SECURING PROPERTY AT POINT BLANK

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Texas Family Law Council (Member 2005 to 2010, 2016 to 2019; Secretary 2019 to 2020, Treasurer, 2020 to 2021)
Member, Texas State Bar Family Law Section Legislative Committee (2000 to present)
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Current and Past President, Panhandle Family Law Association
Member, Texas Board of Legal Specialization Family Law Paralegal Committee (2011 to 2016)
Member, Texas State Bar Family Law Section Checklist Committee (2002 to 2003; 2009 to 2010)
Member, Supreme Court of Texas Ancillary Proceedings Task Force (2008 to 2011)
Member, State Bar District 13 Grievance Committee (2013 to 2016)
Co-Course Director, Advanced Family Law Course (2020)
Course Director, Marriage Dissolution Institute (2018)
Co-Course Director, New Frontiers in Marital Property Law (2010)
Course Director, Family Law Boot Camp, San Antonio, Texas (2008)
Assistant Course Director, Texas Academy of Family Law Specialists 18th Annual Trial Institute (2004)
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Dan Price Award, Texas Family Law Section (2019)
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Panhandle Family Law Association Leadership Award (2009)
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Graduate, 40-Hour Basic Mediation Course, Center for Public Policy Dispute Resolution at The University of Texas School of Law (2008)

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First Lieutenant, Air Defense Artillery, United States Army (1986 to 1990)
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I. I WANT MY MONEY

> **Brewster:** You're a very bad man, Walker, a very destructive man! Why do you run around doing things like this?
> **Walker:** I want my money. I want my $93,000.
> **Brewster:** $93,000? You threaten a financial structure like this for $93,000? No, Walker, I don't believe you. What do you really want?
> **Walker:** I - I really want my money.
> **Brewster:** Well, I'm not going to give you any money and nobody else is. Don't you understand that?
> **Walker:** Who runs things?
> **Brewster:** Carter and I run things. I run things.
> **Walker:** What about Fairfax? Will he pay me?
> **Brewster:** Fairfax is a man who signs checks.
> **Walker:** No, cash.
> **Brewster:** Fairfax isn't going to give you anything. He's finished. Fairfax is dead. He just doesn't know it yet.
> **Walker:** Somebody's got to pay.

From the movie "Point Blank" (1967) with actors Carroll O'Connor as Brewster and Lee Marvin as Walker.

II. ENFORCEMENT IS EVERYTHING

Whether by settlement or trial, the family law practitioner's goal in a divorce suit is to obtain the best property division possible and, if applicable, the best spousal maintenance order possible. Attorneys are tempted to relax once the settlement is negotiated or the ruling made. In the end, however, the client's fate is tied not to the award but to the receipt of what is awarded. Ultimately, the client does not care what the decree says; the client wants his property. The client wants her spousal maintenance payments paid on time and in full. Anything less than that frustrates the client, as the client faces spending even more money or being cheated. If the attorney cannot deliver the promised award or maintenance payments, what was the attorney good for? Enforcement is everything. "Somebody's got to pay."

Enforcement begins with how the attorney negotiates for the client and what the attorney requests from the court in trial. Enforcement continues in the drafting of the decree and closing documents, drafting to make it unlikely the opposing party will try to avoid compliance and to permit the attorney to force the opposing party to comply if necessary. This enforcement includes, when possible, securing the property awarded to make its collection easier. Enforcement ends with post-divorce motions and orders.

III. DRAFTING SETTLEMENT DOCUMENTS AND THE FINAL DECREE OF DIVORCE

A. An Enforceable Order Answers Five (Sometimes Six) Basic Questions

The concept is simple: when drafting both settlement documents and the final decree of divorce, use enforceable language. Besides having command words (*e.g.*, "IT IS ORDERED AND DECREED that"), enforceable language is specific. It includes all the details and leaves nothing to the imagination. Enforceable language answers the questions who, what, when, where, when, how, and sometimes why.

When the order answers these questions, it is more likely to be enforceable by contempt. *See* "Contempt" *infra*. More than just bringing the threat of contempt as a punishment, an enforceable order serves as a good instruction manual, preventing confusion and organizing the process of partitioning the property of the parties.

1. Who?

The order identifies who gets the asset. It identifies the name of each person or entity required to take an action to transfer the asset. The order uses the proper name of any third party and, if necessary, for identification purposes, the address of the third party.

2. What?

The order clearly states what is to be done. In the process of answering "what," the order may also answer "how' and "why." In some cases, the differences between the answers to these three questions are hard to see. Just make sure you answer them.

3. Where?

The enforceable order states the address of where each action necessary to transfer the asset will take place. If a document is to be executed, where will it be executed? If the document is to be delivered after it is executed, to where will it be delivered? When a party is getting personal property from the possession of the other, where will the property be surrendered?

4. When?

The order states when each action will occur. Critically, in an enforceable order, the date and time each action will take place fall after the date the court signs the order.

5. How?

If an asset will be transferred to a spouse, how is that transfer supposed to take place? The enforceable order describes each detail. If a mutual friend or police officer will attend a property transfer, the order will specify how that person will be selected. If applicable, the order will also state who will pay for the service and when the payment is due. If an individual retirement account (IRA) is being transferred, how does that take place? Which document must one party sign and deliver to the other to transfer funds from that IRA? If real estate is being transferred, which documents do each party need to sign?

6. Why?

In some instances, particularly if an enforceable order is difficult to draft, it helps to include an explanation of the purpose behind that part of the order. This explanation can help if a party needs to return to the court to ask it to clarify its order to make it enforceable.

B. Prepare the Order before Being Awarded the Assets

If she wants to win, a coach needs to have a game plan and to train the team before the game starts. The wise practitioner similarly does not wait until the time of decision to prepare; she researches and drafts the language of the order before going into settlement negotiations or into court. The wise practitioner:

- gathers the information necessary to identify and secure each asset the client wants or could be awarded and
- brings proposed decretal language to mediation and collaborative law settlement conferences to insert in the written agreements and brings that language (in the form of exhibits) to contested final hearings and trials.

1. Gather Information to Identify Assets

An excellent tool for gathering and organizing the information necessary to identify and secure each asset your clients wants is Form 7-1, "Inventory and Appraisement of [name of party]," found in the Texas Family Law Practice Manual (TFLPM), also known as "the Formbook," published by the Texas State Bar. This inventory form is far too detailed to be useful as a trial exhibit. It works great, however, to collect the information you need to properly identify and secure each awarded asset and to draft enforceable language in the decree to get each of those assets into your client's possession. For example, the real property and mineral interest sections ask for the legal description of each property. The securities section asks for the type of security and certificate numbers. The retirement benefits section demands, among other details, the name and address of the plan administrator, the starting date of creditable service, payee of survivor benefits, and balance of loan against plan. All this information is important for understanding the value and risks of each asset, for drafting the decree, and, if applicable, for securing the receipt of the asset from the other party.

Start by giving Form 7-1 to your client early in the case. Form 7-2 contains instructions for the preparation of the inventory and appraisement, making it easy for you to give the homework assignment. Push your client to produce documents to support the information he or she includes in Form 7-1. That effort will save you time and your client money when you receive a production request, try to persuade the other side in negotiations, and prepare exhibits for trial.

Use written discovery requests to fill in the information your client does not have. It is usually smart to send those requests to the opposing party first. Don't ask for what you already have. Unnecessary documents distract you and your staff and make your file unwieldy. Custom-designed interrogatories and requests for production home in on the specific details you need.

Once you receive the written discovery responses, sit down and read them. Did the other side resist discovery? If so, can you compel it to respond? Should you compel it to respond? From the other side's responses, update your client's inventory and appraisement. Identify and set aside key documents for use in negotiations or court. Consider deposing the spouse. The deposition of the opposing party can be useful as well to learn or test information.

Don't neglect looking to other sources for information. Send discovery requests to third parties if there are gaps in what you know or doubts about the accuracy of information. Note that to obtain discovery of a record from a financial institution relating to a customer of the institution, the requesting party must comply with Texas Finance Code section 59.006. That section is generally the exclusive method to obtain that information. Tex. Fin. Code § 59.006(a). Research can pay off as well. Some information is publicly available, such as legal descriptions of real property, if you know where to look. For example, Zillow.com and appraisal district records can help value real estate in the absence of a formal appraisal. Kelly Blue Book, www.kbb.com, can do the same for vehicles.

2. Plan How to Transfer Each Asset

After identifying the assets and before the collaborative law settlement conference, mediation, or trial (*i.e.,* the time of decision), determine what is required to give your client possession or control of them.

- Start by making a checklist of the property, then write down the necessary steps to transfer each asset to your client.
- Proceed to draft the language you want to see in the decree to award your client the assets your client wants or may receive. Use the information you gathered to describe each asset with as much detail as possible.
- Then draft the particular language necessary to transfer those assets to your client if the assets are under the control or in the name of the spouse. The latter should include the answers to the questions discussed above—who, what, where, when, how, and (sometimes) why—needed to make the transfer language enforceable by contempt.
- If time permits, draft the whole collaborative law agreement or mediated settlement before the negotiation begin and draft the whole decree before trial.

This drafting may seem tedious and possibly a waste of your time, but it serves valuable purposes. First, it concentrates your attention on the case, so you frankly are better prepared when you need to be. Too often attorneys fail to prepare for settlement conferences and mediation, times of decision when the client's case can be won or lost just as surely as at a contested final hearing. Drafting forces you to think about each detail of your case while there is still time for you to correct shortcomings. Do you have all the information you need? Can you get any missing information you need in time or should you try to delay the collaborative law settlement conference, mediation, or trial? Obviously, the earlier you do this exercise, the more time you have to make up any information deficits without delaying or jeopardizing your case.

Second, the drafting helps you analyze your case. You may realize the asset or payment obligation your client wants from the spouse cannot be adequately secured. The obstacle makes a big difference in how valuable that asset should be to your client. Which assets can be listed in the "Confirmation of Separate Property" portion of the decree and which will have to be included with the rest of the community property because your client can't meet his burden of proof?

Third, the drafting gives you the opportunity to have your specific language be the language in the binding document, *i.e.*, the collaborative law agreement, the mediated settlement agreement, or the final decree of divorce. The drafter of the language has a distinct advantage in that the drafter has thought through each issue and the various options. The other side is more apt to pick and choose drafting battles and let some issues go without a fight, giving the drafter the potential to rack up many victories in the drafting, even if most are small victories. And you, the drafter, are not making up this language at the last minute under the pressure of negotiation or trial, when you would be more likely to make a mistake. You will have proofread and tested this language before proposing it at the time of decision.

Finally, this preparation makes the drafting of the settlement document go faster and speeds up the entry of the final decree. If the language is accepted at the time of decision, the drafting of the decree or retirement division order becomes easier as parts of each order are not just already drafted but drafted in a manner both parties have (or must) approve.

The following is a non-exclusive list of common categories of assets and steps to take to transfer them.

i. Real Property

The identification of the real property needs to include the legal description. The street address is helpful to include too. The party not receiving the asset usually should execute, have acknowledged, and deliver to the spouse a special warranty deed. The warranty in a deed may be limited by words in the clause of warranty, as where the vendor warrants title against all persons claiming title "by, through, or under him, but not otherwise." *Owen v. Yocum*, 341 S.W.2d 709, 710 (Tex. Civ. App.−Fort Worth 1960, no writ).

If both parties are on the mortgage, the party receiving the property in turn should execute, have acknowledged, and deliver to the grantor a deed of trust to secure assumption. The transfer of the asset does not relieve the transferor of responsibility for payment of the debt. A deed of trust to secure assumption allows the transferor to foreclose on the property and pay the debt.

TFLPM Chapter 24 has forms for a special warranty deed and a deed of trust to secure assumption. Consider attaching them to the decree as exhibits with an enforceable order commanding the other party to sign them in the form of each exhibit and to deliver each within a set time after the date of divorce. It is the only way to hold the other party in contempt if he fails to sign and return these closing documents. This advice applies to all documents you need the other side to sign in order for your client to gain full ownership of an asset awarded to her.

ii. Mineral and Royalty Interests

Mineral interests and royalty interests are transferred by deed. TFLPM Form 24-11 is a mineral deed, and Form 24-12 is a royalty deed. Oil companies often require a change in ownership to be documented in a division order, which the company provides. Check with the company well in advance of the time of decision so you can have that form ready for execution.

iii. Household Furnishings, Appliances, and Equipment

Attempt to transfer these assets before the date of divorce all the ordinary personal property that must change hands. Come to the time of decision with a plan for doing just that. Where and when (date and start time) will the transfer occur? Who will witness? Will law enforcement be present? Who will do the heavy lifting? Who will move the items once they are loaded up? Where will the property go? Who will pay any costs involved in transportation and storage and by what date?

Don't let your client's house turn into a storage facility for the ex-spouse's property. How long will the transferee have to get her property from the transferor? Will the property be awarded to the transferor if the transferee fails to collect it within a set time period?

As a backup if some property does not get moved before the date of divorce, always include an exchange date that occurs after the date of divorce. Include the same details. If the property cannot be transferred before the divorce, this approach will be the only option.

If the property is not wholly transferred before the date of divorce, the decree must include a thorough, detailed description of all property awarded to the party not in present possession of it. Any property omitted from that list will be awarded to the party in possession of it. Ensure your client comes to the time of decision, the settlement conference or trial, with an exhibit listing exactly what she wants. Don't try to come up with that list at the tail end of an eight-hour mediation or in response to a question while in the witness stand.

If the transferee is unable or unwilling to take quick possession of property awarded to him, consider an order moving the assets to a storage unit acquired in the transferee's name so the exchange of property is not put off.

iv. Financial Accounts

As soon as practicable after the divorce suit is filed, negotiate with the other party to close joint accounts or transfer them into one party's sole name. If your client won't, contact each financial institution to obtain the necessary forms. If for some reason joint accounts still exist at the time of divorce or if one party is being awarded an account, such as a bank account, a brokerage account, or an IRA, that is solely in the name of the other spouse, attach these filled out forms to the decree as exhibits and make reference to them in an order requiring a spouse to sign them and deliver them to the other party by a future date certain.

Be wary of using catchall language awarding the other side all accounts in that party's sole name if you and your client are uncertain the other party has disclosed all financial assets. If you later discover a hidden account in the ex-spouse's sole name that existed at the time of divorce, your client will be unable to seek its division (*see* "Property Not Previously Divided" *infra*) if your expansive language awarded the stash to the ex-spouse.

v. Spouse's Employee Retirement Benefits

To transfer all or some of the spouse's employee retirement benefits to your client, you need the proper name of the retirement plan. That proper name must appear in the decree and the order dividing the retirement benefits. It should also appear in the mediated settlement agreement or collaborative law settlement agreement.

Know what the plan requires and permits before the time of decision and what the particular circumstances of these parties are. Is there a method for valuing the retirement benefits? What portion of the benefits are vested? Is there a loan against the participant's benefits? When could the alternate payee receive her portion if it were awarded to her? Is that date dependent on when the participant retires? Is it too late for the plan participant to elect the joint and survivor annuity option under the defined benefit retirement plan, thereby making your alternate payee client's receipt of a share of the benefits over her entire lifetime uncertain? If it is not too late, what orders will be necessary to make the plan participant select that joint and survivor annuity option? Does the plan administrator charge a fee for reviewing each retirement division order and can that fee be shared with the alternate payee?

The answers to these questions help draft the retirement division order, such as a qualified domestic relations order (QDRO), and the drafting of that order triggers the asking of appropriate questions. It makes sense therefore to draft the order before the time of decision so you will know what questions to ask and will have gotten the answers before the time you need them. The draft will alert you not only to the questions that need to be answered but also to the information you are missing. Contact the plan administrator early in the suit to get the information you need about the plan. Use discovery requests to get the information you need from the other party, if that party is the participant If you rely on an outside source to prepare your QDROs, consult that source early on to discover what questions you should be asking.

Try to pre-qualify the QDRO before the time of decision so you know you are on firm ground when you go into negotiation or trial. For more discussion of retirement division orders, see "Post-Divorce Qualified Domestic Relations Order" below.

vi. Life Insurance Policies

If your client will receive a life insurance policy owned by the spouse, contact the life insurance

company early on to get the forms the company requires for the transfer. Plan for how the premiums will be paid between the date of settlement or rendition by the court and the date the policy is actually transferred.

If a life insurance policy is to be used to guarantee an obligation to pay child support, spousal maintenance, alimony, or part of the property settlement, carefully consider how that should read. Does the company have a particular form or language it requires? If not, consider whether a permanent injunction should be included in the decree to enjoin the order from using the policy in a contrary manner. The injunction should state that it shall be binding on the owner of the party on his or her agents, servants, employees, and attorneys; "and on those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise." Send the decree to the life insurance company's registered agent by certified mail to put it on notice.

If the former spouse is to remain as a beneficiary of an insurance policy on the life of the spouse, be sure to comply with the provisions of the Family Code discussed in "Beneficiary of Life Insurance" below, if they apply to the policy.

vii. Publicly Traded Stocks, Bond, and Securities

If your client may receive publicly traded stocks, bond, and securities not held in brokerage account, use the proper name in which the security is registered. Unless your client's name if the only one on the security, you will need the spouse holding title to it to sign the back of the stock certificate or, if the transferring spouse does not possess the actual certificate, sign a stock power. (*See* TFLPM Form 24-17 "Irrevocable [Stock/Bond] Power") Normally, the signature must occur in the presence of a person who can guarantee the signature, such as a bank or trust officer. A notary public is insufficient.

viii. Motor Vehicles

Know the year, make, and model and get the vehicle identification number. Include an enforceable order that the party transferring title must sign the title and deliver it to the receiving party. If the parties do not have the title, which would be the case if they have not paid off a loan secured by the vehicle, require the transferring party to sign and deliver a Texas Department of Motor Vehicles Form VTR-271, Limited Power of Attorney for Eligible Motor Vehicle Transactions, along with a Texas Department of Motor Vehicles Form VTR-40 Odometer Disclosure Statement. You must also require the transferring party to provide a photocopy of his or her photo identification.

ix. Business Interests

If a party is being awarded a sole proprietorship, be sure to clearly identify each of the physical, intellectual, and financial assets of the business. Ensure this award does not conflict with other provisions in the agreement or decree. For example, do not award a party all equipment in that party's possession if some of that equipment is a part of the sole proprietorship being awarded to the other party.

