

**POST - JUDGMENT ENFORCEMENT -
CHAPTER 9 REMEDIES**

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CHAPTER 20

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PROPERTY ENFORCEMENT - (CHAPTER 9 REMEDIES)

I. OVERVIEW OF CHAPTER 9

An understanding of Chapter 9's powers and limitations is necessary to represent clients in property enforcement suits and to better negotiate and draft property divisions. Unfortunately, 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. Often times, practitioners try to apply to property enforcement the broad powers Chapter 157 provides to enforce child support and possession orders, with unsuccessful results. The goal of this paper is to prepare you to represent your clients in a property enforcement suit.

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

Subchapter A: Suit to Enforce Decree

Subchapter B: Post-Decree Qualified Domestic Relations Order

Subchapter C: Post-Decree Division of Property

Subchapter D: Disposition of Undivided Beneficial Interest

It is important to note that Chapter 9 does not exhaust all methods of enforcing a property division. For example, once a party is granted a judgment against another, that party can seek relief under the Rules for Ancillary Proceedings, 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, if your client is a creditor, the relief available to a creditor outside of the Family Code is also available to your client.

II. PROCEDURE

A. Scope of Chapter 9

Chapter 9 applies to the enforcement of division of marital property as provided by Chapter 7 of the Family Code. Tex. Fam. Code § 9.001(a). 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 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 v. McGoodwin*, 671 S.W.2d 880 (Tex. 1984)).

However, Chapter 9 does not apply to all suits enforcing a divorce decree. “[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. Because enforcement of an injunction against speech does not fall under Chapter 9, the provisions regarding the payment of attorney’s fees under Section 9.014 are also not applicable 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) (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”) (memo op.).

B. Standing

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 real 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 and had standing to file suit. *Id.* at 590.

C. Venue

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 and 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 v. Dechon*, 909 S.W.2d 950, 955 (Tex. App.—El Paso 1995, no writ).

Interestingly, you do not *have* to file suit in the court that rendered the decree. 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 because 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 Ann. § 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 Ann. § 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 (Tex. Civ. App.—Dallas 1976, no writ)). *Adwan* holds that, although the Family Code grants exclusive jurisdiction over suits affecting parent-child relationship to the court rendering judgment, a breach of contract suit for damages based on a failure to make payments provided for in an agreed judgment could be brought in a district court rather than the court that rendered the decree. *Adwan*, 538 S.W.2d at 194-95.

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.). *Chavez*, 287 S.W.3d at 845. 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 Houston 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.” *Id.*

D. Filing Suit

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.*

PRACTICE TIP: For those used to filing motions for enforcement under Title 5 of the Family Code, note that while Section 157.062 provides in some cases for a hearing on the motion for enforcement ten days after the notice of hearing is served, Chapter 9 does not have any such provisions. *Compare* Tex. Fam. Code § 9.001 *with* Tex. Fam. Code § 157.062.

E. Filing Deadlines

Filing deadlines are among the thorniest issues with Chapter 9 enforcement suits. Section 9.003 creates two different deadlines. Those deadlines are only applicable to certain property. In particular, 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).

Also, if responding to a motion for enforcement that may be untimely, it is imperative to plead limitations. Limitations is an affirmative defense that is waived if not pleaded. *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 deadline 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.

“‘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 Ann. § 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.

In *Ford*, the divorce decree awarded the wife \$44,000 from an individual retirement account. 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 wife argued the trial court erred when it determined that the motion was barred by Section 9.003 because (1) the cash award and Robert’s obligation to pay any taxes attributable to it was not “tangible personal property” and (2) the taxes to be paid by Robert were not property in existence at the time of the decree. *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. The appellate court noted that 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 and 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.

Additionally, the Waco Court of Appeals held that the two-year limitation in former Section 3.70(c), now Section 9.003(a), does 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). The 14th Court of Appeals in *Ford*, however, noted that *Burton* conflicts with *Dechon*, 909 S.W.2d at 961. *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 noted “that while clarification is a remedy, it is in fact a prerequisite to enforcement rather than a method of enforcement. A period of several years may pass before a litigant recognizes the necessity for a clarification proceeding. [W]e apply no statute of limitations to the clarification procedure itself. It does apply, however, to the enforcement process once clarification is obtained.” *Id.* at 961-62. 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.

