unconscionable conduct by forging her name, cashing the check, and keeping the proceeds. The appellate court reasoned that just like a property division, the trial court should divide property on a post-divorce division in a just and right manner. The trial court's division of property on a post-divorce division suit should be overturned only if the trial court abused its discretion by ordering a division that is manifestly unjust and unfair. The decision was affirmed.

3. Ezirike v. Anthony, No. 01-05-00090-CV (Tex. App.—Houston [1st Dist.], May 17, 2007, no pet. hist.).

When husband and wife divorced, the decree did not divide or even mention husband's retirement benefits. Wife filed a motion for post-divorce division of property of these benefits. The trial court awarded wife a 50 percent share in husband's retirement, and husband appealed. The appellate court affirmed, rejecting all husband's claims of res judicata and collateral estoppel. When the decree was totally silent as to the retirement benefits, a post-divorce division of that property was proper.

4. Kadlecek v. Kadlecek, 93 S.W.3d 903 (Tex. App.—Austin, 2007, no pet.).

Husband and wife divorced after a 23-year marriage. The parties had a detailed settlement agreement which included an award of a portion of husband's civil service retirement benefits to wife. The agreement also contained a residuary clause which provided that all community property or its value not otherwise awarded in the decree was awarded to the spouse in possession or control of the property. The decree made no provision for survivor annuity. Fifteen years after the divorce, wife filed a suit to partition the survivor annuity. Husband argued that the right to elect the survivor annuity was awarded to him in the residuary clause of the decree. An important distinction, the appellate court pointed out, was that there are two types of annuities for civil service members. One is a retirement annuity, and the other is a survivor or former-spouse annuity. According to the Federal Civil Service Retirement Act, 5 U.S.C.A.

Sections 8831-8351 (West 1996 & Supp. 2001), beginning at age 62, a qualified civil service employee is entitled to retirement benefits which provide monthly payments to the retiree during the retiree's lifetime. A former spouse of a deceased employee entitled to retirement benefits is entitled to a survivor annuity, referred to as a former spouse annuity to the extent it is expressly provided for within the divorce decree or other court order. The appellate court noted that the right to elect a civil-service survivor annuity earned during marriage is community property. Further, the appellate court found the language in the divorce decree that awarded wife a percentage of **any** retirement that husband **receives** pivotal. Husband would never receive any survivor annuity payments. Therefore, the portion of the decree awarding wife a percentage of retirement pay that husband receives is insufficient to award her the right to a survivor annuity. The appellate court also found the residuary clause insufficient to award the survivor annuity to husband. He could not have been in control of this property at divorce because he could not elect this option before retirement.

5. In re Notash, 118 S.W.3d 868 (Tex. App.—Texarkana, 2003, no pet.).

Husband and wife married in Iran, moved to Texas for about 5 years, then wife moved back to Iran. The Iranian divorce judgment did not divide any of the community property in Texas. Wife filed an action to divide this property and modify the decree. She also claimed breach of fiduciary duty based on the fact husband had not given her any profits from the community property since she left Texas. The jury awarded her damages, exemplary damages, and divided the community property estate giving 60 percent to wife. The appellate court reversed the judgment that found husband had breached his fiduciary duty and for exemplary damages. The trial court had found the Iranian divorce was not void; therefore, there was no fiduciary duty since they were legally divorced. Also, when property is not divided in a divorce, the ex-spouses become tenants in common. There is no fiduciary duty between cotenants or tenants in common absent an agreement. As for the division of the community property, the appellate court reiterated that the division of this property is on a just and right basis. The trial court did not abuse its discretion in awarding more of the community property to wife.

6. In re Moore, 890 S.W.2d 821 (Tex. App.—Amarillo, 1994, no pet.).

The appellate court held that a residuary clause in the parties' divorce decree that awarded all the community property or its value not otherwise divided

in the decree to be continually owned by the parties in equal, undivided interests effectively disposed of the entire community estate.

**W. Limitations: Section 9.202**

- 1) A suit under this subchapter must be filed before the second anniversary of the date a former spouse unequivocally repudiates the existence of the ownership interest of the other former spouse and communicates that repudiation to the other former spouse.
- 2) The two year limitations period is tolled for the period that a court of this state does not have jurisdiction over the former spouses or over the property.