If a party is being awarded a corporation, the agreement and decree need to state that the party is being awarded the stock in the corporation. The corporation needs to be identified correctly. Follow the procedures discussed above for the transfer of shares of stock. If applicable, include provisions in the agreement and decree requiring the transferee to resign as an officer or director.

If the party is being awarded a limited liability company, the party should be awarded the membership interest in the properly identified company. TFLPM Form 24-16, Assignment of Interest, can be adapted to convey this interest. Again, to ensure the opposing party will execute the document, attach it to the decree and reference it in an enforceable order that requires the opposing party to sign and deliver it. You can use this same form if the spouses are partners in a business and one is transferring all of his interest to the other.

x. Promise to Pay in the Future

If one party is promising to pay the other money in the future, try to have that money from an existing asset and order that the funds be paid from that asset. For example, if the husband owes the wife $50,000, but the wife was willing to wait six months for a $100,000 certificate of deposit (CD) awarded to the husband to mature, use an enforceable order to require the husband to pay the wife her money from the funds in that CD. The court may 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 if it is a sum of money in existence at the time the decree was rendered. *See* Tex. Fam. Code § 9.012(b)(1).

If there is no pile of money conveniently in existence at the time of divorce to fulfil a promise to pay money in the future, a promissory note will be needed. TFLPM Form 24-6, Real Estate Lien Note, can be used or adapted for this purpose. A promissory note needs to:

- be in writing
- be dated
- contain the name and address, including the county, of the maker of the note
- contain the name of the payee

- contain the address, including the county, where the payments must be made
- state the principal amount of the debt
- state the interest rate on the unpaid balance when the note is not in default
- state the interest rate on the unpaid balance when the note is in default and include a usury savings clause
- contain payment terms (*e.g.*, lump sum due on a specified date, monthly payments due on the fifth day of each month for a set number of months)
- describe the security for the payment (*e.g.*, secured by a deed of trust with the note containing the legal description of the real property)
- describe what will happen if the maker defaults on the note
- be signed by the maker of the note.

It is critical to draft or at least think through this document before the time of decision. If the opposing party is to sign a promissory note, be sure to address two interest rates in the settlement documents or at the contested final hearing. The first interest rate is the interest that accrues on the unpaid principal balance when the payor is meeting his obligations under the note. The second, and often overlooked, interest rate applies if the payor is in default. The payee wants the second interest rate to be significantly higher than the first rate. A hefty interest rate if the payor is in default may be all the incentive the payor needs to pay in full, on time. If a mediated settlement agreement specifies only one interest rate, that likely will the same rate if the payor is in default.

A common example of a promise to pay in the future involves an owelty lien. Often the homestead is the largest asset of the parties, leaving one side owing the other a share in the home's equity. An owelty of partition against the entirety of a homestead of a family or of a single adult person may be imposed by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding. Tex. Const. art. XVI, § 50; Tex. Prop. Code § 41.001(b)(4). When the equity in a homestead is divided, the court may impose an owelty lien to ensure the debt is paid. A divorce decree by which the ex-husband agrees to pay the ex-wife a sum of money in consideration for the conveyance of her interest in real property creates an equitable vendor's lien for the ex-wife. *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882 (Tex. 1984); *Perry v. Perry*, 512 S.W.3d 523, 529 (Tex. App.—Houston [1st Dist.] 2016, no pet.). Although the ex-wife no longer has title to the property, she can use the lien as an encumbrance against the property to satisfy the debt. *Perry*, 512 S.W.3d at 529. If the ex-husband fails to satisfy the debt after the lien matures, the ex-wife may foreclose on and force the sale of the property. *McGoodwin*, 671 S.W.2d at 883; *Perry*, 512 S.W.3d at 529.

If a promissory note or real estate documents need to be executed, attach the drafts of the documents to the decree. Order the party to execute, have acknowledged (if needed), and deliver the documents in the form of those exhibits. Include a deadline that is after the date of divorce. Include a place where the documents must be delivered. In this way, the court can hold the party in contempt if it does not sign as ordered.

If compliance is a serious question, bring the promissory note and real estate documents to the prove-up hearing, along with a notary public. Ask the judge to order the party to sign the documents in the courtroom in front of the judge. Be sure to have presented opposing counsel with drafts of the documents beforehand.

IV. SIMPLE TECHNIQUES TO ENSURE YOUR CLIENT GETS THE PROPERTY AWARDED

While contempt and other enforcement remedies are essential, the wise practitioner looks for ways to secure the property division with minimal reliance on a motion for enforcement or breach of contract suit. These ways require an awareness of the attorney to the need to not just get the property division but to ensure the client receives the assets or that the opposing party pays certain debts. These techniques sometimes call for a bit of creativity. Not all these methods are available in each case, but when they are, they can save your client potential post-divorce litigation.

A. Hold Up Finalizing the Divorce

The most common technique to avoid an enforcement issue is to ensure before the court signs the decree that the client receives or is guaranteed to receive physical possession of the property or the transfer of promised funds. Parties and attorneys sometimes assume an exchange will go smoothly after the decree is entered, only to be disappointed. Sometimes a party refuses to cooperate; sometimes the language of the decree, such as the description of an asset, turns out to be ambiguous or unclear. The same asset may have been awarded to each party and no one caught the mistake. A delay in finishing the suit until these exchanges are done will smoke out any problem while the parties or the court can best fix it.

Consider the following ideas:

- Don't sign the decree until the property is exchanged.

- Have a neutral, trusted third-party hold the property until the suit is finalized.
- If a party must transfer funds to the spouse, have the party execute the transfer documents before the suit is finalized and give the executed documents to the party's attorney to deliver once the judge signs the decree. The attorney confirms to opposing counsel that the attorney has the executed documents so the final hearing can proceed.
- If a party agrees to pay money to the spouse on the date of divorce, ensure the paying party has delivered a certified check to his attorney or has deposited those funds into his attorney's trust account before the court signs the decree. The attorney notifies opposing counsel that the attorney has the funds so the final hearing can proceed.

These solutions can delay the final hearing, but that delay can be worth it.

B. Use a Motion for New Trial

Instead of holding up the final hearing, the parties can finalize the divorce, but if there are obstacles to the transfer of property or the execution of documents, either can file a motion for new trial before the 30th day after the date the court signs the decree. With the filing of the motion for new trial, the court's plenary power is extended, and the court can be far more creative and effective in addressing the issues.[1] While it maintains its plenary power, the court need not worry whether it is modifying or clarifying its property division.

The filing of a motion for new trial also proves useful if a party needs some more time to prepare a domestic relations order for submission to the court and does not want to file a post-divorce petition for the court to sign the domestic relations order, particularly if the other party will be difficult to serve with process.[2]

In either scenario, alert opposing counsel to the purpose of the filing of the motion for new trial before filing it. Opposing counsel should not fear the movant is wanting to retry the whole case.

C. Conditional Awards

Although seeming in conflict with the court's duty to divide the community estate, another way to give a party sufficient incentive to meet her obligations is to conditionally award the property to the party, leaving the other party with an ownership interest in the property until then. The wife is awarded the Ford F-150 pickup upon her refinancing within the 90 days of the date of divorce the existing loan secured by that vehicle so that the husband no longer has any obligations under the terms of the existing loan. Until the wife meets those conditions and if she fails to refinance the existing loan in that manner by the 90th day after the date of divorce, the parties are each awarded an undivided one-half interest as tenants in common in the Ford F-150 pickup, subject to future partition. Alternatively, the vehicle could be awarded to the husband if the wife fails to refinance in time. Similar language could be used for a residence that has an existing mortgage. The decree can include forced sale language if the deadline to refinance comes and goes.

When representing the party who is supposed to refinance, negotiate a credit for your client of the portion of the principal of the loan balance the client pays after the date of divorce if the client fails to satisfy the conditions necessary to be awarded the asset in its entirety.

Conditional awards prove useful when a party wants an asset, but the spouse worries the party will not timely pay the debt secured by that asset, which could hurt the spouse's credit. Conditional awards are not miracle cures, but they give the concerned spouse some options if those concerns prove justified and give the party awarded the asset an incentive to refinance the secured loan.

If ordering the sale of an asset, whether outright or only if a condition is not met, such as the refinance of a mortgage, take the time—well before the drafting of the decree—to think through the necessary details. Who will sell the asset: a party, both parties, an auctioneer, or a receiver? When must the asset be put up for sale? If the personal property, where must the asset be? What will be the listing and sale prices? If the parties cannot agree to these prices, will they agree—or will the court order them—to use an appraiser to set these prices? If the court omits a necessary detail, the parties may fail to insert that detail in the decree, which could result in the parties coming back to court. Best to get the process set out completely in the mediated settlement agreement and in the original decree than face the question of whether the court is simply clarifying its order to make it enforceable or impermissibly modifying the property division after it lost plenary power to do so.

If the parties agree to accept the first bona fide offer above or equal to a specific price or if there is a schedule for dropping the listing and sale prices the longer the residence is on the market, be sure to memorialize that agreement in an agreement incident to divorce that will not be filed with the court unless it

[1] Thanks to the Hon. Ronnie Walker, retired presiding judge of the Randall County Court at Law Number Two for suggesting this idea.

[2] Thanks to my colleague, Briar Wilcox of Amarillo, for introducing me to this use of the motion for new trial and, with it, sparing both our clients an additional headache.

is necessary to enforce its provisions. If that agreement was reached in mediation, be sure not to file the mediated settlement agreement with the court either. The parties should not wreck their chances of getting a better deal by telling the public what their bottom line must be.

D. Setting a Hearing for Entry of Decree

A well-organized court or well-organized attorneys can use the setting of a future hearing to reduce one of the causes of enforcement suits. Many problems arise when deadlines set in settlement or by court order are missed but can't be enforced by contempt because the parties did not submit a written order to the court in time. At a contested final hearing, the court could order the parties to appear before it at a future set date and time if they have not submitted a draft of the final decree approved by both sides before that date. Attorneys usually respond to hearing settings, and parties usually respond if doing so allows them to avoid more fees. The setting of these hearings moves the drafting, review, and approval of these decrees to a much higher priority.

E. Anticipate Problems

The attorney's job is to imagine what would happen if the parties cannot cooperate. To that end, the attorneys know what is required for each order to be enforceable. In rendering an order requiring one party to surrender property to another, state clearly what property is being transferred, when the transfer will occur (a date and time after the decree will be signed), where the transfer will occur, and how it will occur. If one party is surrendering a vehicle that may not run due to disuse—or sabotage—which party has the burden of moving it? May a party surrender personal items by placing them in a commercial storage building and providing the other party with key? If there is a long list of household items to be surrendered, should a specific, generally agreed to be neutral person check off the items as they are transferred? Keep a record of how you have resolved different situations to avoid reinventing the wheel each time.

These levels of detail seem tedious, but courts can inspire parties to think in these specific terms. A judge can be known for having favorite ways of resolving common family law disputes, ways that practitioners may adopt or do all that they can to avoid. Judges can raise the level of family law practice by demonstrating they know what is needed to make property divisions effective and enforceable and by requiring practitioners to have that same level of knowledge if the practitioners want to keep their clients happy or at least not paying attorney's fees to the other side.

V. SECURE THE AWARD

One simple mechanism for greatly increasing the chance your client will receive the asset award is to require the other party to provide security for it. If the court orders one spouse to pay money to the other spouse, either in a single payment or over time, can the obligation be secured with property? The chances that a party will comply with his or her obligation to pay money under the property division increase dramatically if the owed party gets a security interest in valuable property instead of a mere equitable vendor's lien.

If possible, use real property as security for an obligation, as was discussed above with an owelty lien. Either negotiate for a note secured by real property or ask the court to award this relief to your client. In addition to the execution of the promissory note, the maker of the note will also need to execute, have acknowledged, and deliver a deed of trust. A deed of trust allows the grantee to foreclose on the real property if the maker of the note defaults on her obligations under the note. A deed of trust is merely a security instrument and does not convey title to land, although words of conveyance are usually used. *Fleming v. Adams*, 392 S.W.2d 491, 495 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.). To be effective, the deed of trust must be delivered to the grantee. Delivery may be established by the filing of the deed of trust for record in the proper office by the grantor on the request of or with the consent of the grantee. *West v. First Baptist Church*, 71 S.W.2d 1090, 1099 (Tex. 1934). TFLPM Form 24-5 is an example of a deed of trust and contains the essential elements of a deed of trust. The sale of real property pursuant to a deed of trust is set out in Property Code section 51.002.

Be sure to check the chain of title of the real property to ensure it is not subject to prior liens, which can arise under previous owners of the property.

By agreement or court order, personal property awarded to a party can be collateral for a debt or obligation that party owns the ex-spouse. The goal is for the creditor to be able to foreclose on this personal property without the intervention of a court. To do so, the creditor must ensure the collateral has not been pledged to someone else and that it actually belongs to the debtor. The Uniform Commercial Code (UCC), found in Title 1 of the Business and Commerce Code, addresses how security interests attach to personal property and are perfected. The full details of the UCC are beyond the scope of this paper.

Under the UCC, the term "security agreement" means an agreement that creates or provides for a security interest. Tex. Bus. & Com. Code § 9.102(74). A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment. Tex. Bus. & Com. Code §

9.203(a). In a divorce, a security interest is typically created with a promissory note that contains an agreement that personal property of the maker of the note will be collateral. The note must describe the collateral with enough detail to identify it. Further, the note needs to reflect key elements of section 9.203(b) of the Business and Commerce Code, which states that, with some exceptions, a security interest is enforceable against the debtor and third parties with respect to the collateral only if three factors are present:

(1) value has been given;
(2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
(3) one of the following conditions is met:

(A) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
(B) the collateral is not a certificated security and is in the possession of the secured party under Section 9.313 pursuant to the debtor's security agreement;
(C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 8.301 pursuant to the debtor's security agreement; or
(D) the collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents, and the secured party has control under Section 7.106, 9.104, 9.105, 9.106, or 9.107 [of the Business and Commerce Code] pursuant to the debtor's security agreement.

Tex. Bus. & Com. Code § 9.203(b). TFLPM Form 24-20 (Security Agreement with Collateral Pledge and Appointment of Escrow Agent) is a form you can use to create a security agreement for various types of personal property collateral.

In addition to wanting the security interest to attach to the collateral, the creditor spouse wants to perfect the security interest so the creditor spouse can enforce the security interest against third parties. The creditor spouse wants first dibs on the collateral.

The method to perfect a security interest that works on most personal property is to file a UCC-1 financing statement. Tex. Bus. & Com. Code § 9.310. Section 9.310(b) lists the instances in which the filing of a financing statement is not necessary to perfect a security interest. Section 9.502 describes the necessary contents of the financing statement. Tex. Bus. & Com. Code § 9.502. *See also* Tex. Bus. & Com. Code § 9.503 (Name of Debtor and Secured Party). A financing statement sufficiently indicates the collateral that it covers if the financing statement provides:

(1) a description of the collateral pursuant to Section 9.108; or
(2) an indication that the financing statement covers all assets or all personal property.

Tex. Bus. & Com. Code § 9.504. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. Tex. Bus. & Com. Code § 9.502(d). In most cases, the UCC-1 financing statement is filed with the office of the Secretary of State. Tex. Bus. & Com. Code § 9.501. UCC forms are available at its website: www.sos.state.tx.us/ucc/uccforms.shtml. Generally, a filed financing statement is effective for a period of five years after the date of filing. Tex. Bus. and Com. Code § 9.515(a).

Unless the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed. Tex. Bus. & Com. Code § 9.207.

The security does not need to be complicated and does not have to involve a UCC-1 filing. A secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. Tex. Bus. & Com. Code § 9.313(a).[3] If the husband will pay the wife a sum or sums of money after the divorce, the decree and an accompanying promissory note could provide that wife will take possession of a physical asset, such as a firearm, painting, or appliance, until the husband completes his payment obligation. The wife would then surrender the asset in exchange for the last payment.

If the collateral has a title, such as a motor vehicle, a trailer, or a boat, the security interest is perfected by recording the security interest on the certificate of title. *See e.g.*, Tex. Parks & Wildlife Code § 31.052 (security interest liens on vessels and

[3] There is an exception. With respect to goods covered by a certificate of title issued by this state, a secured party may perfect a security interest in the goods by taking possession of the goods only in the circumstances described in section 9.316(d) of the Texas Business and Commerce Code. Tex. Bus. & Com. Code § 9.313.

outboard motors); Tex. Transp. Code § 501.111(a) (perfection of security interest on motor vehicles not held as inventory by a person in the business of selling motor vehicles); *see also* Tex. Bus. & Com. Code § 9.303(c) (Law Governing Perfection and Priority of Security Interests in Goods Covered by a Certificate of Title).

A secured party has control of a deposit account if:

(1) the secured party is the bank with which the deposit account is maintained (not applicable to divorce property divisions);
(2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or
(3) the secured party becomes the bank's customer with respect to the deposit account.