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

The second deadline 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), *on reh'g in part* (May 22, 1997).

In the *Ford* case discussed in the previous subsection of this paper, the tax liabilities were also not subject to Section 9.003(a) because the liabilities did not exist at the time of the decree. Considering 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.

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 Sections 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 bankruptcy Trustee did not seek to compel a *division* of property via his motion to enforce. The bankruptcy 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. *See also Bowden v. Knowlton*, 734 S.W.2d 206, 208 (Tex. App.—Houston [1st Dist.] 1987 no writ) (limitation period specified in Fam. Code §3.70(c), now §9.003, did not apply to reducing monetary award to judgment under Fam. Code §3.74, now §9.010).

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 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. In *Stine*, the petitioner brought a third-party beneficiary breach of contract claim against her former son-in-law for refusing to pay her the proceeds from the sale of property as required under an Agreement Incident to Divorce. *Id.*

A breach of fiduciary duty claim also 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).

III. 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

A court may not amend, modify, alter, or change the division of property made or approved in the decree of divorce or annulment. 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. 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. It is, however, 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).

So, for example, 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.).

B. Some Powers of the Court Abated While Court Retains Plenary Power

Effective, September 1, 2017, 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. Tex. Fam. Code § 9.007(c). 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. *Id.*

C. Contempt

In certain—but not all—cases, a party can go to jail for failing to comply with the court’s order dividing property. 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 drafting an order to be enforced by contempt, 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 spouse frequent flyer miles of the other spouse 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.). Accordingly, the phrasing for both the descriptions of the property awarded and the details of the transfer must satisfy these requirements to preserve the ability to enforce with contempt.

It is critical in drafting an order to be enforceable by contempt that the order requires the opposing party to act on a date certain after the date of 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).

Be aware of when a contempt motion is inappropriate. A sloppy request to enforce the payment of a debt by contempt may result in the movant paying the respondent's attorney's fees and costs. *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)).

In re Henry involved a trial court's coercive contempt sentence for a spouse's failure to pay a court-ordered property tax. *Henry* 154 S.W.3d at 594. The Texas Supreme Court reversed the trial court, holding that "when a trial court finds that the particular property at issue currently exists and awards that property as part of the community estate's division, the contemnor is not indebted to the other party, but becomes a constructive trustee who holds that party's assets." *Id.* at 597. In this case, however, the Court found that the spouse's obligation to pay property taxes was not based on the identification of any funds in existence, and consequently the mere "fact that the tax obligation was imposed as a part of the division of community property does not in itself transform the obligation into one enforceable by coercive contempt." *Id.* at 597-598.)

In *Ex parte Yates*, the Court held that the controlling factor in determining whether contempt was available for the enforcement of a provision in a division of community property was whether the money required to be paid was in the possession of the contemnor at the time of divorce. *Yates* 387 S.W.2d at 380. Accordingly, these decisions draw a clear line between the division of extant property, for which the contemnor is a trustee for the other spouse and can be held in contempt, and a judgment of debt to be paid in the future.

PRACTICE TIP: In drafting a decree, payments of debts and money awards should be tied to specific accounts with listed balances or specific pieces of property. This allows the payments to be premised upon property in existence at the time of the rendition.

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

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, however, 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). And, as noted before, 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).

For example, in *Hollingsworth*, 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. 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.

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 Ann. § 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.

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 scope and application of a constructive trust is generally left up to the court imposing it. *Messier v. Messier*, 14-13-00572-CV, 2015 WL 452171 at *6 (Tex. App.—Houston [14th Dist.], Jan. 27, 2015, no pet.).

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.

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.

PRACTICE TIP: Compare this language to the language in §157.167(a) & (b) wherein it states that the court *shall* order the respondent to pay the movant's reasonable attorney's fees and all court costs unless the court, for good cause shown, waives the requirement and states the reasons supporting that finding on the record.

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 in order 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*, 2015 WL 452171, at *7.

Interestingly, 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 in order 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.).