1. Contreras v. Contreras, 04-08-00607-CV (Tex. App.—San Antonio, 2009, no pet.)(memo. op.).

Wife filed a Motion for Division of Property Not Divided in Divorce alleging she was entitled to receive (1) a percentage of husband's gross monthly annuity retirement benefits, (2) a percentage of any refund of employee contributions to which husband may be entitled and apply for under his retirement plan, and (3) a percentage of the former spouse survivor annuity under his retirement plan. The trial court denied all wife's claims because they were barred by limitations under Section 9.202. The appellate court reversed. There was nothing in the record from the trial court that husband had unequivocally repudiated the existence of wife's ownership interest in his retirement benefits or that he communicated a repudiation to her.

2. Maves v. Steward, 11 S.W.3d 440 (Tex. App.—Houston [14th Dist.], 2000, pet. denied).

The limitations provisions in Section 9.202 do not apply to a partition suit brought under Section 23.001 of the Texas Property Code.

3. Sagester v. Waltrip, 970 S.W.2d 767 (Tex. App.—Austin, 1998, pet. denied).

The parties married in 1954 and divorced in 1975. Wife filed for a partition of the military benefits two years after the divorce. Husband filed a special appearance and a general denial subject to his special appearance. The case was dismissed in 1981 for want of prosecution. In 1997, wife again filed for a partition of the military benefits. Husband filed a general denial and a summary judgment based on the lapse of the limitations period. The trial court granted the summary judgment. The only evidence to the trial court was her 1977 petition, his answer, and the dismissal of that suit. The trial court agreed that husband's general denial was a repudiation of wife's claim. The appellate court

reversed holding that the pleadings from the 1977 lawsuit did not show husband's unequivocal repudiation of wife's claim.

**X. Division of Undivided Assets When Prior Court had Jurisdiction: Section 9.203**

- 1) If a court of this state failed to dispose of property subject to division in a final decree of divorce or annulment even though the court had jurisdiction over the spouses or over the property, the court shall divide the property in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.
- 2) If a final decree of divorce or annulment rendered by a court in another state failed to dispose of property subject to division under the law of that state even though the court had jurisdiction to do so, a court of this state shall apply the law of the other state regarding undivided property as required by Section 1, Article IV, United States Constitution (the full faith and credit clause), and enabling federal statutes.

1. Maddox v. Maddox, 06-10-00055-CV (Tex. App.—Texarkana, 2011, reh. overruled).

Husband and wife divorced after 40 years of marriage. Wife was awarded 50 percent of annual payments from husband's savings plan. The decree also states that husband is awarded all other benefits existing by reason of his past, present, or future employment except the savings plan named above. The appellate court affirmed the trial court's finding that there was no specific distribution or reference to the savings plan's corpus. Therefore, it was an asset that was undivided in the divorce.

2. See cases under Section 9.202.

**Y. Division of Undivided Assets When Prior Court Lacked Jurisdiction: Section 9.204**

- 1) If a court of this state failed to dispose of property subject to division in a final decree of divorce or annulment because the court lacked jurisdiction over a spouse or the property, and if that court subsequently acquires the requisite jurisdiction, that court may divide the property in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

- 2) If a final decree of divorce or annulment rendered by a court in another state failed to dispose of property subject to division under the law of that state because the court lacked jurisdiction over a spouse or the property, and if a court of this state subsequently acquires the requisite jurisdiction over the former spouses or over the property, the court in this state may divide the property in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

**Z. Attorney's Fees: Section 9.205**

In a proceeding to divide property previously undivided in a decree of divorce or annulment as provided by this subchapter, the court may award reasonable attorney's fees. The court may order the attorney's fees to be paid directly to the attorney, who may enforce the order in the attorney's own name by any means available for the enforcement of a judgment for debt.

1. Pletcher v. Goetz, 9 S.W.3d 442 (Tex. App.—Fort Worth, 1999, pet. denied).

Husband filed a post-divorce petition to divided undivided property, specifically, a money market account. After a hearing, the trial court divided the account equally between the parties, but ordered wife to pay \$600 in attorney's fees to husband. The appellate court upheld the award of attorney's fees because it was authorized under this section due to the fact the money market had not been divided in the divorce decree.