Tex. Bus. & Com. Code § 9.104(a). A secured party that has satisfied subsection (a) has control, even if the debtor retains the right to direct the disposition of funds from the deposit account. Tex. Bus. & Com. Code § 9.104(b).

Look to Texas Business and Commerce Code sections 9.311 and 9.312 for how security interests in different assets may be perfected.

VI. ENFORCEMENT UNDER THE FAMILY CODE: OVERVIEW OF CHAPTER 9

Property enforcement in family law cases is governed by Chapter 9 of the Family Code. Chapter 9 is an often overlooked and misunderstood portion of Title 1 of the Family Code. In the enforcement arena, it is overshadowed by Chapter 157 in Title 5, which governs much of the enforcement of child-related orders. Practitioners sometimes try to apply to property enforcement the broad powers Chapter 157 provides to enforce child support and possession orders, with unsuccessful results. Attorneys and judges need to understand what powers and limitations there are in Chapter 9, both so they can effectively enforce the orders and protect the rights of respondents. Attorneys especially need to know what Chapter 9 can and cannot do so they can draft decrees and related documents effectively.

Chapter 9, entitled Post-Decree Proceedings, consists of four parts:

1. Subchapter A: Suit to Enforce Decree
2. Subchapter B: Post-Decree Qualified Domestic Relations Order
3. Subchapter C: Post-Decree Division of Property
4. Subchapter D: Disposition of Undivided Beneficial Interest

Subchapter A contains general provisions for enforcement, while Subchapters B and C apply to specific issues. Subchapter B enables a party to receive the retirement benefits awarded to that party and so orders under Subchapter B are akin to the enforcement of the property division. Subchapter C does not enforce a property division but offers a necessary alternative if the property division fails to address an asset. Subchapter D also does not address how to enforce an order but does address two situations in which a former spouse may be cut off from claiming a benefit and thereby is barred from enforcing such a claim. This paper will discuss all four subchapters, looking at enforcement of a property division in the broad sense.

Chapter 9 does not exhaust all methods of enforcing a property division. Particularly once a party has a judgment against another, that party can seek relief under the Rules for Ancillary Proceedings, for example, found in Part VI of the Texas Rules of Civil Procedure. Those ancillary proceedings include applications for writs of attachment, distress warrants, execution, garnishment, injunctions, receivership, and sequestration. Unless affected by Chapter 9, the relief available to a creditor outside of the Family Code is available to a party seeking to enforce a property division.

VII. CHAPTER 9 PROCEDURE

A. Scope of Chapter 9

What kind of disputes can be brought under Chapter 9? Chapter 9 applies to the enforcement of a division of property as provided by Chapter 7 of the Family Code. Tex. Fam. Code § 9.001(a). Chapter 7 addresses the award of marital property. Chapter 9 specifically applies to a division of property and any contractual provisions under the terms of an agreement incident to divorce or annulment under Section 7.006 that was approved by the court. Tex. Fam. Code § 9.001(a). A property settlement agreement, although incorporated into a final decree of divorce, is treated as a contract and its legal force and its meaning are governed by the law of contracts, not by the law of judgments. *Dechon v. Dechon*, 909 S.W.2d 950, 956 (Tex. App.—El Paso 1995, no writ) (*citing McGoodwin*, 671 S.W.2d at 880).

Chapter 9 does not apply to all suits enforcing a divorce decree, however. "[T]he obvious purpose of former sections 3.70–.77 of the Family Code, currently sections 9.001–.014, was to provide an expeditious procedure for enforcing and clarifying property divisions in divorce decrees." *Brown v. Fullenweider*, 52 S.W.3d 169, 170-71 (Tex. 2001) (*per curiam*). The Supreme Court held that chapter 9 does not apply to an attorney's suit to collect attorney's fees from his client

after representing that client in a divorce. *Id.* at 170. Chapter 9 also does not apply to the enforcement of a permanent injunction in a divorce decree prohibiting a party from disclosing the former spouse's medical history. The enforcement of an injunction against speech does not fall under chapter 9 and therefore the provisions regarding the payment of attorney's fees under Section 9.014 do not apply to such a suit. *Shilling v. Gough*, 393 S.W.3d 555, 559 (Tex. App.—Dallas 2013, no pet.); *see also Douglas v. Ingersoll*, 14–05–00666–CV, 2006 WL 2345968 (Tex. App.—Houston [14th Dist.] Aug. 15, 2006, pet. denied) (memo op.) (a suit to enforce under Chapter 9, Subchapter A, should not involve "any issues other than those related to the division of a marital estate").

B. Standing

Who can file a suit under chapter 9? A party affected by a decree of divorce or annulment may file suit, so long as the relevant portion of that decree provides for a division of property under chapter 7, including a division of property and any contractual provisions under the terms of an agreement incident to divorce or annulment under Section 7.006 that was approved by the court. Tex. Fam. Code § 9.001(a). A third-party creditor beneficiary can be such an affected party. In *Stine v. Stewart*, 80 S.W.3d 586, 591 (Tex. 2002), the agreement incident to divorce specifically required the ex-husband to use the net proceeds from the sale of a property to pay the debt the former spouses owed the ex-wife's mother. If the property sale proceeds did not pay the debt, the former spouses were obligated each to pay fifty percent of the remaining debt. Notably, the former spouses did not make similar promises to pay other third-party creditors listed in the agreement, only the ex-wife's mother. The Supreme Court found the ex-wife's mother was a third-party creditor beneficiary. *Id.* at 590.

C. Venue

Where is a suit under chapter 9 filed? The suit may be filed in the court that rendered the decree or in a district court with general jurisdiction to hear a breach of contract action, subject to the general venue rules applicable to a breach of contract action.

There is no question that filing the enforcement suit in the court that rendered the decree is proper. A party with standing to file under chapter 9 may file the suit to enforce in the court that rendered the decree. Tex. Fam. Code § 9.001(a). The court that rendered the decree of divorce or annulment retains the power to enforce the property division as provided by chapter 7, including a property division and any contractual provisions under the terms of an agreement incident to divorce or annulment under Section 7.006 that was approved by the court. Tex. Fam. Code § 9.002. A trial court has inherent power to clarify or enforce its previously entered decree. Such jurisdiction encompasses both subject-matter jurisdiction to adjudicate the dispute and personal jurisdiction over the parties originally affected by the decree. *Dechon*, 909 S.W.2d at 955.

While it is proper to file the enforcement suit in the court that rendered the decree, a party is not required to file a breach of contract suit under chapter 9 in that court. Sections 9.001(a) and 9.002 do not give the court that rendered the decree the *exclusive* jurisdiction to enforce the contractual provisions in the decree.

> [T]he language of section 9.001—"a party affected by a divorce decree ... *may* request enforcement of that decree ..."—is permissive in nature, not mandatory. Unless the legislature clearly intended otherwise, words used in statutes should be given their ordinary, reasonable meaning. The ordinary meaning of "shall" or "must" is of a mandatory effect, whereas the ordinary meaning of "may" is merely permissive in nature.
>
> Secondly, had the Legislature intended that Sections 9.001 and 9.002 provide exclusive jurisdiction, it could have done so by using clear statutory language, as it has done in other situations. *See* Tex. Fam. Code § 9.101(a) (Vernon 2006) ("[T]he court that rendered a final decree of divorce ... retains continuing, exclusive jurisdiction to render an enforceable qualified domestic relations order ...."); Tex. Fam. Code § 155.002(a) (Vernon 2008) ("[A] court acquires continuing exclusive jurisdiction over the matter provided for by this title in connection with a child on the rendition of a final order.").

Chavez v. McNeely, 287 S.W.3d 840, 844-45 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (some citations omitted).

The court in *Chavez* noted that the suit before it was a breach of contract action based upon an agreement incorporated into a final divorce decree. A breach of contract action to recover money damages invokes the general jurisdiction of the district court. *Chavez*, 287 S.W.3d at 845 (*citing Adwan v. Adwan*, 538 S.W.2d 192, 194-95 (Tex. Civ. App.—Dallas 1976, no writ)). *Chavez* also relied on *Underhill v. Underhill*, 614 S.W.2d 178, 180 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). The court in *Underhill* held that the court granting a divorce does not have exclusive jurisdiction to hear a suit brought to enforce a property settlement agreement entered into upon divorce. The Fourteenth Court of Appeals stated,

"[O]nce the parties have agreed on a property settlement that contains a provision for periodic support payments, a suit to recover missed payments does not involve matters incident to divorce, but is instead more akin to an independent action on a contract." *Chavez*, 287 S.W.3d at 845 (*quoting Underhill*, 614 S.W.2d at 180).

D. Filing Suit and Setting Hearing

The procedure for filing a suit under Chapter 9 is not greatly different than filing any other suit. Except as otherwise provided in Chapter 9, a suit to enforce is governed by the Texas Rules of Civil Procedure applicable to the filing of an original lawsuit. Tex. Fam. Code 9.001(b). A party whose rights, duties, powers, or liabilities may be affected by the suit to enforce is entitled to receive notice by citation. Tex. Fam. Code 9.001(c). That party shall be commanded to appear by filing a written answer. *Id.* Thereafter, the proceedings shall be as in civil cases generally. *Id.*

Some attorneys confused the setting of a hearing under Chapter 9 with the setting of a hearing under Chapter 157. Under Section 157.062, a hearing on a motion for enforcement of a final order providing for child support or possession of or access to a child, any provision of a final order rendered against a party who has already appeared in a suit under this title, or any provision of a temporary order may be heard as early as the tenth day after personal service. *See* Tex. Fam. Code § 157.062(c). Chapter 9 does not have any such provisions. *See* Tex. Fam. Code § 9.001(c).

E. Filing Deadlines

Filing deadlines are among the thorniest issues with Chapter 9 enforcement suits. Section 9.003 creates two different deadlines, deadlines that are only applicable to certain property. Section 9.003 applies only to personal property, not real property. *Carter v. Charles*, 853 S.W.2d 667, 672 (Tex. App.—Houston [14th Dist.] 1993, no writ) (addressing then Texas Family Code § 3.70). The courts have looked at whether these Section 9.003 deadlines should apply to other actions under Chapter 9.

The wise practitioner will plead limitations if responding to a motion for enforcement that may be untimely. Limitations is an affirmative defense that is waived if not pleaded or tried by consent. *Hollingsworth v. Hollingsworth*, 274 S.W.3d 811, 814-15 (Tex. App.—Dallas 2008, no pet.). *See also* Tex. R. Civ. P. 94 (affirmative defenses).

1. Suit to Enforce Division of Tangible Personal Property in Existence at Time of Decree

The first of the deadlines applies to tangible personal property awarded in the decree that existed at the time of the decree. 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. Tex. Fam. Code 9.003(a). **Example:** In the divorce decree, the husband is awarded a lawnmower that is in the possession of the wife. The case is not appealed. The wife refuses to surrender the lawnmower. The husband has until the second anniversary of the date the decree is signed to file a motion for enforcement to require the wife to surrender the lawnmower.

The nature of the property determines if this limitations period applies. Specific questions have been whether Section 9.003(a) applies to a cash award, to the payment of a debt, and to a contempt proceeding.

> 'Tangible personal property' is not defined in the Family Code. The Tax Code defines it as: 'personal property that can be seen, weighed, measured, felt, or touched or that is perceptible to the senses in any other manner....

Ford v. Ford, 14-99-00246-CV, 2000 WL 1262469 at *2 (Tex. App.—Houston [14th Dist.], Sept. 7, 2000, no pet.) (mem. op.) (*quoting* Tex. Tax Code § 151.009 (Vernon Supp. 2000)).

> Although 'goods' are tangible personal property, money is not a 'tangible chattel' or 'goods' but is instead a currency of exchange that enables the holder to acquire goods.

Ford, 2000 WL 1262469 at *2 (citing *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174 (Tex. 1980) (money is not a "tangible chattel" or "goods" as defined by the DTPA)).

In *Ford*, the divorce decree awarded the wife $44,000 from an IRA. The husband was to liquidate the account, pay the proceeds to the wife, and pay the taxes on the distribution from the IRA. He did not liquidate the full amount in the account and did not pay the taxes, thereby costing the now ex-wife $20,000. The wife sued four years after the divorce. The trial court determined the wife's motion was barred by section 9.003. The wife argued the trial court abused its discretion because (1) the cash award and the husband's obligation to pay any taxes attributable to it were not "tangible personal property," (2) the taxes to be paid by the husband were not property in existence at the time of the decree, and (3) a contempt proceeding is not subject to section 9.003. *Ford*, 2000 WL 1262469 at *1.

The appellate court disagreed with the trial court, even though the wife's motion was filed after the second anniversary of the date the decree was signed. Although the $44,000 awarded to the ex-wife was to

come from a specific source, *i.e.,* the account, it was an award of cash; the decree awarded the ex-wife no interest in the account itself. Because cash is not tangible personal property, but, rather, intangible property, any amount remaining unpaid from the original $44,000 award was not subject to the two-year limitations period in section 9.003(a). Similarly, the obligation to pay any tax liabilities resulting from withdrawing funds from the account was a debt and as such, was also not tangible personal property subject to section 9.003. *Ford,* 2000 WL 1262469 at *2.

Regarding the wife's action for contempt, the court held that the obligation to pay a tax liability is a debt, the payment of which is not enforceable by contempt. Therefore, the trial court's denial of the motion was proper as to the contempt action on the unpaid taxes and penalties. *Id.*

Regarding the contempt action on the alleged unpaid portion of the $44,000 award, the *Ford* court was careful not to express an opinion about the extent to which section 9.003 applies to contempt actions except to state that the court did not believe that section 9.003(a) can bar a contempt action to enforce a property division where an action seeking delivery or payment of the underlying property or money is itself not barred by section 9.003. The court found it illogical to conclude that a contempt action to enforce payment of the cash award could be barred even before an action to order payment of that award was required to be filed. *Id.* at *3.

The 14th Court of Appeals in *Ford* noted the conflict between courts of appeals regarding the application of section 9.003's filing deadline to contempt proceedings. *Id.* at *3 n.8. The Waco Court of Appeals in *Burton v. Burton* held that the two-year limitation in former section 3.70(c), now section 9.003(a), did not expressly apply to motions for contempt. A party can therefore file a motion seeking to hold the respondent in contempt of court after the limitations period bars a suit to enforce the division of tangible personal property in existence at the time of the decree. *Burton v. Burton*, 734 S.W.2d 727, 729 (Tex. App.—Waco 1987, no writ).

By contrast, the El Paso Court of Appeals in *Dechon* determined that what is now section 9.003(a) makes little sense unless it applies to all methods of enforcement, including contempt. The court declined to carve exceptions depending on the method of enforcement sought and applied the two-year statute of limitations to the contempt proceedings too. *Dechon*, 909 S.W.2d at 961.

The *Ford* court also noted that *Burton* conflicts with *Gonzales v. Gonzales*, 728 S.W.2d 446, 447 n. 1 (Tex. App.—San Antonio 1987, no writ). *Ford*, 2000 WL 1262469 at *3 n.8.

The lesson from *Ford* is to award specific accounts in existence at the time of divorce to enforce the division by contempt rather than award a sum of money. The failure of a party to execute and deliver the account transfer documents can be punished by contempt, unlike the payment of a debt, provided the other requirements for an enforceable order are met. This technique requires a high confidence in the current value of the account. A wise practitioner may bring the paperwork necessary to transfer the account to his or her client to mediation or trial. If the court anticipates problems, the court could order a party to execute the paperwork in the courtroom or at a specific date and time.

2. Suit to Enforce Division of Future Property Not in Existence at Time of Decree

The second of the deadlines applies to property that was divided in the decree, but which did not exist at the time of the decree. It is the right to future property that the decree divided. 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. Tex. Fam. Code § 9.003(b). **Example:** The wife is owed money by a third party. The debt does not come due until three years after the divorce decree becomes final. The divorce decree awards the husband one-half of the payment of the debt when the debt is paid. The third party pays the debt three years after the divorce decree becomes final. The wife refuses to pay the husband his one-half share. The husband has two years from the date the debt was paid to file a motion to require the wife to pay him his share of the debt.

In *Chavez v. Chavez,* the ex-husband, a UPS employee, was required to sell one-half of the company stock awarded to the ex-wife and was ordered to deliver the sale proceeds to her. When he did not do so, the appellate court held that the proceeds from the sale of the stock constituted property not in existence at the time of the divorce decree—otherwise known as future property. The court applied the statute of limitations for enforcing the division of future property, which is two years from the date the right to the property matures or accrues or the decree becomes final. *Chavez,* 12 S.W.3d at 564 (citing Tex. Fam. Code § 9.003(b)).

Retirement benefits or other matured interests paid in installments affect the manner in which limitations apply. Limitations on these payments accrue as to each installment. As each installment is paid, the person owed the installment payment must sue to recover her share within two years of the date of payment. *Matter of Marriage of Reinauer*, 946 S.W.2d 853, 860 (Tex. App.—Amarillo 1997, no pet.).

In the *Ford* case discussed in the previous subsection of this paper, a reason the tax liabilities

were not subject to section 9.003(a) was that the liabilities did not exist at the time of the decree. Moreover, because there was no evidence in the record as to the dates the funds were withdrawn or the alleged tax liabilities were assessed, there was no evidence that the motion was filed more than two years after the obligation to pay the liabilities matured such that the claim for taxes could be barred by section 9.003(b) (*i.e.,* even assuming that such a debt could be considered future property at all). *Ford,* 2000 WL 1262469 at *2. The party asserting the limitations bar must therefore prove when the property came into existence.

3. Suit to Reduce an Unpaid Debt to a Money Judgment

There is a conflict between the appellate courts regarding the filing deadline in a suit to reduce an unpaid debt to a money judgment. Some courts reject the application of section 9.003 to these suits; others reach the opposite conclusion.