The Fort Worth Court of Appeals agrees 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 v. Jenkins*, 991 S.W.2d 440, 450 (Tex. App.—Fort Worth 1999, pet. denied). The wiser course then is to ensure that the judgment at least states good cause for the award attorney's fees.

IV. 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. While sometimes these orders appear inside the decree of divorce or annulment, usually they are separate orders. (PRACTICE TIP: You should include the language in both.) 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 this section applies to a previously divided pension, retirement plan, or other employee benefit divisible under the law of this state or of the United States, whether the plan or benefit is private, state, or federal. 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. 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 this chapter did not provide a qualified domestic relations order or similar order permitting payment of benefits to an alternate payee or other lawful payee. Tex. Fam. Code § 9.103.

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

relations order amended under 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.

V. 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. The failure to fully dispose of all property might occur for various reasons, such as: (1) a party inadvertently or intentionally does not disclose the existence of community property, (2) property is not included in the evidence at trial, or (3) property is omitted from the decree. 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*. However, in the event 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.

PRACTICE TIP: Be careful about broad language that awards property not specifically listed in the decree. For instance, many practitioners will simply list that husband, or wife, is awarded all bank accounts in his or her name. This language divides accounts, whether they are disclosed or not. It is better practice to specifically list each and every account identified in his or her Inventory & Appraisal.

Sometimes a divorce decree will include a provision that ensures there is no undivided property. The following residuary clause in a decree effectively disposes of all community property not specifically referred to and divided between the parties in the divorce decree:

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.

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 667, 671 (Tex. App.—Houston [14th Dist.] 1993, no writ). 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 “just and right” standard that a Texas court uses to divide property in an original dissolution proceeding also applies in a post-divorce division suit. 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.

PRACTICE TIP: 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.

VI. 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.

PRACTICE TIP: The great lesson from Subchapter D is to advise your clients to change their beneficiary designations as soon as possible after divorce.

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. —, 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 individual retirement account, employee stock option plan, stock option, or other form of savings, bonus, profit-sharing, or other employer plan or financial plan of an employee or a participant in force at the time of rendition, the designating provision in the plan in favor of the other former spouse is not effective unless:

- (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 former 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 former 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 to those paying retirement benefits in a manner also identical to those 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 this section 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).

VII. CONCLUSION

Chapter 9 is a seemingly simple area of Family Law that has its pitfalls and traps. Even a brief review of its sections and the case law interpreting them can save a practitioner from making mistakes. Those mistakes can result in suits being time-barred or containing impermissible requests for a respondent to be held in contempt. With the possibility of attorney's fees being awarded in a suit under this chapter, the wise practitioner should educate himself or herself before initiating or responding to such a suit. Hopefully, this paper will easily facilitate that education.

VIII. ACKNOWLEDGMENT

I would like to thank Jim Mueller of Verner Brumley McCurley Mueller Parker, P.C. for graciously giving me permission to use and present his paper entitled Property Enforcement (Chapter 9 Remedies). Mr. Mueller authored this article and presented same at the 42nd Advanced Family Law Course.

APPENDIX 1

NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA

NO. 2017-CI-12345

JOHN SMITH	§	IN THE DISTRICT COURT
	§	
V.	§	45TH JUDICIAL DISTRICT
	§	
JANE SMITH	§	BEXAR COUNTY, TEXAS

PETITION FOR ENFORCEMENT OF PROPERTY DIVISION BY CONTEMPT

1. Discovery in this case is intended to be conducted under level 2 of rule 190 of the Texas Rules of Civil Procedure.

2. This suit is brought by JOHN SMITH, Petitioner. The last three numbers of JOHN SMITH's driver's license number are 123. The last three numbers of JOHN SMITH's Social Security number are 123.

Respondent is JANE SMITH. Process should be served on Respondent, JANE SMITH, at 345 Circle Path, San Antonio, Texas 78209.