2. Wilson v. Wilson, 09-07-484-CV (Tex. App.—Beaumont, 2008, no pet.).

The award of attorney's fees under this section is discretionary with the court. Although wife prevailed on her issues to the court, she is not ENTITLED to attorney's fees.

3. Stirling v. Stirling, 01-10-00329-CV (Tex. App.—Fort Worth, July 28, 2011, no pet.).

Husband and wife's divorce decree awarded to husband all of his retirement and pensions in his name due to his past, present and future employment, including but not limited to Company 1 and Company 2. Wife later filed a motion to divide undivided property because she learned husband had a pension with Company 3. The trial court awarded to wife a portion of husband's retirement in Company 3 along with attorney's fees to wife. The appellate court reversed stating that the decree was unambiguous in awarding all of the Company 3 retirement to husband

due to the language of "including but not limited to." Since wife loses on her issue, the attorney's fees were reversed also.

4. Messina v. Messina, 01-07-00277-CV (Tex. App.—Houston [1st Dist.], 2008, pet. denied).

Wife sued husband in a post-divorce proceeding requesting a division of undivided assets but nonsuited her case on the day of trial. Husband had a pending motion for sanctions and attorney's fees. The court dismissed wife's claims, declined the motion for sanctions, but awarded husband attorney's fees. The appellate court held that the trial court had statutory authority to award attorney's fees to husband. Citing Section 9.205, the court held that since wife did not prevail on her claim, the trial court properly exercised its discretion in awarding attorney's fees to husband.

**AA. Pre-Decree Designation of Ex-Spouse as Beneficiary of Life Insurance: Section 9.301**

- 1) If a decree of divorce or annulment is rendered after an insured has designated the insured's spouse as a beneficiary under a life insurance policy in force at the time of rendition, a provision in the policy in favor of the insured's former spouse is not effective unless:
  - a) the decree designates the insured's former spouse as the beneficiary;
  - b) the insured redesignates the former spouse as the beneficiary after rendition of the decree; or
  - c) the former spouse is designated to receive the proceeds in trust for, on behalf of, or for the benefit of a child or a dependent of either former spouse.
- 2) If a designation is not effective under Subsection (1), the proceeds of the policy are payable to the named alternative beneficiary or, if there is not a named alternative beneficiary, to the estate of the insured.
- 3) An insurer who pays the proceeds of a life insurance policy issued by the insurer to the beneficiary under a designation that is not effective under Subsection (1) is liable for payment of the proceeds to the person or estate provided by Subsection (2) only if:
  - a) before payment of the proceeds to the designated beneficiary, the insurer receives written notice at the home office of the insurer from an interested



person that the designation is not effective under Subsection (1); and

- b) the insurer has not interpleaded the proceeds into the registry of a court of competent jurisdiction in accordance with the Texas Rules of Civil Procedure.

1. Gray v. Nash, No. 2-07-351-CV (Tex. App.—Fort Worth, June 19, 2008, pet. denied).

In the divorce decree, husband was required to purchase, as additional child support, a life insurance policy with a death benefit of \$60,000 naming wife as irrevocable beneficiary as trustee for the benefit of the parties' child. Husband purchased a life insurance policy with a \$500,000 death benefit and named the daughter as the beneficiary. A year later, husband remarried and changed the beneficiary of the policy to provide that \$60,000 would be payable to his first wife and the balance of the policy payable to his current wife. Thereafter, husband filed a suit to modify the parent-child relationship and was awarded primary conservatorship. The order found the husband current in all child support obligations and terminated his duty to pay child support. Five years later, husband died. His current wife filed a claim to receive the full \$500,000, and the insurance company filed an interpleader depositing into the registry of the court the \$60,000 plus interest designated to be paid to the first wife. The first wife and current wife each filed a lawsuit seeking payment of the \$60,000 plus interest. The trial court awarded the money to the current wife, and the first wife appealed. The appellate court reversed and rendered giving the money to the first wife. The legislature specified that only divorce decrees and annulments would nullify beneficiary designations. Orders modifying conservatorship is not included in that list and must be excluded for purpose. Moreover, the legislature limited 9.301's nullifying effect to designations made before the decree of annulment when the spouses are still married. That is not the facts of this case. Therefore, this statute does not apply.