In *Arnold v. Eaton*, 910 S.W.2d 181, 183 (Tex. App.—Eastland 1995, no writ), the original divorce decree awarded appellee a debt of $20,000.00 and secured that debt by a lien. The appellee's suit for enforcement sought to reduce the unpaid debt to a money judgment. The court held that since neither the debt nor the lien is tangible personal property, the limitations period in what is now section 9.003(a) does not apply. *Id.*

The court in *Jenkins v. Jenkins*, 991 S.W.2d 440, 445 (Tex. App.—Fort Worth 1999, pet. denied), reached the same conclusion. Section 9.003(b)'s two-year statute of limitations did not apply in that case because the trustee did not seek to compel a *division* of property via his motion to enforce. The trustee sought a money judgment for alimony awarded but not paid. Because the trustee sought a reduction of the specific monetary award in the agreement incident to divorce to judgment, rather than a division of property, the trustee's claim was not governed by section 9.003(b). *Jenkins*, 991 S.W.2d at 445.

Other courts disagree with *Arnold* and *Jenkins*. In *Morales v. Morales*, 195 S.W.3d 188, 191 (Tex. App.—San Antonio 2006, pet. denied), the court held that section 9.003(b) applied and the party was required to bring his motion to reduce the payments he was awarded under the divorce decree to a money judgment within two years from the date his right to those payments matured. The court further agreed with the El Paso Court of Appeals in *Dechon* that section 9.003's two-year statute of limitations should apply to all property enforcement motions. *Id.* (*citing Dechon*, 909 S.W.2d 961-62).

4. Suits to Clarify a Division of Tangible Property

Although section 9.003 of the Texas Family Code contains a limitations period for a "suit to enforce the division of tangible personal property," no similar limitations period is imposed on a clarification procedure. *Vejil v. Vejil*, 04-13-00194-CV, 2013 WL 5950156, at *1 (Tex. App.—San Antonio Nov. 6, 2013, no pet.).

5. Suits Subject to Other Limitations Periods

Some property enforcement suits do not fall under section 9.003 and therefore other limitations periods apply to them. For example, the Family Code's two-year statute of limitations does not apply to bar a third-party beneficiary breach of contract claim. A suit for breach of the agreement is not a suit to enforce the "division of property." Rather, the claim is that a party breached the agreement. Therefore, the general four-year statute of limitations for breach of contract applies. *Stine*, 80 S.W.3d at 592.

A breach of fiduciary duty claim has a four-year statute of limitations. It is not a suit to enforce a property division, so the two-year limitations periods under section 9.003 do not apply. *Preston v. Preston*, 04-03-00333-CV, 2004 WL 1835765, at *2 (Tex. App.—San Antonio, Aug. 18, 2004, no pet.).

F. Right to a Jury Trial

Generally, there is no right to a jury trial under Chapter 9. If a party invokes the procedures to enforce a decree of divorce or annulment under Chapter 9, a party may not demand a jury trial. Tex. Fam. Code § 9.005.

The exception to this statute occurs when a party is subject to a motion seeking to hold that party in contempt. If the motion alleges a "serious" charge of criminal contempt, the respondent is entitled to a jury under the constitution. A charge for which confinement may exceed six months is serious. *Ex parte Sproull*, 815 S.W.2d 250, 250 (Tex. 1991). The nature of the case, whether the charge of contempt is serious, is determined by the pleadings. *Ex parte York*, 899 S.W.2d 47, 48 (Tex. App.—Waco 1995, no writ) (the case was serious because the motion requested a $500 fine and/or 6 months' jail confinement for each violation of 43 alleged failures to pay child support, thereby placing the relator in jeopardy of receiving fines totaling $21,500 and/or jail time of 21½ years).

Although Texas courts have made the distinction between criminal and civil contempt, this distinction is not controlling. The right to counsel turns on whether deprivation of liberty may result from a proceeding, not upon its characterization as "criminal" or "civil." *Ex parte Strickland*, 724 S.W.2d 132, 133-34 (Tex. App.—Eastland 1987, no writ). In a contempt hearing for a serious offense, waiver of the right to jury trial cannot be presumed from a silent record. *Ex parte*

Griffin, 682 S.W.2d 261, 262 (Tex. 1984). Judges therefore should expressly ask the respondent if the respondent is waiving his or her right to a jury trial and require an answer to that question on the record. The wise practitioner should ensure her judge does that.

VIII. CHAPTER 9 ENFORCEMENT REMEDIES

Under Chapter 9, a court has several remedies for enforcing a property division made or approved in a decree of divorce or annulment. Except as provided by Chapter 9, Subchapter A, and by the Texas Rules of Civil Procedure, a court may render further orders to enforce the division of property made or approved in the decree of divorce or annulment to assist in the implementation of or to clarify the prior order. The court may specify more precisely the manner of effecting the property division previously made or approved if the substantive division of property is not altered or changed. An order of enforcement does not alter or affect the finality of the decree of divorce or annulment being enforced. Tex. Fam. Code § 9.006.

A. Court May Not Modify Division of Property

There is often a thin line between the enforcement or clarification of a property division and the modification of that division. The latter is prohibited. 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. 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. Tex. Fam. Code § 9.007(a), (b). Section 9.007 is jurisdictional. Orders violating its restrictions are void. *Gainous v. Gainous*, 219 S.W.3d 97, 108 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

Under the Family Code, the court that renders a divorce decree retains jurisdiction to clarify and enforce the property division within that decree. If a decree is ambiguous, that court can enter a clarification order. However, 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. *Pearson v. Fillingim*, 332 S.W.3d 361, 363 (Tex. 2011).

Conversion of a debt into spousal maintenance as a "clarification" of the decree is a change in the substantive division of property, exceeds the permissible scope of a clarification order, and may not be enforced under section 9.007(b). *Everett v. Everett*, 421 S.W.3d 918, 921 (Tex. App.—El Paso 2014, no pet.).

In *Perry*, the appellate court held that the trial court improperly modified the division of property when it appointed a receiver in a post-divorce order to sell a house in the receiver's sole discretion and upon terms and conditions determined by the receiver. *Perry*, 512 S.W.3d at 529. The decree had not specified by when or for how much the house must be sold. Under the rules of contract construction, when construing an agreement to avoid forfeiture, the court may imply terms that can reasonably be implied. If a divorce decree orders that property be sold, but fails to specify a price, the law presumes that the parties intended a reasonable price. Likewise, if the decree fails to specify a time for performance, the law implies a reasonable time. Because the divorce decree's provisions did not specify by when or for how much the house had to be sold, the law provided these two missing terms: the house had to be sold at a reasonable time and for a reasonable price. *Id.* at 528. The trial court modified these presumed terms by giving the receiver the discretion to sell the house at a different time and for a different price. *Id.* at 528-29.

The prohibition on modifying a property division applies only after the trial court loses plenary power over the suit for dissolution of marriage. A trial court retains jurisdiction over a case for a minimum of thirty days after signing a final judgment. During this time, the trial court has plenary power to change its judgment. The period of plenary power may be extended, however, by timely filing an appropriate postjudgment motion. Thus, the filing of a motion for new trial or a motion to modify, correct or reform the judgment within the initial thirty-day period extends the trial court's jurisdiction over its judgment up to an additional seventy-five days, depending on when or whether the court acts on the motions. *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 310 (Tex. 2000).

If the trial court learns of issues with its property division before it loses plenary power and it can act while it still has plenary power, the court will have much greater latitude to address those issues. If the trial court signs a modified judgment while it still has plenary power over the judgment, the deadlines for the filing of postjudgment motions and the time for appeal are reset from the date the trial court signed the modified judgment. Tex. R. Civ. 329b(h); Tex. R. App. P. 4.3(a); *see also* Tex. R. App. P. 27.3. Note, however, the new restrictions on the trial court's power to enforce and clarify the property division while it still has plenary power described in the next subsection of this paper.

The court's retention of plenary power immediately after it signs the decree is an excellent

reason to include in a decree orders for the exchange of property before that plenary power is lost. If the parties are ordered to exchange personal property say at 10:00 a.m. on the first Saturday after the court signs the decree and problems arise concerning the exchange, either party can ask the court to amend its decree while it still can. The court can fix the problems without regard to whether the fix is a clarification, so long as the court has plenary power when it makes its new order.

B. Temporary Orders While Case is Being Appealed

Until September 1, 2017, the power of the court to render further orders to assist in the implementation of or to clarify the property division was abated while an appellate proceeding was pending. Tex. Fam. Code § 9.007(c) (eff. to August 31, 2017). There was no restriction on the court's ability to enforce or clarify the division before the appellate proceeding began. There also was no means by which the trial court could enforce or clarify the property division after the appeal was filed.

That system changed for orders rendered on or after September 1, 2017. Since then, the trial court may not render an order to assist in the implementation of or to clarify the property division made or approved in the decree before the 30th day after the date the final judgment is signed. If a timely motion for new trial or to vacate, modify, correct, or reform the decree is filed, the trial court may not render an order to assist in the implementation of or to clarify the property division made or approved in the decree before the 30th day after the date the order overruling the motion is signed or the motion is overruled by operation of law. Tex. Fam. Code § 9.007(c). This change in law goes hand in hand with the changes to Section 6.709 discussed below and moves the practice of family law away from the trial court having no jurisdiction whatsoever to deter the party in possession of property awarded to the other party, in a property division, from disposing of or damaging the property while an appeal is pending, to a new regime where the trial court will be able to take reasonable steps to protect the party awarded property in a property division from the other party's bad acts. Chris Nickelson, Bill Review of S.B. 1237 for the Texas Family Law Foundation (March 8, 2017).

These changes make sense when examined in light of the 2017 overhaul of Section 6.709 of the Family Code, the section that addresses temporary orders during appeal. The new Section 6.709 also became effective on September 1, 2017 for orders rendered on or after that date. An order rendered before September 1, 2017 is governed by the law in effect immediately before that date, and the former law is continued in effect for that purpose. 2017 Tex. Sess. Law Serv. Ch. 421 (S.B. 1237), § 14. If any eligible parties have filed a notice of appeal from a final judgment under the Texas Rules of Appellate Procedure before September 1, 2017, any party to the appeal may file a motion in the trial court for an original temporary order under Section 6.709, as it existed immediately before September 1, 2017, and the trial court has jurisdiction to conduct a hearing and sign an original temporary order under that section until October 30, 2017. 2017 Tex. Sess. Law Serv. Ch. 421 (S.B. 1237), § 13.

As it pertains to the enforcement of a property division, Section 6.709(a) permits the trial court in a suit for dissolution of a marriage, on the motion of a party or on the court's own motion, after notice and hearing, to render a temporary order as considered equitable and necessary for the preservation of the property and for the protection of the parties during an appeal, including an order directed toward one or both parties:

- appointing a receiver for the preservation and protection of the property of the parties;
- enjoining a party from dissipating or transferring the property awarded to the other party in the trial court's property division; or
- suspending the operation of all or part of the property division that is being appealed.

Tex. Fam. Code § 6.709(a). Subsection (a) is the starting point and centerpiece of the temporary orders on appeal statute, but it is not the limit of the trial court's authority.

As is often the case in family law cases, a trial court does not have to comply with the ordinary requirements for the issuance of an injunction. A temporary order under Section 6.709 enjoining a party from dissipating or transferring the property awarded to the other party in the trial court's property division may be rendered without the issuance of a bond between the spouses. Tex. Fam. Code § 6.709(b)(1)(A). It may be rendered without an affidavit or a verified pleading stating specific facts showing that immediate and irreparable injury, loss, or damage will result. Tex. Fam. Code § 6.709(b)(1)(B). Such a temporary order is not required to define the injury or state why the injury is irreparable or include an order setting the suit for trial on the merits with respect to the ultimate relief sought. Tex. Fam. Code § 6.709(b)(2).

A temporary order under section 6.709 can protect each party's interests in the disputed property. The temporary order may not prohibit a party's use, transfer, conveyance, or dissipation of the property awarded to the other party in the trial court's property division if the use, transfer, conveyance, or dissipation of the property is for the purpose of suspending the enforcement of the property division that is the subject

of the appeal. Tex. Fam. Code § 6.709(b)(3). A temporary order under section 6.709 that suspends the operation of all or part of the property division that is the subject of the appeal may not be rendered unless the trial court takes reasonable steps to ensure that the party awarded property in the trial court's property division is protected from the other party's dissipation or transfer of that property. Tex. Fam. Code § 6.709(c).

The trial court may not suspend the property division unless it takes reasonable steps to protect the party awarded property in the property division from the other party's dissipation or transfer of that property. The trial court in the temporary hearing is required to look broadly when deciding whether to suspend the enforcement of the property division. In considering a party's request to suspend the enforcement of the property division, the trial court shall consider whether:

(1) any relief granted under Subsection 6.709(a) is adequate to protect the party's interest in the property awarded to the party or
(2) the party who was not awarded the property should also be required to provide security for the appeal in addition to any relief granted under Subsection 6.709(a).

Tex. Fam. Code § 6.709(d).

At the temporary hearing, the trial court can examine whether a party should provide security during the appeal, which the trial court can order in addition to other temporary relief. If the trial court determines that the party awarded the property can be adequately protected from the other party's dissipation of assets during the appeal only if the other party provides security for the appeal, the trial court shall set the appropriate amount of security, taking into consideration any relief granted under Subsection 6.709(a) and the amount of security that the other party would otherwise have to provide by law if relief under Subsection 6.709(a) was not granted. Tex. Fam. Code § 6.709(e). In rendering a temporary order under this section that suspends enforcement of all or part of the property division, the trial court may grant any relief under Subsection 6.709(a), in addition to requiring the party who was not awarded the property to post security for that part of the property division to be suspended. The trial court may require that the party who was not awarded the property post all or only part of the security that would otherwise be required by law. Tex. Fam. Code § 6.709(f).

The Family Code does not preempt a party suspending the enforcement of a judgment pending appeal by other means, such as filing a supersedeas bond as set out in Texas Rule of Appellate Procedure 24. Section 6.709 does not prevent a party who was not awarded the property from exercising that party's right to suspend the enforcement of the property division as provided by law. Tex. Fam. Code § 6.709(g).

The deadline for requesting the temporary relief when the case is on appeal is generous. A motion seeking an original temporary order under section 6.709 may be filed before trial but may not be filed by a party after the date by which that party is required to file the party's notice of appeal under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 6.709(h). A party can file its motion for temporary relief on appeal in the party's original petition or counter-petition for divorce. The trial court retains jurisdiction to conduct a hearing and sign an original temporary order under this section until the 60th day after the date any eligible party has filed a notice of appeal from final judgment under the Texas Rules of Appellate Procedure. Tex. Fam. Code § 6.709(i).

The trial court retains jurisdiction to modify and enforce a temporary order under section 6.709 unless the appellate court, on a proper showing, supersedes the trial court's order. Tex. Fam. Code § 6.709(j). On the motion of a party or on the court's own motion, after notice and hearing, the trial court may modify a previous temporary order rendered under this section if the circumstances of a party have materially and substantially changed since the rendition of the previous order and modification is equitable and necessary for the preservation of the property or for the protection of the parties during the appeal. Tex. Fam. Code § 6.709(k).

A temporary order rendered under section 6.709 is not subject to interlocutory appeal. Tex. Fam. Code § 6.709(m). A party may seek review of the trial court's temporary order under section 6.709 by:

(1) motion filed in the court of appeals with jurisdiction or potential jurisdiction over the appeal from the judgment in the case;
(2) proper assignment in the party's brief; or
(3) petition for writ of mandamus.

Tex. Fam. Code § 6.709(l).

As part of the statute's aim of allowing trial courts as many tools as possible to protect the parties' interests in the property while the appeal is pending, the remedies provided in section 6.709 are cumulative of all other remedies allowed by law. Tex. Fam. Code § 6.709(n).

C. Contempt

In certain—but not all—cases, a party can go to jail for failing to comply with the court's division of property order. The court may enforce by contempt an order requiring delivery of specific property or an award of a right to future property. Tex. Fam. Code § 9.012(a).

The order to be enforced by contempt must also be direct enough. When practitioners draft orders to be enforced by contempt, they must include all the steps the party must take to accomplish the task and use "IT IS ORDERED" and "shall" language. For a person to be held in contempt for disobeying a court decree, the decree must spell out the details of compliance in clear, specific, and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him. *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967) (orig. proceeding). Thus, to sentence a party to confinement for contempt of a prior court order, that order must have unequivocally commanded the party to perform the duties or obligations imposed on him. *Ex parte Padron*, 565 S.W.2d 921, 921 (Tex. 1978) (orig. proceeding). For example, a decree that merely awarded a party her former spouse's frequent flyer miles and placed no duty on the controlling spouse to transfer those miles could not be enforced by contempt against the controlling spouse. *In re Marriage of Alford*, 40 S.W.3d 187, 189 (Tex. App.—Texarkana 2001, no pet.).

As discussed above, when drafting an order, include the following as applicable to ensure it is enforceable by contempt:

- who—the name of the person required to perform the action
- what and how—a detailed description of the required action
- when—the date and time the action must take place
- where—the location where the action must occur
- why—an explanation of what the order is designed to accomplish (sometimes advisable to include)

You should use this same checklist for any subtasks necessary to enforce the property division. If movers will be needed to transfer property, who is responsible for hiring them? When is the deadline for hiring them? What are the movers to do? Where and when are the movers to do the moving?

To be enforceable by contempt, it is critical that the order requires the opposing party to act on a date after the date of the trial court signs the order. An order is void insofar as enforcement by contempt if it orders a party to perform an act in the past, which is impossible. *Ex parte Finn*, 615 S.W.2d 293, 296 (Tex. Civ. App.—Dallas 1981, no writ). For this reason, an order should require compliance a set number of days after the decree is signed so in this respect the order is enforceable regardless of when the trial court signs the order. If the order contains a specific date, then the parties need to present the order to the trial court for approval before that date and the trial court needs to act promptly to review and sign the order.