3. On February 15, 2017 this Court signed an order that appears in the minutes of this Court, and states in relevant part as follows:

“JANE SMITH is ORDERED to deliver to JOHN SMITH, at his residence, 123 Circle Path, San Antonio, Texas 78209, between 5:00 p.m. and 6:00 p.m. on March 1, 2017, the Himalayan cat, "Snookie.” JANE SMITH is FURTHER ORDERED to deliver to JOHN SMITH, at his residence, 123 Circle Path, San Antonio, Texas 78209, between 5:00 p.m. and 6:00 p.m. on March 1, 2017, the 2000 Volvo motor vehicle.

Petitioner was the Petitioner and Respondent was the Respondent in the prior proceedings.

4. Respondent has failed to comply with the order described above as follows:

Violation 1. Respondent failed to comply with the order by failing to deliver to JOHN SMITH, at his residence, 123 Circle Path, San Antonio, Texas 78209, between 5:00 p.m. and 6:00 p.m. on March 1, 2017, the Himalayan cat, "Snookie,” although Respondent was able to comply at that time.

Violation 2. Respondent failed to comply with the order by failing to deliver to JOHN SMITH, at his residence, 123 Circle Path, San Antonio, Texas 78209, between 5:00 p.m. and 6:00 p.m. on March 1, 2017, the 2000 Volvo motor vehicle, although Respondent was able to comply at that time.

5. Petitioner seeks an order directing Respondent to deliver to JOHN SMITH, at his residence, 123 Circle Path, San Antonio, Texas 78209, between 5:00 p.m. and 6:00 p.m. on June 1, 2017, the Himalayan cat, "Snookie."

6. Petitioner prays that the Court order Respondent to deliver the 2000 Volvo motor vehicle or an equivalent sum of money to Petitioner at a date and place certain.

7. Delivery of the 2000 Volvo motor vehicle which was awarded in the decree previously entered by the Court is no longer an adequate remedy because the property was not delivered in a timely manner. Petitioner has suffered damages and more will have to be delivered in order to restore the Petitioner to the same position he would have had if the property were delivered on time. Respondent's failure to deliver the property has caused damage to Petitioner in the amount of \$1,000.00. Petitioner prays that the Court award Petitioner a money judgment, including prejudgment and postjudgment interest, against Respondent for those damages caused by Respondent's failure to deliver the property.

8. Since the date of the decree, several disputes have arisen between Petitioner and Respondent concerning the construction and interpretation of the language awarding the 2000 Volvo motor vehicle to Petitioner. Petitioner prays that the Court issue a clarifying order to read substantially as follows: Jane Smith is ORDERED to deliver the 2000 Volvo motor vehicle, VIN 123ABC456DEF789, Texas license plate number ABC -123 to JOHN SMITH, at his residence, 123 Circle Path, San Antonio, Texas 78209, between 5:00 p.m. and 6:00 p.m., on June 1, 2017. Petitioner further requests the Court to specify in its clarifying order any other duty, obligation, or act necessary to the enforcement of the decree and a reasonable time within which compliance will be required.

9. Petitioner requests that Respondent be held in contempt, jailed, and fined for each violation alleged above, for a period of six months on each count, to run concurrently.

10. Petitioner requests that after Respondent serves her sentence for criminal contempt, Respondent be confined in the county jail for a period not to exceed eighteen months (total for civil and criminal contempt) or until Respondent complies with the order of the Court, whichever occurs first.

11. Petitioner requests that, if the Court finds that any part of the order sought to be enforced is not specific enough to be enforced by contempt, the Court enter a clarifying order more clearly specifying the duties imposed on Respondent and giving

Respondent a reasonable time within which to comply.

12. It was necessary to secure the services of Christina Molitor, a licensed attorney, to enforce and protect the rights of JOHN SMITH. Respondent should be ordered to pay reasonable attorney's fees, expenses, and costs, and a judgment should be rendered in favor of the attorney and against Respondent and be ordered paid directly to the undersigned attorney, who may enforce the judgment in the attorney's own name. Petitioner requests postjudgment interest as allowed by law.