2. Spiegel v. Klu Endowment Fund, 228 S.W.3d 237 (Tex. App.—Austin, 2007, pet. denied).

Husband and wife attended a mediation regarding their divorce. They settled their controversies as set forth in a Mediated Settlement Agreement which awarded to wife her life insurance policy. Wife died before the divorce decree was entered. Husband sought payment of the life insurance proceeds as beneficiary of wife's policy. The appellate court affirmed the trial court's decision that revoked the wife's beneficiary designation. The court held that the parties' MSA contained language indicating their intent to

immediately and completely sever their financial relationship. The court also held that the MSA contained a broad release by each party as to any future claims or demands against the other party arising from or related to the events and transactions that were the subject matter of the pending divorce.

3. Comacho v. Montes, No. 07-05-0003-CV (Tex. App.—Amarillo, September 15, 2006, no pet.).

Husband and wife divorced, and husband was awarded the life insurance policy insuring his life. Ex-wife continued to make premium payments on the policy. Husband remarried and subsequently died, but he never changed the beneficiary designation from his ex-wife. Ex-wife sued for policy benefits. The court held that pursuant to this section, the divorce decree terminated her beneficiary designation, and since she was not redesignated as a beneficiary after the divorce by the husband, she was not entitled to the proceeds.

**BB. Pre-Decree Designation of Ex-Spouse as Beneficiary in Retirement Benefits and Other Financial Plans: Section 9.302**

- 1) If a decree of divorce or annulment is rendered after a spouse, acting in the capacity of a participant, annuitant, or account holder, has designated the other spouse as a beneficiary under an individual retirement account, employee stock option plan, stock option, or other form of savings, bonus, profit-sharing, or other employer plan or financial plan of an employee or a participant in force at the time of rendition, the designating provision in the plan in favor of the other former spouse is not effective unless:
  - a) the decree designates the other former spouse as the beneficiary;
  - b) the designating former spouse redesignates the other former spouse as the beneficiary after rendition of the decree; or
  - c) the other former spouse is designated to receive the proceeds or benefits in trust for on behalf of, or for the benefit of a child or dependent of either former spouse.
- 2) If a designation is not effective under Subsection (1), the benefits or proceeds are payable to the named alternative beneficiary or, if there is not a named alternative beneficiary, to the designating former spouse.

- 3) A business entity, employer, pension trust, insurer, financial institution, or other person obligated to pay retirement benefits or proceeds of a financial plan covered by this section who pays the benefits or proceeds to the beneficiary under a designation of the other former spouse that is not effective under Subsection (1) is liable for payment of the benefits or proceeds to the person provided by Subsection (2) only if:
  - a) before payment of the benefits or proceeds to the designated beneficiary, the payor receives written notice at the home office of principal office of the payor from an interested person that the designation of the beneficiary or fiduciary is not effective under Subsection (1); and
  - b) the payor has not interpleaded the benefits or proceeds into the registry of a court of competent jurisdiction in accordance with the Texas Rules of Civil Procedure.
- 4) This section does not affect the right of a former spouse to assert an ownership interest in an undivided pension, retirement, annuity, or other financial plan described by this section as provided by this subchapter.
- 5) This section does not apply to the disposition of a beneficial interest in a retirement benefit or other financial plan of a public retirement system as defined by Section 801.001, Government Code.

1. *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 555 U.S. 285, 129 S.Ct. 865, 172 L.Ed. 262 (U.S. Sup. Ct. 2009).

Husband had designated his wife as plan beneficiary. Husband and wife divorced, and wife signed a waiver of interest in husband's retirement. Husband failed to change his plan beneficiary from his ex-wife, though. The plan administrator paid the benefits to ex-wife. The Supreme Court held that this was a proper distribution. They found that under the terms of the savings and investment plan, the former spouse was the beneficiary. The plan provided an easy way for husband to change the designation, but he did not do so. The plan also provided a way for ex-wife to disclaim an interest in the plan, but she did not purport to follow it. The plan administrator therefore did exactly what the statute required. The documents controlled, and they named the former wife as the beneficiary. (This case by implication overrules *Keen*

*v. Weaver*, 121 S.W.3d 721 (Tex. 2003) which held that ERISA did not preclude a pension plan beneficiary from waiving an interest in the plan.)