While courts should punish those parties not complying with their orders, they should also punish those parties who waste the court's time and the resources of the other party with baseless, ill conceived, or poorly drafted motions for enforcement. Trial courts may award a respondent her attorney's fees and costs following a sloppy request to enforce the payment of a debt by contempt. *See* Tex. Fam. Code §§ 9.013; 9.014.

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:

(1) a sum of money in existence at the time the decree was rendered; or
(2) a matured right to future payments as provided by Section 9.011.

Tex. Fam. Code § 9.012(b). Agreements incorporated into a final divorce decree are considered contracts. *In re Dupree*, 118 S.W.3d 911, 914 (Tex. App.—Dallas 2003, pet. denied). The Texas Constitution prohibits imprisonment for the failure to comply with an order to pay a "debt." *Id.* at 914-15 (*citing* Tex. Const. art. I, § 18 ("No person shall ever be imprisoned for debt.")).

The fact that a party to a divorce was ordered to pay an obligation owed to a third-party, as part of the division of the community estate, does not transform that obligation into one enforceable by coercive contempt. *Shumate v. Shumate*, 310 S.W.3d 149, 152 (Tex. App.—Amarillo 2010, no pet.). In deciding whether a spouse's obligation to pay a third-party debt was enforceable by contempt, the Supreme Court distinguished those situations where specific funds to pay the debt existed, or where particular community property from which the debt was to be paid was specified. In each of those situations, the spouse being awarded the property holds that property as a constructive trustee for the benefit of the other spouse. In such a situation, failure to surrender that property pursuant to the divorce decree would be enforceable by contempt because it is not considered payment of a debt. The surrendering spouse is not paying a debt, but rather turning over property rightfully due another under the terms of the divorce decree. *Id.* (*citing In re Henry*, 154 S.W.3d 594, 597 (Tex. 2005)).

If a court finds a respondent in contempt based on an order that is insufficiently direct or that does not require the delivery of specific property or an award of a right to future property, the respondent may challenge the finding and any confinement by filing a habeas corpus proceeding. An original habeas corpus proceeding is a collateral attack on the contempt judgment. The relator bears the burden to show the

contempt order is void, not merely voidable. A relator must conclusively show his entitlement to the writ. *Dupree*, 118 S.W.3d at 914. An order is void if it is beyond the power of the court to enter it, or if it deprives the relator of liberty without due process of law. *Ex parte Barnett*, 600 S.W.2d 252, 254 (Tex. 1980) (orig. proceeding).

Compliance with due process is essential if seeking to hold a person in contempt. The respondent should have notice of the order violated before she may be held in contempt. *Finn*, 615 S.W.2d at 296 (*citing Ex parte Conway*, 419 S.W.2d 827, 828 (Tex. 1967)). The show cause order should also place the respondent on notice of the grounds upon which she may be deprived of her liberty. Courts are without power to summarily punish for contempt not in the presence of the court. There must be notice and an opportunity to be heard, together with evidence heard by the court to sustain its judgment of contempt. *Ex parte Hardin*, 344 S.W.2d 152, 153 (Tex. 1961).

Subchapter A of Chapter 9 does not detract from or limit the general power of a court to enforce an order of the court by appropriate means. Tex. Fam. Code § 9.012(c). A court may combine contempt and other remedies in a single enforcement suit.

D. Clarification

Besides enforcing its property division, the court rendering the decree of divorce may render further orders to assist in the implementation of or to clarify the prior order. *Marshall v. Priess*, 99 S.W.3d 150, 156 (Tex. App.—Houston [14th Dist.] 2002, no pet.). If the order requires the delivery of specific property or an award of a right to future property, but the order is insufficiently direct to be enforced by contempt, after the entry of the decree, the court may add the details or other language necessary for the respondent to be held in contempt if noncompliant. 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. Tex. Fam. Code § 9.008(a). A court is not required hold a trial on the merits before issuing a clarification order. *Alford*, 40 S.W.3d at 190. 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. The court may not give retroactive effect to a clarifying order. The court shall provide a reasonable time for compliance before enforcing a clarifying order by contempt or in another manner. Tex. Fam. Code § 9.008(b)-(d). A clarifying order may not amend, modify, alter, or change the division of property ordered in the decree of divorce or annulment. Tex. Fam. Code § 9.007(a).

A trial court may need to clarify some of our most frequently used terms, terms that make an order unenforceable by contempt. A trial court properly clarified provisions of a final decree regarding the payment of taxes because the decree ordered the appellant to pay the taxes, penalties, and interest "timely." The word "timely" is imprecise and subjective; it does not readily inform the person of the duty imposed upon him. Such an order is unenforceable and cannot support a contempt judgment. The clarification order further properly provided a precise time and place that appellant was to pay appellee the amount of appellee's obligation to the IRS. The decree was ambiguous in that it did not describe whom appellant was to pay. *Hollingsworth*, 274 S.W.3d at 818.

E. Delivery of Property

Oftentimes, a decree will award a party property in the possession of the other party but fail to specify when and where the possessing party is to surrender or deliver that property. Even after the entry of the decree, a court can order a former spouse to deliver property awarded to the other former spouse. To enforce the division of property made or approved 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 especial value, including an award of an existing sum of money or its equivalent. Tex. Fam. Code § 9.009.

F. Money Judgments

1. Reduction to Money Judgment

Unfortunately, a party possessing property awarded to the other former spouse sometimes fails to surrender that property. Sometimes that failure ruins the value of the property, either because the possessing party disposed of the property or the property still exists but lost its value due to the delay. 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. 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 the party is entitled. The remedy of a reduction to money judgment is in addition to the other remedies provided by law. A money judgment rendered under Section 9.010 may be enforced by any means available for the enforcement of judgment for debt. Tex. Fam. Code § 9.010. *Jenkins*, 991 S.W.2d at 445.

When retirement benefits were divided in a post-divorce proceeding, the non-participant former spouse, the ex-wife, owned her portion of those retirement benefits as a co-tenant. Co-tenants may obtain a

partition of the res in which they own a joint interest. *In re Marriage of Malacara*, 223 S.W.3d 600, 603 (Tex. App.—Amarillo 2007, no pet.) (*citing* Tex. Prop. Code § 23.001 (Vernon 2000)), which states that joint owners of real or personal property may compel the partition of the interest in the property among the joint owners). The statute authorized the trial court to partition the retirement benefits, though the respective interests of the former spouses in those benefits were addressed in the divorce agreement. Since the decree effectively awarded the ex-wife a share in the retirement payments received by the ex-husband before the post-divorce partition, the ex-husband had a duty to account for his former spouse's share. The court held that the ex-husband was obligated to give the ex-wife her share of the retirement benefits and the trial court was entitled to award her that share under sections 9.009 and 9.010(b). *Malacara*, 223 S.W.3d at 603.

A party needs to be careful about the relief it requests. The award of a money judgment may prevent a party from receiving additional relief if the judgment turns out to be uncollectible. In *Koenig v. Blaylock*, the parties' decree required the wife to transfer her ownership interest in a residence to the husband upon, among other events, his refinancing the debt secured by the residence and his payment of $61,500 to the wife. The wife later filed an enforcement suit, alleging that the husband was in default of the decree by failing to refinance the residence and pay her the $61,500 within 60 days of the decree's entry. The wife asked the court to order a sale of the residence or to enter a money judgment in the amount owed to her by the husband for the residence. The trial court refused to order the sale of the residence but entered an enforcement order granting the wife a money judgment against the husband in the amount of $61,500, plus pre- and post-judgment interest and attorney's fees. Finding herself unable to collect on her judgment, the wife then filed a partition suit, seeking an order from the district court to sell the residence and distribute to the parties the net proceeds in accordance with their alleged undivided, equal ownership interests. *Koenig v. Blaylock*, 497 S.W.3d 595, 596-97 (Tex. App.—Austin 2016, pet. denied). The court of appeals held that when the wife petitioned the district court to enforce the divorce decree and obtained a judgment for the $61,500 that she was awarded in the decree in exchange for the award of the residence to the husband, she was made whole by receiving the very award to which she was entitled. Under these circumstances, the enforcement order served to effectuate the property division in the decree, and the wife was barred from later contending that she still had rights to the residence awarded to the husband. *Id.* at 600.

2. Abstract of Judgment

The first step in collecting a judgment is to prepare and record an abstract of judgment. A judgment lien requires an abstract of judgment that is properly recorded and indexed. However, it was settled at an early date that no judgment other than a final judgment can give rise to a lien. *York Div., Borg-Warner Corp. v. Sec. Sav. & Loan Ass'n, Dickinso*n, 485 S.W.2d 327, 331 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.) (citing *Blankenship & Buchanan v. Herring*, 62 Tex. Civ. App. 298, 132 S.W. 882 (1910); *Eastham v. Sallis and Ralsto*n, 60 Tex. 576 (1884)). Unless dormant, an abstract of judgment that is properly indexed and recorded constitutes a lien on and attaches to any real property of the defendant, other than real property exempt from seizure or forced sale under Property Code chapter 41, the Texas Constitution, or any other law, that is located in the county in which the abstract is recorded and indexed, including real property acquired after such recording and indexing. Tex. Prop. Code § 52.001.[4]

The creditor should check each step of the process, including the recording and indexing of the abstract. An improperly indexed abstract of judgment does not create a valid lien. The lien is purely a creature of statute, and in order to create a valid lien, the statute must be observed in all of its details. *Day v. Day*, 610 S.W.2d 195, 197 (Tex. App.—Tyler 1980, writ ref'd n.r.e.); *City State Bank in Wellington v. Bailey*, 214 S.W.2d 901, 903 (Tex. Civ. App.—Amarillo 1948, writ ref'd).

On application of a person in whose favor a judgment is rendered or on application of that person's agent, attorney, or assignee, the judge or justice of the peace who rendered the judgment or the clerk of the court in which the judgment is rendered shall prepare, certify, and deliver to the applicant an abstract of the judgment. The applicant for the abstract must pay the fee authorized by law for providing the abstract. Tex. Prop. Code § 52.002(a). The attorney of a person in whose favor a judgment is rendered in a small claims court or a justice court or a person in whose favor a judgment is rendered in a court other than a small claims court or a justice court or that person's agent, attorney, or assignee may prepare the abstract of judgment. An abstract of judgment prepared in this manner must be verified by the person preparing the abstract. Tex. Prop. Code § 52.002(b). An unsworn declaration will not suffice. Tex. Civ. Prac. Rem. Code § 132.001(b).

An abstract of a judgment must show:

[4] Exceptions to this rule are found in Property Code sections 52.0011 (Establishment of Lien Pending Appeal of Judgment) and 52.0012 (Release of Record of Lien on Homestead Property).

(1) the names of the plaintiff and defendant;
(2) the birthdate of the defendant, if available to the clerk or justice;
(3) the last three numbers of the driver's license of the defendant, if available;
(4) the last three numbers of the social security number of the defendant, if available;
(5) the number of the suit in which the judgment was rendered;
(6) the defendant's address, or if the address is not shown in the suit, the nature of citation and the date and place of service of citation;
(7) the date on which the judgment was rendered;
(8) the amount for which the judgment was rendered and the balance due;
(9) the amount of the balance due, if any, for child support arrearage; and
(10) the rate of interest specified in the judgment.

Tex. Prop. Code § 52.003(a). While section 52.003 of the Property Code states that an abstract of a judgment may show a mailing address for each plaintiff or judgment creditor, section 52.0041 of that same code states in part, "A judgment abstracted after September 1, 1993, may not be recorded unless a mailing address for each plaintiff or judgment creditor appears on the abstract of judgment or a penalty filing fee equal to the greater of $25 or twice the statutory recording fee for the abstract is paid." Tex. Prop. Code § 52.003(b); 52.0041(a).

The county clerk must immediately record in the county real property records each properly authenticated abstract of judgment that is presented for recording. Tex. Prop. Code § 52.004(a). Satisfaction of a judgment in whole or in part may be shown by recordation of a return on an execution issued on the judgment, or a copy of the return, certified by the officer making the return and showing specific information regarding the parties, the suit, the judgment, and the issuance and return of the execution of judgment the names of the parties to the judgment, the number or a receipt, acknowledgement, or release that is signed by the party entitled to receive payment of the judgment or by that person's agent or attorney of record and that is acknowledged or proven for record in the manner required for deeds. Tex. Prop. Code § 52.005. TFLPM Form 24-18 is a release of judgment.

A private party's judgment lien continues for 10 years following the date of recording and indexing the abstract, except that if the judgment becomes dormant during that period the lien ceases to exist. Tex. Prop. Code § 52.006(a). If a writ of execution is not issued within 10 years after the rendition of a judgment of a court of record or a justice court, the judgment is dormant, and execution may not be issued on the judgment unless it is revived. If a writ of execution is issued within 10 years after rendition of a judgment but a second writ is not issued within 10 years after issuance of the first writ, the judgment becomes dormant. A second writ may be issued at any time within 10 years after issuance of the first writ. Tex. Civ. Prac. & Rem. Code § 34.001(a), (b).[5] Note that the deadline to have a writ of execution issued is based on the date the judgment was rendered whereas the Property Code sets the lifespan of the judgment lien based on the date the abstract was recorded and indexed, a later date.

A dormant judgment may be revived by scire facias or by an action of debt brought not later than the second anniversary of the date that the judgment becomes dormant.[6] Tex. Civ. Prac. & Rem. Code § 31.006. It is critical that the judgment creditor take action to enforce the judgment before the judgment becomes dormant or at least before the second anniversary of its dormancy.

Note that an abstract of a judgment may be filed in other states in which the judgment debtor may own property, not just in Texas.

3. Execution of Judgment

An execution is a process of the court from which it is issued. If no supersedeas bond or notice of appeal, as required of agencies exempt from filing bonds, has been filed and approved, the clerk of the court or justice of the peace shall issue the execution upon such judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed. If a timely motion for new trial or in arrest of judgment is filed, the clerk shall issue the execution upon the judgment on application of the party or his attorney after the expiration of thirty days from the time the order overruling the motion is signed or from the time the motion is overruled by operation of law. Tex. R. Civ. P. 627. Such execution may be issued at any time before the thirtieth day upon the filing of an affidavit by the plaintiff in the judgment or his agent or attorney that the defendant is about to remove his personal property subject to execution by law out of the county, or is about to transfer or secrete such personal property for the purpose of defrauding his creditors. Tex. R. Civ. P. 628. Under the writ of execution, the sheriff or constable will levy the defendant's non-exempt

[5] Subsection (a) and (b) of Texas Civil Practice and Remedies Code section 34.001 do not apply to a judgment for child support under the Family Code. Tex. Civ. Prac. & Rem. Code § 34.001(c).

[6] Scire facias is a judicial writ directing a judgment debtor to appear and show cause why, after the lapse of the limitation period, execution against him or her should not be revived. 46 Am. Jur. 2d Judgments § 372.

property found in the county following the procedures in the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 636 – 656.

The clerk of the district or county court or the justice of the peace, as the case may be, 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. Tex. R. Civ. P. 622. At any time after rendition of judgment, and so long as said judgment has not been suspended by a supersedeas bond or by order of a proper court and has not become dormant, the judgment creditor send discovery requests to aid in the collection of the judgment. Tex. R. Civ. P. 621a. The style of the execution shall be "The State of Texas." It shall be directed to any sheriff or any constable within the State of Texas. It shall be signed by the clerk or justice officially, and bear the seal of the court, if issued out of the district or county court, and shall require the officer to execute it according to its terms, and to make the costs which have been adjudged against the defendant in execution and the further costs of executing the writ. It shall describe the judgment, stating the court in which, and the time when, rendered, and the names of the parties in whose favor and against whom the judgment was rendered. A correct copy of the bill of costs taxed against the defendant in execution shall be attached to the writ. It shall require the officer to return it within thirty, sixty, or ninety days, as directed by the plaintiff or his attorney. Tex. R. Civ. P. 629.

An execution issued upon a judgment for the delivery of the possession of a chattel or personal property, or for the delivery of the possession of real property, shall particularly describe the property, and designate the party to whom the judgment awards the possession. The writ shall require the officer to deliver the possession of the property to the party entitled thereto. Tex. R. Civ. P. 632. If the judgment be for the recovery of personal property or its value, the writ shall command the officer, in case a delivery thereof cannot be had, to levy and collect the value thereof for which the judgment was recovered, to be specified therein, out of any property of the party against whom judgment was rendered, liable to execution. Tex. R. Civ. P. 633.

When an execution is issued upon a judgment for a sum of money, or directing the payment simply of 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. Tex. R. Civ. P. 630.

4. Aid from the Court

A judgment creditor is entitled to aid from a court of appropriate jurisdiction, including a justice court, 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 is not exempt from attachment, execution, or seizure for the satisfaction of liabilities. Tex. Civ. Prac. & Rem. Code § 31.002(a). 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.

Tex. Civ. Prac. & Rem. Code § 31.002(b). The court may enforce the order by contempt proceedings or by other appropriate means in the event of refusal or disobedience. Tex. Civ. Prac. & Rem. Code § 31.002(c). 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. Tex. Civ. Prac. & Rem. Code § 31.002(d). A court may enter or enforce an order under section 31.002 that requires the turnover of nonexempt property without identifying in the order the specific property subject to turnover. Tex. Civ. Prac. & Rem. Code § 31.002(h). The judgment creditor is entitled to recover reasonable costs, including attorney's fees. Tex. Civ. Prac. & Rem. Code § 31.002(e).