Petitioner prays that citation and notice issue as required by law, that the Court render an order directing Respondent to deliver to John Smith, at his residence, 123 Circle Path, San Antonio, Texas 78209, between 5:00 p.m. and 6:00 p.m. on June 1, 2017, the Himalayan cat, "Snookie" and the 2000 Volvo motor vehicle, VIN 123ABC456DEF789, Texas license plate number ABC -123, that Respondent be held in contempt and punished as requested, that the Court clarify any part of its prior order found not to be specific enough to be enforced by contempt, for a judgment for One Thousand Dollars Even (\$1,000.00), for attorney's fees, expenses, costs, and interest, and for all further relief authorized by law.

Respectfully submitted,

Law Offices of Christina Molitor, P.C.
423 East Ramsey Road
San Antonio, Texas 78216
Tel: (210) 472-2200
Fax: (210) 340-0414

By: /s/ Christina Molitor

Christina Molitor
State Bar No. 00794320
eservice@christinamolitor.com
Attorney for JOHN SMITH

ORDER TO APPEAR

Respondent, JANE SMITH, is ORDERED to appear and respond to this Petition for Enforcement in the Presiding District Court, Room 109 of the Bexar County Courthouse, 100 Dolorosa, San Antonio, Texas 78205 on May 15, 2017 at 9:00 A. M. The purpose of this hearing is to determine whether the relief requested in this petition should be granted.

SIGNED on _____.

JUDGE PRESIDING

APPENDIX 2

NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA

NO. 2017-CI-12345

JOHN SMITH	§	IN THE DISTRICT COURT
	§	
V.	§	45TH JUDICIAL DISTRICT
	§	
JANE SMITH	§	BEXAR COUNTY, TEXAS

ANSWER TO PETITION FOR ENFORCEMENT OF PROPERTY DIVISION BY CONTEMPT

This Answer to Petition for Enforcement of Property Division by Contempt is filed by JANE SMITH, Respondent. The last three numbers of JANE SMITH's driver's license number are 123. The last three numbers of JANE SMITH's Social Security number are 123.

1. Respondent denies the allegations of the Petition for Enforcement of Property Division by Contempt.

2. The order sought to be enforced is incapable of enforcement, in that it is ambiguous and is not clear and specific enough in its terms that Respondent knows what duties or obligations are required.

3. Respondent has had insufficient notice of the hearing set on Petitioner's Petition for Enforcement of Property Division by Contempt and has had insufficient time to prepare to respond to the petition. In the interest of justice, hearing on Petitioner's petition should be delayed and reset.

4. Petitioner's Petition for Enforcement of Property Division by Contempt is barred by the statutes of limitations.

5 It was necessary to secure the services of Law Firm USA, a licensed attorney, to enforce and protect the rights of JANE SMITH. Petitioner should be ordered to pay reasonable attorney's fees, expenses, and costs, and a judgment should be rendered in favor of the attorney and against Petitioner and be ordered paid directly to the undersigned attorney, who may enforce the judgment in the attorney's own name. Respondent requests postjudgment interest as allowed by law.

Respondent prays that the Court deny Petitioner's Petition for Enforcement of Property Division by Contempt and that Respondent recover all attorney's fees and

costs incurred.

Respectfully submitted,

Law Firm USA
789 Legal Street
San Antonio, Texas 78201
Tel: (210) 555-5555
Fax: (210) 555-5555

By: /s/ Law Firm USA

Law Firm USA
State Bar No. 123456789
counsel@lawfirmusa.com
Attorney for JANE SMITH

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure on May 25, 2017.

/s/ Law Firm USA

Law Firm USA
Attorney for JANE SMITH

APPENDIX 3

NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA

NO. 2017-CI-12345

JOHN SMITH	§	IN THE DISTRICT COURT
V.	§	45TH JUDICIAL DISTRICT
JANE SMITH	§	BEXAR COUNTY, TEXAS

ORDER OF ENFORCEMENT BY CONTEMPT AND SUSPENSION OF COMMITMENT (PROPERTY DIVISION)

On September 1, 2017 the Court heard Petitioner's Petition for Enforcement of Property Division by Contempt.

Appearances

Petitioner, JOHN SMITH, appeared in person and through attorney of record, Christina Molitor, and announced ready for trial.

Respondent, JANE SMITH, appeared in person and through attorney of record, Law Firm USA, and announced ready for trial.