2. *Olmstead v. Napoli*, No. 14-12-00149-CV (Tex. App.—Houston [14th Dist.], September 6, 2012, no pet.).

Husband designated wife as beneficiary on an IRA he purchased prior to marriage. The parties later married and divorced, and the decree awarded the IRA and its proceeds to husband. Husband later died, and ex-wife sought the proceeds as beneficiary. The court held that although the husband never changed the beneficiary designation, the parties' divorce decree contained language whereby the wife forfeited all her rights to the IRA. The court held that pursuant to this section, the decree extinguished the wife's rights as an IRA beneficiary.

## **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.

### **I. 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 [14<sup>th</sup> 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:

1) The Movant is not required to prove that the underlying order is enforceable by contempt

to obtain other appropriate enforcement remedies.

- 2) A finding that the respondent is not in contempt does not preclude the court from ordering any other enforcement remedy, including rendering a money judgment, posting a bond or other security, withholding income or ordering make up visitation.

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

## **II. 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:

- 1) 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:
  - a) the child becomes an adult; or
  - b) on which the child support obligation terminates under the order or by operation of law.
- 2) 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 10<sup>th</sup> anniversary after the date:
  - a) The child becomes an adult; or
  - b) On which the child support obligation terminates under the child support order 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.

### III. 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 [14<sup>th</sup> 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 325<sup>th</sup> 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
4/1/2012	\$1,200	\$600	4/15/12	\$600
5/1/2012	\$1,200	\$00	N/A	\$1,800
6/1/2012	\$1,200	\$800	6/23/12	\$2,200
7/1/2012	\$1,200	\$300	7/4/12	\$3,100
<b>TOTAL</b>	<b>\$4,800</b>	<b>\$1,700</b>		<b>\$3,100</b>

In *In re Luebe*, No. 01-09-00908-CV, 2010 WL 1546961 (Tex. App.—Houston [1<sup>st</sup> Dist.] April 2, 2010, no pet. h.), 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:

1. 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, 2014, 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 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:

- 1) 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.
- 2) A motion for enforcement does not constitute an election of remedies that limits or precludes:
  - a) the use of any other civil or criminal proceeding to enforce a final order; or
  - b) 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:

- 1) 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.
- 2) If the motion for enforcement does not request contempt, the court shall set the motion for hearing on the request of a party.
- 3) 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 (3) 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 10<sup>th</sup> 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 20<sup>th</sup> 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 20<sup>th</sup> 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 required;
  - 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 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).

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).

#### **IV. 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, 2012."). 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 [14<sup>th</sup> 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 help alleviate conditions that made the respondent violate 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 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 [1<sup>st</sup> 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 [14<sup>th</sup> 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, 81<sup>st</sup> 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 §157.313, 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 the statute:

- 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, a claim for negligence or personal injury,

or an insurance settlement or award for the claim, due to or owned by the obligor.

*Subsection (a-1) below is effective for SAPCR's relating to a court order establishing paternity or the obligation to pay child support filed on or after September 1, 2007, or for proceedings to modify or enforce child support commenced on or after September 1, 2007. In all other instances, the law is effective on September 1, 2007.*

(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 §§157.317, 157.318.

*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 15<sup>th</sup> day nor later than the 21<sup>st</sup> 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 [14<sup>th</sup> 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 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:

- a) the obligor owes child support in an amount equal to or greater than the total support due for three months under a support order;

- b) has been provided an opportunity to make payments toward the overdue child support under a court-ordered or agreed repayment schedule; and
- c) 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:

- a) the name and, if known, social security number of the individual;
- b) the name of the licensing authority that issued a license the individual is believed to hold; and
- c) the amount of arrearages owed under the child support order or the facts associated with the individual's failure to comply with:
  - 1) a subpoena; or
  - 2) 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 20<sup>th</sup> day after the date of service on the obligor. Tex. Fam. Code §232.007(a). The license suspension shall be suspended 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.

your motion to enforce does not succeed, or fail, based on whether or not contempt is granted. Other remedies are usually available.

### **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 [1<sup>st</sup> 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).

## **V. 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 [1<sup>st</sup> Dist.] 1980, no writ).

## **VI. 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