Unless in a suit to enforce a child support obligation or a judgment for past due child support, a court may not enter or enforce an order under section 31.002 that requires the turnover of the proceeds of, or the disbursement of, property exempt under any statute, including Property Code section 42.0021. Tex. Civ. Prac. & Rem. Code § 31.002(f).

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 section 31.002(b)(3) do not attach until the financial institution recetab list.ives service of a certified copy of the order of receivership in the manner specified by Section 59.008, Finance Code. Tex. Civ. Prac. & Rem. Code § 31.002(g).

5. Garnishment

A postjudgment remedy is garnishment, which allows a judgment creditor to collect a money judgment from funds or property third parties hold for the judgment creditor if the creditor does not know of sufficient property of the debtor's in Texas to satisfy the debt. Garnishment is particularly useful to get at funds in bank accounts, safety deposit boxes, shares of stock, past-due promissory notes, income from some trust funds, and compensation owing to an independent contractor (but see below). Garnishment may not be used against:

- Realty. *Fitzgerald v. Brown, Smith & Marsch Bros*., 283 S.W. 576, 578 (Tex. Civ. App.—Texarkana 1926, writ dism'd).
- Homestead claimant's proceeds of a sale of a homestead for six months after the date of sale. Tex. Prop. Code § 41.001(c).
- Current wages for personal services, except for the enforcement of court-ordered child support payment or as otherwise provided by state or federal law. Tex. Const. art. XVI, § 28; Tex. Civ. Prac. & Rem. Code § 63.004; Tex. Prop. Code § 42.001(b)(1).
- Death and personal injury benefits paid under worker's compensation laws. Tex. Labor Code § 408.201(1).
- Qualified savings plans that is any stock bonus, pension, annuity, deferred compensation, profit-sharing, health, education, or similar plan or account, to the extent the plan or account is exempt from federal income tax or to the extent federal income tax on a person's interest in the plan or account is deferred until actual payment of benefits to the person. These plans include retirement plans, IRAs, health savings accounts, Coverdell education savings accounts, and prepaid tuition contracts. Amounts distributed from a qualified savings plan are exempt from attachment, execution, and seizure for a creditor's claim for 60 days after the date of distribution. Tex. Prop. Code § 42.0021.
- Most state welfare benefits.
- Federal social security benefits. 42 U.S.C. § 407(a).
- Veterans' benefits payments. 38 U.S.C. § 5301.
- Some life, health, and accident insurance benefits. Tex. Ins. Code § 1108.051(b)(2).
- Money due an original contractor or subcontractor from the owner to the prejudice of the subcontractors, mechanics, laborers, materialmen, or their sureties. Tex. Prop. Code § 53.151(a).
- The reserve account of a mortgage lender into which the debtor is required to make monthly installments for the mortgage lender to pay property taxes and insurance premiums for the property pursuant to a deed of trust. *Aetna Finance Company v. First Federal Savings and Loan Association*, 607 S.W.2d 312, 314 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

Wages cease to be "current" and are no longer exempt when they are received by the wage earner or become subject to the wage earner's control. If the wage earner deposits them with another, they are subject to garnishment. *Fitzpatrick v. Leasecomm* Corp., 12-07-00487-CV, 2008 WL 4225973, at *2 (Tex. App.—Tyler Sept. 17, 2008, pet. denied). But note that social security payments and veterans' benefits payment received by the debtor retain their exempt status even after their deposit into a financial account. *Id.*

A writ of garnishment is available if:

(1) an original attachment has been issued;
(2) a plaintiff sues for a debt and makes an affidavit stating that (A) the debt is just, due, and unpaid; (B) within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt; and (C) the garnishment is not sought to injure the defendant or the garnishee; or
(3) a plaintiff has a valid, subsisting judgment and makes an affidavit stating that, within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment.

Tex. Civ. Prac. & Rem. Code § 63.001. Texas Rule of Civil Procedure 657 clarifies section 63.001(3) of the Texas Civil Practice and Remedies Code by stating that "the judgment whether based upon a liquidated demand or an unliquidated demand, shall be deemed final and subsisting for the purpose of garnishment from and after the date it is signed, unless a supersedeas bond shall have been approved and filed in accordance with Texas Rules of Appellate Procedure 47." Tex. R. Civ. P. 657. The debtor's filing an approved supersedes bond therefore suspends execution of the judgment and makes garnishment unavailable.

A garnishment suit is a suit separately docketed from the suit that was the basis of the judgment. Tex. R. Civ. P. 659. The procedure for a garnishment suit is set out in Rules 658 to 679 of the Texas Rules of Civil Procedure. Note that service on and delivery to a financial institution of claims against a customer of the financial institution are governed by section 59.008 of the Finance Code. Tex. Civ. Prac. & Rem. Code § 17.028(f). Failure to comply with the provisions in section 59.008 can make a garnishment claim against

the customer ineffective. *See* Tex. Fin. Code § 59.008(b).

G. Right to Future Property

The court may, by any remedy provided by Chapter 9, 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. Tex. Fam. Code § 9.011(a). 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. Tex. Fam. Code § 9.011(b).

A constructive trust is imposed when one party holds property that legally belongs to the other. The decision whether to impose a constructive trust is an equitable matter within the discretion of the trial court. *Schneider v. Schneider*, 5 S.W.3d 925, 929 (Tex. App.—Austin 1999, no pet.). When the non-owning spouse has not actually received the property awarded to the owner in a divorce decree, the trial court did not err in refusing to impose a constructive trust. *Id.* Under those circumstances, section 9.011(b) does not apply. The scope and application of a constructive trust is generally left up to the court imposing it. *Messier v. Messier*, 458 S.W.3d 155, 164 (Tex. App.—Houston [14th Dist.], Jan. 27, 2015, no pet.).

H. Costs and Attorney's Fees

A key deterrent to violating a property division order—or to bringing a spurious enforcement motion—is the court's ability to punish an offending party other than by contempt. The court may award costs in a proceeding to enforce a property division under Subchapter A of Chapter 9 as in other civil cases. Tex. Fam. Code § 9.013. The court may also award reasonable attorney's fees in a proceeding under Subchapter A of Chapter 9. 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. Tex. Fam. Code § 9.014. This statute does not entitle either party to attorney's fees; rather, it merely permits the court to award them. The decision to grant or deny attorney's fees under this statute is reviewed for an abuse of discretion. *Schneider*, 5 S.W.3d at 930.

A trial court may award attorney's fees to a party requesting that the respondent be held in contempt even if trial court does not hold the respondent in contempt or otherwise grant the party all the relief the party sought. Contempt is not the only available remedy in a suit to enforce a divorce decree. If a party is required to file suit to enforce her right to determine a disputed property issue, the trial court does not abuse its discretion in awarding attorney's fees to that party. *See Messier*, 458 S.W.3d at 166.

The Dallas Court of Appeals has held that under section 9.014, a court does not have to find a party to be the prevailing party in the dispute to award that party attorney's fees. Section 9.014 broadly provides the trial court "may award reasonable attorney's fees in a proceeding under this subchapter." Tex. Fam. Code § 9.014. Section 9.014 does not require that the party prevail on his claims. *See id.* Rather, by its express language, the statute's only requirements are that the award be "reasonable" and in connection with a proceeding to enforce a decree of divorce or annulment providing for a division of property. Tex. Fam. Code §§ 9.001; 9.014. *In re S.E.C.*, 05-08-00781-CV, 2009 WL 3353624, at *1 (Tex. App.—Dallas Oct. 20, 2009, no pet.) (memo op.).

The Fort Worth Court of Appeals agreed that section 9.014 does not require a party to have "prevailed" on her claims against her opponent. The statute simply requires the fee award to be reasonable under the circumstances of this case. The court went on to hold that when a trial court awards attorney's fees to the nonprevailing party in a family law matter, the court must state on the record or in its judgment the good cause substantiating the award. *Jenkins*, 991 S.W.2d at 450. The wiser course then is to ensure that the judgment at least states good cause for the award of attorney's fees.

Sections 9.013 and 9.014 limit what a court may award a party to costs and attorney's fees. Generally speaking, the fee of an expert witness constitutes an incidental expense in preparation for trial and is not recoverable as costs. Expert fees have been awarded under certain provisions of the Family Code, such as Chapters 6 (governing suits for dissolution of marriage) and 106 (concerning suits affecting the parent-child relationship). Each of these chapters, however, contains provisions permitting courts to award expenses in addition to costs and attorney's fees. *See* Tex. Fam. Code §§ 6.708 (authorizing court to award attorney's fees, costs, and expenses in a divorce action), 106.001 (authorizing award of costs in SAPCR), 106.002 (authorizing award of attorney's fees in SAPCR). In contrast, Chapter 9, Subchapter A only authorizes the award of attorney's fees and costs. Tex. Fam. Code §§ 9.013 (authorizing award of costs in an enforcement action), 9.014 (authorizing award of attorney's fees in an enforcement action). Indeed, section 9.013 expressly states that costs may be awarded in such actions "as in other civil cases." Because expert fees are neither attorney's fees nor costs, and because Chapter 9, Subchapter A does not allow an award of expenses in an enforcement action, a trial court errs in awarding a party its expert witness fees under its authority. *Messier*, 458 S.W.3d at 168.

IX. POST-DIVORCE QUALIFIED DOMESTIC RELATIONS ORDER

If a party is awarded retirement benefits held by a private or governmental plan in the name of the other spouse, the party awarded the benefits needs an order directing the plan administrator to divide those benefits. In this sense, these orders enforce the property division by ensuring the party awarded the benefits actually receives them. While sometimes these orders appear inside the decree of divorce or annulment, usually they are separate orders. The trial court that divided the property is the only court that may make and clarify these orders. Notwithstanding any other provision of Chapter 9, the court that rendered a final decree of divorce or annulment or another final order dividing property under Title 1 of the Family Code 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. Tex. Fam. Code § 9.101.

A court has some leeway to accomplish the goal of ensuring the party awarded the benefits actually receives those benefits. The court shall liberally construe Subchapter B 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. Tex. Fam. Code § 9.105.

Section 9.101 applies only to benefits that the trial court already divided by the decree. Unless prohibited by federal law, a suit seeking a qualified domestic relations order or similar order under section 9.101 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. Tex. Fam. Code § 9.101.

An alternate payee, *i.e.* the spouse awarded the retirement benefits of the retirement plan participant, should present a domestic relations order dividing those benefits before the trial court loses plenary power in the dissolution of marriage suit. Frequently, however, the alternate payee does not initiate the process early enough or the plan administrator takes longer than expected to pre-approve the draft of the order. Practitioners often present the courts with retirement division orders just before each court loses plenary power, desperate for the judge's signature. Each court should have a mechanism for identifying and tracking the retirement division orders to ensure the court reviews them before it loses plenary power.

Once the court loses plenary power, the alternate payee must file a petition to enable the court to have the plenary power to approve or clarify the retirement division order. 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 Chapter 9 did not provide a qualified domestic relations order or similar order permitting payment of benefits to an alternate payee or other lawful payee. Tex. Fam. Code § 9.103.

The courts should treat these retirement division orders as they treat other orders, when applicable requiring signatures of counsel showing approval of at least form. If the court lost plenary power to sign the order, the court must ensure the filing of a petition to render the order and due process, including service of process or a waiver of that service.

In *Araujo v. Araujo*, the trial court rendered an agreed divorce decree that divided the husband's Railroad Retirement Board pension, but it did not render or sign a qualified domestic relations order (QDRO). Over thirty days later, the later filed a "Motion to Enter" a Railroad Retirement Order. *Araujo v. Araujo*, 493 S.W.3d 232, 234 (Tex. App. —San Antonio 2016, no pet.). Under such circumstances, sections 9.101. 9.103, and 9.104 provide for limited, post-judgment jurisdiction that may be invoked only in particular circumstances, rather than for plenary, original jurisdiction. This limited, post-judgment jurisdiction is invoked when a party petitions the court to render a qualified domestic relations order or similar order. Section 9.102 provides the procedure for filing such a petition. The trial court's signing the Railroad Retirement Order was not a ministerial act because the trial court did not "render" a QDRO in the divorce decree. Therefore, the wife was required to comply with the provisions of Family Code chapter 9 to obtain a post-judgment QDRO. The wife did not file a "petition" that complies with the applicable rules of civil procedure that govern "the filing of an original lawsuit" as required by Section 9.102(b). Because the wife did not comply with Chapter 9, the Railroad Retirement Order was reversed. *Id.* at 238.

A party may request that the trial court amend a previously entered domestic relations order to allow the order to meet the requirements of the plan administrator. 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. Tex. Fam. Code § 9.104. Similarly, 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. An amended domestic relations order under Section 9.1045 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 Section 9.1045. Tex. Fam. Code § 9.1045.

Except as otherwise provided by the Family Code, the petition is governed by the Texas Rules of Civil Procedure that apply to the filing of an original lawsuit. 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. The proceedings shall be conducted in the same manner as civil cases generally. Tex. Fam. Code § 9.102.

To discourage unwarranted disputes regarding the entry or clarification of domestic relations orders, the trial 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 in a suit under Subchapter B. 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. Tex. Fam. Code § 9.106. Note that there is no provision in Subchapter B for the court to award costs. Section 9.013 allows a court to award costs but only in a proceeding to enforce a property division under Subchapter A.

X. POST-DECREE DIVISION OF PROPERTY

A. Property Not Previously Divided

Occasionally, the court in a suit for dissolution of marriage fails to divide all the community property. Sometimes the parties inadvertently omit community property from their decree or do not include it in the evidence at trial. Sometimes, a party intentionally does not disclose the existence of community property. After entry of a divorce decree, if the trial court did not dispose of all community property, the former spouses become tenants-in-common or joint owners of this undivided property. *Busby v. Busby*, 457 S.W.2d 551, 554-55 (Tex. 1970).

Either former spouse may file a suit as provided by Subchapter C of Chapter 9 to divide property not divided or awarded to a spouse in a final decree of divorce or annulment. Except as otherwise provided by Subchapter C, the suit is governed by the Texas Rules of Civil Procedure applicable to the filing of an original lawsuit. Tex. Fam. Code § 9.201. While Subchapter C applies only to community property, a trial court presumes property owned by either spouse during or at dissolution of marriage is community property. *Burgess v. Easley*, 893 S.W.2d 87, 90 (Tex. App.—Dallas 1994, no writ).

It is the respondent's burden to rebut this presumption by proving by clear and convincing evidence that the property was the respondent's separate property or that he did not own the property during marriage. The trial court's task is to determine when the respondent's rights in the property vested and whether the parties were married at that time or whether the acquisition was by gift, devise, or descent. As a matter of law, the property would not be community property if the parties were not married when the respondent's rights vested. *Id.*

Res judicata bars post-divorce property division actions only when the divorce decree has disposed of the asset at issue. If the suit aims to partition assets overlooked in the divorce settlement, then it is not barred by *res judicata*. If, however, the suit seeks merely to claim a share of an asset already divided in the divorce settlement, then it is barred. *Brown v. Brown*, 236 S.W.3d 343, 348 (Tex. App.—Houston [1st Dist.] 2007, no pet.). In contrast to a traditional lawsuit in which *res judicata* is an affirmative defense, the petitioner in this statutory post-divorce action has the burden to prove that the divorce court did not consider or dispose of the disputed property in the final decree. *Id.* at 348-49.

Sometimes a divorce decree will include a provision that ensures there is no undivided property. A residuary clause in a decree that states,

> IT IS FURTHER ORDERED AND DECREED, as part of the division of the estate of the parties, that any community property or its value not otherwise awarded by this Decree shall continue to be owned by the parties in equal undivided interests

effectively disposes of all of the community property not specifically referred to and divided between the parties in the divorce decree. Subchapter C therefore does not apply and the community property "not otherwise divided" is owned by the parties in equal undivided interests. *Matter of Marriage of Moore*, 890 S.W.2d 821, 840 (Tex. App.—Amarillo 1994, no writ). *But see Ewing v. Ewing*, 739 S.W.2d 470, 472–73 (Tex. App.—Corpus Christi 1987, no writ) (residuary clause did not divide retirement benefits).

The effect of a residuary clause depends very much on its wording. In *Mayes v. Stewart*, 11 S.W.3d 440, 446 (Tex. App.—Houston [14th Dist.] 2000, pet. denied), the husband purchased a winning lottery ticket during separation and conspired with a female third party for the third party to claim ticket as her own so the husband would not have to share proceeds with wife. The parties' decree contained a residuary clause that stated,

IT IS FURTHER ORDERED AND DECREED, as a part of the division of the estate of the parties that

any community property or its value not otherwise awarded by this decree is awarded to the party in possession or in control of the property.

The wife later successfully sued the third party for fraud and conspiracy. The appellate court affirmed, holding that the residuary clause was insufficient to dispose of the lottery proceeds, in that the divorce decree did not mention lottery proceeds, the trial court did not contemplate the lottery proceeds in the division of the community assets, and, at the hearing on the parties' divorce action, both the husband and the third party testified that the proceeds belonged solely to the third party and the respondent had no interest in them. As the lottery proceeds were not in the "possession" of the husband, the proceeds were not disposed of in the divorce decree. *Mayes*, 11 S.W.3d at 448.

B. Limitations

A party discovering there was undivided community property must act diligently to assert that party's interest in the property. A suit under Subchapter C 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. Tex. Fam. Code § 9.202. For this statute to apply, a petitioner must show that:

(1) the property sued upon was not divided or awarded in a final decree of divorce;
(2) the respondent repudiated the petitioner's ownership interest in the property;
(3) the respondent's repudiation was unequivocal; and
(4) that unequivocal repudiation was communicated to the petitioner.