Jurisdiction

The Court, after examining the record and the evidence and argument of counsel, finds that it has jurisdiction over the subject matter and the parties in this case. All persons entitled to citation were properly cited.

Record

The record of testimony was duly reported by the court reporter for the 45th Judicial District Court.

Jury

A jury was waived, and all questions of fact and of law were submitted to the Court.

Clarification of Prior Order

The Court finds that certain terms of the prior order of the Court are not specific enough to be enforced by contempt, that the prior order should be clarified, and that Respondent should be ordered to comply with the terms of the clarifying order no later

than June 1, 2017.

IT IS ORDERED that the prior order of the Court is clarified as follows:

1. Jane Smith is ORDERED to deliver the 2000 Volvo Motor vehicle, VIN 123ABC456DEF789, Texas license plate number ABC-123, to John Smith, at his residence, 123 Circle Path, San Antonio, Texas 78209, between 5:00 p.m. and 6:00 p.m. on June 1, 2017.

IT IS FURTHER ORDERED that all terms of the prior order that are not clarified in this order shall remain in full force and effect. IT IS FURTHER ORDERED that Respondent shall comply with the terms of the prior order that are clarified in this order no later than June 1, 2017, after which these clarifying orders may be enforced by contempt.

Findings

The Court finds that Respondent is guilty of separate violations of the Final Decree of Divorce signed on February 15, 2017 that appears in the minutes of this Court at volume 123, page 1, and states in relevant part as follows:

“Respondent shall deliver to Petitioner, at his residence, 123 Circle Path, San Antonio, Texas 78209, between 5:00 p.m. and 6:00 p.m. on March 1, 2017, the Himalayan cat, “Snookie.”

The Court further finds that Respondent has failed to comply with and has violated the provisions of the order as follows:

1. Respondent failed to comply with the order by failing to deliver to Movant at his residence between 5:00 p.m. and 6:00 p.m. on March 1, 2017, the Himalayan cat, “Snookie,” although Respondent was able to comply at that time.

The Court specifically finds that Respondent is in contempt for the violation enumerated above.

The Court further finds that on the day of this hearing Respondent had the ability to comply with the prior order of the Court.

The Court further finds that attorney's fees and costs of \$1,500.00 should be assessed against Respondent.

Relief Granted

IT IS ADJUDGED that Respondent, JANE SMITH, is in contempt for the violation enumerated above.

Criminal Contempt

IT IS ORDERED that punishment for the violation is assessed at a fine of Five Hundred Dollars (\$500.00), for the violation as alleged, which JANE SMITH shall pay to JOHN SMITH, by cashier's check at 123 Circle Path, San Antonio, Texas 78209, on or before June 1, 2017. IT IS FURTHER ORDERED that punishment for the violation is also assessed at confinement in the county jail of Bexar County, Texas, for a period of 30 days. IT IS THEREFORE ORDERED that Respondent is committed to the county jail of Bexar County, Texas, for a period of 30 days for the violation enumerated above.

Civil Contempt

IT IS ORDERED that Respondent, JANE SMITH, shall be confined in the county jail of Bexar County, Texas, for a period not to exceed eighteen months, including time served for criminal contempt, or until Respondent has complied with the following orders, whichever occurs first. IT IS ORDERED that Respondent:

1. Deliver to JOHN SMITH, at his residence, 123 Circle Path, San Antonio, Texas 78209, between 5:00 p.m. and 6:00 p.m. on June 1, 2017, the Himalayan cat, "Snookie."

Suspension of Commitment

IT IS FURTHER ORDERED that commitment is suspended on the following terms and conditions:

1. IT IS ORDERED the enforcement of this Order is SUSPENDED on condition Respondent purge herself of contempt as herein ordered.

2. IT IS ORDERED that Respondent pay, by cash, cashier's check, or money order, as attorney's fees, expenses, and costs, One Thousand Five Hundred Dollars (\$1,500.00) to Christina Molitor at 423 East Ramsey Road, San Antonio, Texas 78216 by 5:00 p.m. on June 1, 2017. The attorney may enforce this order for attorney's fees, expenses, and costs in the attorney's own name.