Carter v. Charles, 853 S.W.2d at 671. A general denial combined with mere failure to share benefits is not, as a matter of law, unequivocal repudiation. *Sagester v. Waltrip*, 970 S.W.2d 767, 769 (Tex. App.—Austin 1998, pet. denied).

The two-year limitations period is tolled for the period that a Texas court does not have jurisdiction over the former spouses or over the property. Tex. Fam. Code § 9.202.

C. Division of Assets

The standard that a Texas court uses to divide property that should have been divided by that court in the dissolution proceeding is the same just and right standard that would have applied in the original proceeding. If a Texas court 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. Tex. Fam. Code § 9.203(a).

The "just and right" standard implicitly encompasses the power to divide other than equally. *In re Marriage of Moore*, 890 S.W.2d at 840. Depending upon the facts of each case, the court may validly apportion some, all, or none of the assets to any particular party. *Forgason v. Forgason*, 911 S.W.2d 893, 896 (Tex. App.—Amarillo 1995, writ denied). In making a division of the property, the trial court may consider such factors as the spouses' capacities and abilities; benefits that the party not at fault would have derived from continuation of the marriage; business opportunities, education, relative physical conditions, relative financial condition and obligations; disparity of ages; size of separate estates; and the nature of the property. The consideration of a disparity in earning capacities or incomes is proper and need not be limited by necessitous circumstances. *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981). In making its post-divorce partition, a trial court may consider a party's failure in the original proceeding to disclose the disputed assets, but that is not the only factor a court may consider. *Brown v. Brown*, 236 S.W.3d 343, 350 (Tex. App.—Houston [1st Dist.] 2007, no pet.). In a post-divorce partition suit, an unequal division should not be disturbed absent a showing that the division was so disproportionate, unjust, and unfair that it was a clear abuse of discretion. *Brown*, 236 S.W.3d at 348.

A different standard is used if the decree of divorce or annulment was rendered in another state, but the parties are asking a Texas court to divide property not awarded to anyone in the original proceeding. If a final decree of divorce or annulment rendered by a court in a state other than Texas failed to dispose of property subject to division under the law of that state even though the court had jurisdiction to do so, a Texas court 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. Tex. Fam. Code § 9.203(b). In these cases, practitioners must familiarize themselves and educate the Texas court about the relevant law of the other state.

While section 9.203 addresses the problem of a court that had jurisdiction to divide the property but failed to divide it, Section 9.204 applies to the less common situation of the divorce court not having jurisdiction to divide the property, but later that court or, if the divorce court was in another state, a Texas court acquires jurisdiction over the parties and the property. If a Texas court failed to dispose of property subject to division in a final decree of divorce or annulment because the Texas 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. Tex. Fam. Code § 9.204(a). 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 Texas court subsequently acquires the requisite jurisdiction over the former spouses or over the property, the Texas 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. Tex. Fam. Code § 9.204(b). Since the court of the previous state did not have jurisdiction to divide the assets, Texas law will apply to the later suit to divide that property.

D. Attorney's Fees

In a proceeding to divide property previously undivided in a decree of divorce or annulment as provided by Subchapter C, 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. Tex. Fam. Code § 9.205. Note that there is no provision in Subchapter C for the court to award costs. Section 9.013 allows a court to award costs but only in a proceeding to enforce a property division under Subchapter A.

XI. DISPOSITION OF UNDIVIDED BENEFICIAL INTEREST

Subchapter D of Chapter 9 limits the ability of a former spouse to receive money as a beneficiary of an insurance policy on the life of the other former spouse and, similarly, to receive money as a beneficiary of a retirement or similar plan in the name of the other former spouse. As a general rule, the former spouse may not receive money as a beneficiary, but there are exceptions to this rule. The great lesson for practitioners from Subchapter D is that they should advise their clients to change their beneficiary designations as soon as possible after divorce. The lesson for judges is that they must ensure their orders in contested suits comply with Subchapter D if they want their orders to have their desired effect.

A. Beneficiary of Life Insurance

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:

(1) the decree designates the insured's former spouse as the beneficiary;
(2) the insured redesignates the former spouse as the beneficiary after rendition of the decree; or
(3) 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.

Tex. Fam. Code § 9.301(a). If a designation is not effective under section 9.301(a), 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. Tex. Fam. Code § 9.301(b).

Federal law may preempt section 9.301 in certain circumstances. The Federal Employees' Group Life Insurance Act of 1954 (FEGLIA), 5 U.S.C. § 8701 *et seq*., establishes a life insurance program for federal employees. FEGLIA provides that an employee may designate a beneficiary to receive the proceeds of his life insurance at the time of his death. 5 U.S.C. § 8705(a). If a beneficiary has been duly named, the insurance proceeds the beneficiary is owed under FEGLIA cannot be allocated to another person by operation of state law, even if a state law of the same effect as section 9.301 would otherwise apply. *Hillman v. Maretta*, 569 U.S. 483, 133 S. Ct. 1943, 1953, 186 L. Ed. 2d 43 (2013).

The U.S. Supreme Court also held that Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, pre-empts a Washington State statute having the same effect as section 9.301 to the extent that statute applies to ERISA plans. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 143, 121 S. Ct. 1322, 1325-26, 149 L. Ed. 2d 264 (2001). In *Egelhoff*, the husband obtained a divorce but did not change the designation of his former wife as the beneficiary of a life insurance policy. Upon the husband's death, his ERISA plan administrator paid the policy proceeds to his former wife. His children then sued her to recover those proceeds. The husband's children relied on a state statute that revoked a designation of a spouse as the beneficiary of a life insurance policy upon divorce. The Supreme Court held that ERISA preempts state law in this regard. *Barnett v. Barnett*, 67 S.W.3d 107, 116 (Tex. 2001) (*citing Egelhoff*, 532 U.S. at 146, 121 S. Ct. at 1327.)

The Texas Supreme Court reached the same conclusion. ERISA preempts any state laws that "relate to" covered employee benefit plans. Administrators of employee benefit plans are directed to make payments to the "beneficiary," who is designated by a participant or by the terms of the plan. *Barnett*, 67 S.W.3d at 112.

Section 9.301 includes provisions to protect the insurers. 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 section 9.301(a) is liable for payment of the proceeds to the person or estate provided by section 9.301(b) only if:

(1) 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 Section 9.301(a); and
(2) 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.

Tex. Fam. Code § 9.301(c).

B. Beneficiary in Retirement and Other Financial Plans

Section 9.302 parallels section 9.301, applying instead to retirement benefits and employee benefits. 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 IRA, 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:

(1) the decree designates the other former spouse as the beneficiary;
(2) the designating former spouse redesignates the other former spouse as the beneficiary after rendition of the decree; or
(3) 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.

Tex. Fam. Code § 9.302(a). If a designation is not effective under section 9.302(a), 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. Tex. Fam. Code § 9.302(b).

Federal preemption is also an issue for section 9.302. In *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865, 172 L. Ed. 2d 662 (2009), the husband signed a form designating the wife to take benefits under his company's savings and investment plan (SIP). The spouses divorced, subject to a decree that the wife was divested of all right, title, interest, and claim in and to any and all sums the proceeds from, and any other rights related to any retirement plan, pension plan, or like benefit program existing by reason of the husband's past or present or future employment. Critically, the husband did not, however, execute any documents removing the wife as the SIP beneficiary, even though he did execute a new beneficiary-designation form naming his daughter as the beneficiary under the company's Pension and Retirement Plan, also governed by ERISA.

On the husband's death, the daughter was named executrix and asked the company to distribute the SIP funds to the husband's estate. The company, instead, relied on the husband's designation form and paid the balance of some $400,000 to the wife. The estate then sued the company and the SIP plan administrator, claiming that the divorce decree amounted to a waiver of the SIP benefits on the wife's part and that the company had violated ERISA by paying the benefits to the husband's designee. *Kennedy*, 555 U.S. at 289-90, 129 S. Ct. at 869.

The SIP is an ERISA "employee pension benefit plan." *Kennedy*, 555 U.S. at 289, 129 S. Ct. at 868. The plan does, however, permit a beneficiary to submit a "qualified disclaimer" of benefits as defined under the Tax Code, which has the effect of switching the beneficiary to an alternate determined according to a valid beneficiary designation made by the deceased. *Kennedy*, 555 U.S. at 289, 129 S. Ct. at 869. The SIP and the summary plan description provide that the plan administrator will pay benefits to a participant's designated beneficiary, with designations and changes to be made in a particular way. The husband's designation of his then (later former) wife as his beneficiary was made in the way required. The former wife's later waiver of these benefits was not. The Court concluded that the plan administrator properly distributed the SIP benefits to the former wife in accordance with the plan documents. *Kennedy*, 555 U.S. at 304, 129 S. Ct. at 877-78.

The statute provides protection those paying retirement benefits in a manner also identical that available to insurers under section 9.301(c). 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 section 9.302 who pays the benefits or proceeds to the beneficiary under a designation of the other former spouse that is not effective under section 9.302(a) is liable for payment of the benefits or proceeds to the person provided by section 9.302(b) only if:

(1) before payment of the benefits or proceeds to the designated beneficiary, the payor receives written notice at the home office or principal office of the payor from an interested person that the designation of the beneficiary or

fiduciary is not effective under Section 9.302(a); and

(2) 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.

Tex. Fam. Code § 9.302(c).

Section 9.302 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 section 9.302 as provided by Subchapter D. Tex. Fam. Code § 9.302(d). Section 9.302 also 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 802.001 of the Government Code. Tex. Fam. Code § 9.302(e).

XII. ENFORCEMENT OF SPOUSAL MAINTENANCE

Spousal maintenance obligations may be enforced by contempt, through an award of a judgment, and through income withholding. The income may be withheld both for current spousal maintenance payments and for the payment of arrears. While these procedures can appear like those for the enforcement of child support, there are significant differences.

A. Contempt

A court has a much greater ability to enforce a spousal maintenance obligation than an obligation to pay a debt. The court may enforce by contempt against the obligor the court's maintenance order or an agreement for periodic payments of spousal maintenance under the terms of Family Code Chapter 8 voluntarily entered into between the parties and approved by the court. Tex. Fam. Code § 8.059(a).

A spousal maintenance obligation is not automatically put on hold if the suit is under appeal. When a final judgment has not been superseded or stayed pending an appeal, either the trial court or the court of appeals may entertain a motion for contempt. If the motion is filed in a court of appeals, it remains the better practice to refer that motion to the trial court for hearing and factfinding. *In re Sheshtawy*, 154 S.W.3d 114, 124–25 (Tex. 2004).

If the spousal maintenance order is reversed on appeal, the reversal of the spousal maintenance award means that the trial court's order directing that the obligor be incarcerated for civil coercive contempt until he pays spousal maintenance of a set amount cannot be enforced because there is no longer an order with which he is to comply. However, "[v]iolations of an order are punishable as criminal contempt even though the order is set aside on appeal, or though the basic action has become moot." *Id.* at 126 (*quoting United States v. United Mine Workers of Am.*, 330 U.S. 258, 294, 67 S. Ct. 677, 91 L. Ed. 884 (1947)).

B. Spousal Maintenance versus Contractual Alimony

A contractual alimony agreement is not an agreement for spousal maintenance made pursuant to chapter 8 of the family code. Consequently, the trial court has no authority to enforce the contractual alimony obligation by contempt pursuant to section 8.059(a) or section 9.012(b), as doing so would contravene Article I, Section 18 of the Texas Constitution. *In re Dupree,* 118 S.W.3d at 916. In *Dupree*, the decree expressly referred to the obligation as "contractual alimony." *Id.* at 913. The absence of decretal language in the divorce decree ordering or commanding an obligor to make the alimony payments also prevents a court for holding the obligor in contempt for failing to make these payments. The obligor cannot be held in contempt of court for failing to take an action the court never ordered him to take. *Id.* at 916.

By contrast, if the decree speaks of contractual maintenance rather than alimony and if it clearly contains decretal language by the trial court ordering the obligor to pay a sum certain, obligation is not merely an agreement of the parties, but a spousal maintenance order of the court. A court has the authority to enforce its order. *In re Taylor,* 130 S.W.3d 448, 450 (Tex. App.—Texarkana 2004, no pet.).

The mere fact than an agreement to pay alimony might be incorporated into a divorce decree and explicitly approved by the court does not render it an unenforceable court order or award of alimony. Instead, it has long been held that such alimony agreements and other marital property agreements, even when incorporated into divorce decrees, are enforceable as contracts and governed by contract law. *McCollough v. McCollough*, 212 S.W.3d 638, 642 (Tex. App.—Austin 2006, no pet.) (citation omitted).

C. Enforcement of Spousal Maintenance Beyond What Court Could Have Imposed

The court's enforcement by contempt is limited if the parties had agreed to maintenance terms beyond what the court could have imposed involuntarily. The court may not enforce by contempt any provision of an agreed order for maintenance that exceeds the amount of periodic support the court could have ordered under Chapter 8 or for any period of maintenance beyond the period of maintenance the court could have ordered under Chapter 8. Tex. Fam. Code § 8.059(a-1). Be aware of this limitation when making these agreements. Notify your client in writing of this limitation, and save a copy of that notice.

D. Suit for a Judgment

On the suit to enforce by an obligee, the court may render judgment against a defaulting party for the amount of arrearages after notice by service of citation, answer, if any, and a hearing finding that the defaulting party has failed or refused to comply with the terms of the order. The judgment may be enforced by any means available for the enforcement of judgment for debts. Tex. Fam. Code § 8.059(b). The court, in rendering a cumulative judgment for arrearages, may order that a reasonable amount of income be withheld from the disposable earnings of the obligor to be applied toward the satisfaction of the judgment. Tex. Fam. Code § 8.104.

E. Affirmative Defenses

The affirmative defenses are similar to those for an enforcement of a child support obligation. It is an affirmative defense to an allegation of contempt of court or the violation of a condition of probation requiring payment of court-ordered maintenance that the obligor:

(1) lacked the ability to provide maintenance in the amount ordered;
(2) lacked property that could be sold, mortgaged, or otherwise pledged to raise the funds needed;
(3) attempted unsuccessfully to borrow the needed funds; and
(4) did not know of a source from which the money could have been borrowed or otherwise legally obtained.

Tex. Fam. Code § 8.059(c). Note that these affirmative defenses do not apply to a request for a judgment for arrearages.

If the obligee has an affirmative defense, the obligee must plead it. The issue of the existence of an affirmative defense does not arise until pleaded. An obligor must prove the affirmative defense by a preponderance of the evidence. Tex. Fam. Code § 8.059(d).

F. Income Withholding

1. Income Withholding and Its Limitations

In a proceeding in which periodic payments of spousal maintenance are ordered, modified, or enforced, the court may order that income be withheld from the disposable earnings of the obligor as provided by Chapter 8. Tex. Fam. Code § 8.101(a). The court may issue an order or writ for withholding under this chapter at any time before all spousal maintenance and arrearages are paid. Tex. Fam. Code § 8.151. An order or writ of withholding issued under Chapter 8 and delivered to an employer doing business in this state is binding on the employer without regard to whether the obligor resides or works outside this state. Tex. Fam. Code § 8.107. Section 8.152 describes the contents of an order of withholding.

The court may order that income be withheld from the disposable earnings of the obligor in a proceeding in which there is an agreement for periodic payments of spousal maintenance under the terms of Chapter 8 voluntarily entered into between the parties and approved by the court. Tex. Fam. Code § 8.101(a-1). Note, however, that the court may not order that income be withheld from the disposable earnings of the obligor to the extent that any provision of an agreed order for maintenance exceeds the amount of periodic support the court could have ordered under Chapter 8 or for any period of maintenance beyond the period of maintenance the court could have ordered under Chapter 8. Tex. Fam. Code § 8.101(a-2). Regardless of which the wise practitioner represents, that attorney will notify her client in writing about this limitation and keep a copy of that correspondence. The obligor needs to pay the additional amount outside of withholding. The obligee needs to understand the payment of the additional amount will be harder to enforce and may arrive in a less dependable manner.

These provisions regarding income withholding do not apply to contractual alimony or spousal maintenance, regardless of whether the alimony or maintenance is taxable, unless the contract specifically permits income withholding or the alimony or maintenance payments are not timely made under the terms of the contract. Tex. Fam. Code § 8.101(b). If representing the obligee, the wise practitioner will press for the inclusion of a provision in the decree that the contractual alimony or contractual spousal maintenance is subject to income withholding.

An order or writ of withholding under Chapter 8 has priority over any garnishment, attachment, execution, or other order affecting disposable earnings, except for an order or writ of withholding for child support under Chapter 158. Tex. Fam. Code § 8.105.

An order or writ of withholding must direct that an obligor's employer withhold from the obligor's disposable earnings the lesser of:

(1) the amount specified in the order or writ; or
(2) an amount that, when added to the amount of income being withheld by the employer for child support, is equal to 50 percent of the obligor's disposable earnings.

Tex. Fam. Code § 8.106.

An obligor or obligee may file with the clerk of the court a request for issuance of an order or writ of withholding. Tex. Fam. Code § 8.153.

2. Combining Withholding of Spousal Maintenance and Child Support

An order or writ of withholding for spousal maintenance may be combined with an order or writ of withholding for child support only if the obligee has been appointed managing conservator of the child for whom the child support is owed and is the conservator with whom the child primarily resides. Tex. Fam. Code § 8.101(c). Note that the failure to designate either joint managing conservator as the one who has the exclusive right to designate the primary physical residence of the child creates an argument that the obligee is not "the conservator with whom the child primarily resides." On the other hand, section 8.101(c) looks to the conservator with whom the child primarily resides, not the conservator with the exclusive right to designate the primary physical residence of the child.

An order or writ of withholding that combines withholding for spousal maintenance and child support must:

(1) require that the withheld amounts be paid to the appropriate place of payment under Family Code section 154.004;
(2) be in the form prescribed by the Title IV-D agency under Family Code section 158.106;
(3) clearly indicate the amounts withheld that are to be applied to current spousal maintenance and to any maintenance arrearages; and
(4) subject to the maximum withholding allowed under Family Code section 8.106, order that withheld income be applied in the following order of priority:

(A) current child support;
(B) current spousal maintenance;
(C) child support arrearages; and
(D) spousal maintenance arrearages.

Tex. Fam. Code § 8.101(d).

3. Withholding for Spousal Maintenance Arrearages

The court may order that, in addition to income withheld for current spousal maintenance, income be withheld from the disposable earnings of the obligor to be applied toward the liquidation of any arrearages. Tex. Fam. Code § 8.102(a). The additional amount withheld to be applied toward arrearages must be whichever of the following amounts will discharge the arrearages in the least amount of time:

(1) an amount sufficient to discharge the arrearages in not more than two years; or
(2) 20 percent of the amount withheld for current maintenance.

Tex. Fam. Code § 8.102(b).

A court may order income withholding to be applied toward arrearages in an amount sufficient to discharge those arrearages in not more than two years if current spousal maintenance is no longer owed. Tex. Fam. Code § 8.102(c).

4. Writ of Withholding

i. Notice of Application for a Writ of Withholding

An obligor or obligee may file a notice of application for a writ of withholding if income withholding was not ordered at the time spousal maintenance was ordered. The obligor or obligee may file the notice of application for a writ of withholding in the court that ordered the spousal maintenance under Chapter 8, Subchapter B. Tex. Fam. Code § 8.251. The notice of application for a writ of withholding must be verified and:

(1) state the amount of monthly maintenance due, including the amount of arrearages or anticipated arrearages, and the amount of disposable earnings to be withheld under a writ of withholding;
(2) state that the withholding applies to each current or subsequent employer or period of employment;
(3) state that the obligor's employer will be notified to begin the withholding if the obligor does not contest the withholding on or before the 10th day after the date the obligor receives the notice;
(4) describe the procedures for contesting the issuance and delivery of a writ of withholding;
(5) state that the obligor will be provided an opportunity for a hearing not later than the 30th day after the date of receipt of the notice of contest if the obligor contests the withholding;
(6) state that the sole ground for successfully contesting the issuance of a writ of withholding is a dispute concerning the identity of the obligor or the existence or amount of the arrearages;
(7) describe the actions that may be taken if the obligor contests the notice of application for a writ of withholding, including the procedures for suspending issuance of a writ of withholding; and
(8) include with the notice a suggested form for the motion to stay issuance and delivery of the writ of withholding that the obligor may file with the clerk of the appropriate court.

Tex. Fam. Code § 8.252. If the notice of application for a writ of withholding states that the obligor has failed to pay more than one spousal maintenance payment

according to the terms of the spousal maintenance order, the writ of withholding may include withholding for arrearages that accrue between the filing of the notice and the date of the hearing or the issuance of the writ. Tex. Fam. Code § 8.254.

The party who files a notice of application for a writ of withholding shall deliver the notice to the obligor by:

(1) first-class or certified mail, return receipt requested, addressed to the obligor's last known address or place of employment; or
(2) service of citation as in civil cases generally.

If the notice is delivered by mail, the party who filed the notice shall file with the court a certificate stating the name, address, and date the party mailed the notice. The notice is considered to have been received by the obligor:

(1) on the date of receipt, if the notice was mailed by certified mail;
(2) on the 10th day after the date the notice was mailed, if the notice was mailed by first-class mail; or
(3) on the date of service, if the notice was delivered by service of citation.

Tex. Fam. Code § 8.255.

The registration of a foreign order that provides for spousal maintenance or alimony as provided in Family Code Chapter 159 is sufficient for filing a notice of application for a writ of withholding. The notice must be filed with the clerk of the court having venue as provided in Chapter 159. The notice of application for a writ of withholding may be delivered to the obligor at the same time that an order is filed for registration under Chapter 159. Tex. Fam. Code § 8.253.

A party who files a notice of application for a writ of withholding and who determines that the schedule for repaying arrearages would cause unreasonable hardship to the obligor or the obligor's family may extend the payment period in the writ. Tex. Fam. Code § 8.264.

ii. Motion to Stay Issuance of a Writ of Withholding and Hearing on Motion

The obligor may stay issuance of a writ of withholding by filing a motion to stay with the clerk of the court not later than the 10th day after the date the notice of application for a writ of withholding was received. The grounds for filing a motion to stay issuance are limited to a dispute concerning the identity of the obligor or the existence or the amount of the arrearages. The obligor shall verify that the statements of fact in the motion to stay issuance of the writ are correct. Tex. Fam. Code § 8.256. If the obligor files a motion to stay as provided by section 8.256, the clerk of the court may not deliver the writ of withholding to the obligor's employer before a hearing is held. Tex. Fam. Code § 8.257.

If the obligor files a motion to stay as provided by section 8.256, the court shall set a hearing on the motion and the clerk of the court shall notify the obligor and obligee of the date, time, and place of the hearing. The court shall hold a hearing on the motion to stay not later than the 30th day after the date the motion was filed unless the obligor and obligee agree and waive the right to have the motion heard within 30 days. After the hearing, the court shall:

(1) render an order for income withholding that includes a determination of any amount of arrearages; or
(2) grant the motion to stay.

Tex. Fam. Code § 8.258. The court may not refuse to order withholding solely on the basis that the obligor paid the arrearages after the obligor received the notice of application for a writ of withholding. The court shall order that a reasonable amount of income be withheld and applied toward the liquidation of arrearages, even though a judgment confirming arrearages was rendered against the obligor. Tex. Fam. Code § 8.260.

A defect in a notice of application for a writ of withholding is waived unless the respondent specially accepts in writing and cites with particularity the alleged defect, obscurity, or other ambiguity in the notice. A special exception under Section 8.259 must be heard by the court before hearing the motion to stay issuance. If the court sustains an exception, the court shall provide the party filing the notice an opportunity to refile and shall continue the hearing to a specified date without requiring additional service. Tex. Fam. Code § 8.259.

iii. Failure to File Motion to Stay Issuance of a Writ of Withholding

If a notice of application for a writ of withholding is delivered and the obligor does not file a motion to stay within the time provided by section 8.256, the party who filed the notice shall file with the clerk of the court a request for issuance of the writ of withholding stating the amount of current spousal maintenance, the amount of arrearages, and the amount to be withheld from the obligor's income. The party who filed the notice may not file a request for issuance before the 11th day after the date the obligor received the notice of application for a writ of withholding. Tex. Fam. Code § 8.261.

vi. Request for Issuance of a Writ of Withholding

An obligor or obligee may file with the clerk of the court a request for issuance of a writ of withholding. Tex. Fam. Code § 8.153. The clerk of the court shall, on the filing of a request for issuance of a writ of withholding, issue and deliver the writ as provided by Chapter 8, Subchapter D (Procedure), not later than the second working day after the date the request is filed. The clerk shall charge a fee in the amount of $15 for issuing the writ of withholding. Tex. Fam. Code § 8.262. A writ of withholding must direct that an obligor's employer or a subsequent employer withhold from the obligor's disposable earnings an amount for current spousal maintenance and arrearages consistent with Chapter 8. Tex. Fam. Code § 8.263.

After the clerk of the court issues a writ of withholding, a party authorized to file a notice of application for a writ of withholding under this subchapter may deliver a copy of the writ to a subsequent employer of the obligor by certified mail. Except as provided by an order under Section 8.152, the writ of withholding must include the name, address, and signature of the party and clearly indicate that the writ is being issued to a subsequent employer. The party shall file:

(1) a copy of the writ of withholding with the clerk not later than the third working day after the date of delivery of the writ to the subsequent employer; and
(2) the postal return receipt from the delivery to the subsequent employer not later than the third working day after the date the party receives the receipt.

The party shall pay the clerk a fee in the amount of $15 for filing the copy of the writ. Tex. Fam. Code § 8.267.

5. Voluntary Writ of Withholding by Obligor

An obligor may file with the clerk of the court a notarized or acknowledged request signed by the obligor and the obligee for the issuance and delivery to the obligor's employer of a writ of withholding. The obligor may file the request under Section 8.108 regardless of whether a writ or order has been served on any party or whether the obligor owes arrearages. Tex. Fam. Code § 8.108(a). On receipt of a request under section 8.108, the clerk shall issue and deliver a writ of withholding in the manner provided by this Chapter 8, Subchapter C (Income Withholding). Tex. Fam. Code § 8.108(b).

The employer, the obligor, and the obligee may each request a hearing. An employer who receives a writ of withholding issued under section 8.108 may request a hearing in the same manner and according to the same terms provided by section 8.205. Tex. Fam. Code § 8.108(c). An obligor whose employer receives a writ of withholding issued under section 8.108 may request a hearing in the manner provided by Section 8.258. Tex. Fam. Code § 8.108(d). An obligee may contest a writ of income withholding issued under section 8.108 by requesting, not later than the 180th day after the date on which the obligee discovers that the writ was issued, a hearing to be conducted in the manner provided by section 8.258 for a hearing on a motion to stay. Tex. Fam. Code § 8.108(e).

A writ of withholding under section 8.108 may not reduce the total amount of spousal maintenance, including arrearages, owed by the obligor. Tex. Fam. Code § 8.108(f).

6. Modification, Reduction, or Termination of Writ of Withholding

An obligor and obligee may agree to reduce or terminate income withholding for spousal maintenance on the occurrence of any contingency stated in the order. The obligor and obligee may file a notarized or acknowledged request with the clerk of the court under section 8.108 for a revised writ of withholding or notice of termination of withholding. The clerk shall issue and deliver to the obligor's employer a writ of withholding that reflects the agreed revision or a notice of termination of withholding. An agreement by the parties under this section does not modify the terms of an order for spousal maintenance. Tex. Fam. Code § 8.301.

If an obligor initiates voluntary withholding under section 8.108, the obligee may file with the clerk of the court a notarized request signed by the obligor and the obligee for the issuance and delivery to the obligor of:

(1) a modified writ of withholding that reduces the amount of withholding; or
(2) a notice of termination of withholding.

On receipt of a request under this section, the clerk shall issue and deliver a modified writ of withholding or notice of termination in the manner provided by section 8.301. The clerk may charge a fee in the amount of $15 for issuing and delivering the modified writ of withholding or notice of termination. Tex. Fam. Code § 8.302.

An obligor for whom withholding for maintenance owed or withholding for maintenance and child support owed is mandatory may file a motion to terminate withholding. On a showing by the obligor that the obligor has complied fully with the terms of the maintenance or child support order, as applicable, the court shall render an order for the issuance and delivery to the obligor of a notice of termination of withholding. The clerk shall issue and deliver the notice of termination ordered under this section to the obligor. The clerk may charge a fee in the amount of

$15 for issuing and delivering the notice. Tex. Fam. Code § 8.303.

Any person may deliver to the obligor's employer a certified copy of an order that reduces the amount of spousal maintenance to be withheld or terminates the withholding. Tex. Fam. Code § 8.304.

G. Recovery of Overpayment of Spousal Maintenance

If an obligor is not in arrears on the obligor's maintenance obligation and the obligor's maintenance obligation has terminated, the obligee must return to the obligor any maintenance payment made by the obligor that exceeds the amount of maintenance ordered or approved by the court, regardless of whether the payment was made before, on, or after the date the maintenance obligation terminated. Tex. Fam. Code § 8.0591(a).

An obligor may file a suit to recover overpaid maintenance under section 8.0591(a). If the court finds that the obligee failed to return overpaid maintenance under section 8.0591(a), the court shall order the obligee to pay the obligor's attorney's fees and all court costs in addition to the amount of the overpaid maintenance. For good cause shown, the court may waive the requirement that the obligee pay attorney's fees and court costs if the court states in its order the reasons supporting that finding. Tex. Fam. Code § 8.0591(b).

XIII. ENFORCEMENT PROCEDURES

Whether the practitioner is enforcing a property division or a spousal maintenance order, certain factors are critical to success. Some this paper has covered above, but they are worth repeating.

A. Specificity in the Order to be Enforced

The most important factor is the quality of the order to be enforced. Even before the drafting of the decree, at the mediation or contested final hearing, have the specific details of the property to be awarded. Anyone reading the mediated settlement agreement or the evidence at trial must be able to identify the specific property awarded to the client. That level of detail continues to the drafting of the decree, particularly for each item that one party must transfer to the other. Use proper legal descriptions and full vehicle identification numbers. Use complete account numbers, even if those numbers remain confined to an agreement incident to divorce referenced by the decree but not filed with the court.

State WHO must do WHAT, WHERE, WHEN, and HOW. Consider including a statement of WHY. Decretal language is necessary ("IT IS ORDERED…"). The decree should not merely state that husband is awarded the Toyota Camry in the wife's possession. The decree first should state that the husband is awarded the 2015 Toyota Camry, vehicle identification number [state the number], in the wife's possession or subject to her control. The decree should go on to state that that the wife is ordered to surrender the 2015 Toyota Camry, vehicle identification number [state the number], with its title and all keys and remote controls to the husband at the wife's residence located at 1234 Maple, Anytown, Texas at 10:00 a.m. on the first Saturday after the date the court signs the decree. The extra effort in drafting is worth not having to explain to the client why another pleading and court hearing are necessary for the client to receive the property already awarded to him.

If the decree is awarding personal items such as furniture or personal effects, use descriptions to improve enforcement. State the color of the item or its dimensions. Add a photograph of each important, hard-to-describe item as an exhibit to the decree and then reference that exhibit. If the decree splits a collection of vintage guitars or a crystal collection, photographs as exhibits to the decree may prove essential for enforcement. The photographs may also prevent any legitimate confusion by the parties about how got what; use them at mediation and trial, as well as in the decree.

If the property division requires the execution and delivery of a transfer document, such as a special warranty deed or an IRA transfer form, draft the document and include it as an exhibit to the decree. Include language ordering the other party to sign a document in the form of that exhibit and deliver it to a specific person at a specific place at a specific time that is after the date the decree is signed.

For a spousal maintenance order, as with a child support order, state who pays, when each payment is due, how much each payment is, and where the payment must be made. Use decretal language. Use the words "spousal maintenance" and state that this order is made pursuant to Chapter 8 of the Family Code, so there can be no argument the obligation was contractual alimony that is unenforceable by contempt. Do not vary from the terms of Family Code section 8.056, which states when a spousal maintenance obligation must terminate before all the payments have been made. A change to those terms arguably alters a spousal maintenance obligation into a contractual alimony obligation. Include a finding of how much periodic support the court could have ordered and the period of maintenance the court could have ordered, since the portion of an obligation that exceeds either is unenforceable by contempt or withholding. If the spousal maintenance is contractual, specifically permit income withholding.

B. Contents of Motion for Enforcement

Include the proper names of both the movant and each respondent.

Quote the portions of the decree to be enforced.

Number and state separately each violation of an order in the decree. If there was a condition precedent in the decree, state that the condition was satisfied.

For each violation, state if the respondent had the ability to obey the order at the time of the violation. These statements inform the court for which violations the movant is seeking criminal contempt. Criminal contempt is punitive in nature. The sentence is not conditioned upon some promise of future performance because the contemnor is being punished for some completed act which affronted the dignity and authority of the court. *Ex parte Werblud*, 536 S.W.2d 542, 545 (Tex. 1976).

For each violation, state if the respondent can obey the order at the time of the motion. These statements inform the court for which violations the movant is seeking civil contempt. The purpose of civil contempt is remedial and coercive in nature. A judgment of civil contempt exerts the judicial authority of the court to persuade the contemnor to obey some order of the court where such obedience will benefit an opposing litigant. Imprisonment is conditional upon obedience and therefore the civil contemnor "carries the keys of (his) prison in (his) own pocket." In other words, it is civil contempt when one "may procure his release by compliance with the provisions of the order of the court." *Id.* at 545 (citations omitted).

State the relief requested: contempt, delivery of specific property, money judgment, clarification of the prior order, attorney's fees, and court costs. Don't ask for contempt if there is no decretal language in the relevant portion of the decree, if the respondent was unconstitutionally "ordered" to pay a debt, or if the order lacks the specificity to be enforced by contempt, lacks the who, what, where, when, and how. Be sure not to ask the court to modify the property division if the court has lost plenary power.

C. Answer to Motion for Enforcement

When answering a motion for enforcement, explore filing a mere general denial. Look at the affirmative defenses to see if any apply. *See* Tex. R. Civ. P. 94. In particular, examine whether any of the following are applicable: accord and satisfaction, estoppel, laches, payment, release, statute of limitations, and waiver.

D. Enforcement Order

If the movant, draft the enforcement order before the hearing. If the court orders the respondent held in contempt, the movant must get a commitment order signed without delay. Even if the movant does not request contempt, the drafting of the order will help organize the movant's testimony and exhibits.

The goal of the enforcement suit was to secure the property division or the payment of spousal maintenance. The faster the order is presented to the court and signed, the faster the client can achieve his goal.

XIV. CONCLUSION

The securing and enforcement of property divisions is a seemingly simple area of family law that has its pitfalls and traps. As obvious as it seems, advanced preparation of a property case makes all the difference. Start with the end: draft the mediated settlement agreement and decree far in advance of the actual event to discern the gaps in your case. Even a brief review of Chapter 9, associated case law, and the 2017 statute providing for temporary orders pending appeal can save practitioners from making mistakes. Those mistakes can result in suits being time-barred or containing impermissible requests for a respondent to be held in contempt. The wise practitioner should educate herself to make more effective orders dividing property and to properly enforce those orders. The author hopes this paper has made that education a little easier.