Attorney's Fees

It is ordered that a judgment is awarded to Christina Molitor in the amount of One Thousand Five Hundred Dollars (\$1,500.00) for reasonable attorney's fees, expenses, and costs incurred by JOHN SMITH, with interest at six percent per year compounded annually from the date the judgment is signed until paid. The judgment, for which let execution issue, is awarded against JANE SMITH, Respondent, and Respondent is ORDERED to pay the fees, expenses, costs, and interest, by cash, cashier's check, or money order, directly to Christina Molitor at 423 East Ramsey Road, San Antonio, Texas 78216 on or before June 1, 2017 at 5:00 p.m. Christina Molitor may enforce this judgment for fees, expenses, and costs in Christina Molitor's own name by any means available for the enforcement of a judgment debt. Any amounts paid under paragraph 2. above shall be credited against this judgment.

Relief Not Granted

All relief requested and not expressly granted is denied.

SIGNED on _____.

JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

Law Offices of Christina Molitor, P.C.
423 East Ramsey Road
San Antonio, Texas 78216
Tel: (210) 472-2200
Fax: (210) 340-0414

By: _____
Christina Molitor
State Bar No. 00794320
eservice@christinamolitor.com
Attorney for JOHN SMITH

Law Firm USA
789 Legal Street
San Antonio, Texas 78201
Tel: (210) 555-5555
Fax: (210) 555-5555

By: _____
Law Firm USA
State Bar No. 123456789
counsel@lawfirmusa.com
Attorney for JANE SMITH

APPENDIX 4

NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA

WRIT OF COMMITMENT

STATE OF TEXAS

TO ANY SHERIFF OR ANY CONSTABLE WITHIN THE STATE OF TEXAS:

In Cause No. 2017-CI-12345, pending in the 45th Judicial District Court of Bexar County, Texas, styled "JOHN SMITH V. JANE SMITH," JANE SMITH has been adjudged in contempt of court.

You are therefore COMMANDED to take into your custody and commit to the jail of your county, JANE SMITH, to be confined in accordance with the judgment of contempt attached to this writ or until she is otherwise legally discharged.

After service, return this writ, showing how you have executed it.

ISSUED on _____.

District Clerk, Bexar County, Texas

By: _____
Deputy

OFFICER'S RETURN

I received this writ on _____ at _____ . m. and
executed it on _____ at _____ . m. by taking JANE SMITH into
my custody and committing JANE SMITH to the jail of Bexar County, Texas.

FEES:

Service: \$ _____

Mileage: \$ _____

Total: \$ _____

Bexar County, Texas

By: _____
Deputy

APPENDIX 5

CAUSE NO. DF-16-12345

<p>IN THE MATTER OF THE MARRIAGE OF</p> <p>HUSBAND AND WIFE</p>	<p>§ § § § § §</p>	<p>IN THE DISTRICT COURT</p> <p>301ST JUDICIAL DISTRICT</p> <p>DALLAS COUNTY, TEXAS</p>
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**ORIGINAL PETITION FOR BREACH OF DECREE, PROMISSORY NOTE,
CONTRACTUAL ALIMONY, AND SECURED PROMISSORY NOTE
SECURED IN PART BY REAL ESTATE**

1. Discovery Level

Discovery in this case is intended to be conducted under level 2 of rule 190 of the TEXAS RULES OF CIVIL PROCEDURE.

2. Parties

This suit is brought by WIFE, Petitioner, who is a resident of Dallas County, Texas. The last three numbers of Petitioner’s driver’s license number are 123. The last three numbers of Petitioner’s Social Security number are 456.

Respondent is HUSBAND, who is a resident of Dallas County, Texas. Respondent should be served with process wherever he may be found.

3. Respondent’s Contractual Obligations Pursuant to Decree, Promissory Note, and Contractual Alimony

Certified copies of the Final Decree of Divorce and Decree, Promissory Note, Contractual Alimony and Real Property Modification Agreement (hereinafter “Modification Agreement”) are attached hereto as Exhibits “A” and “B,” respectively, and incorporated in full as if fully set forth at length herein verbatim.

HUSBAND, Respondent, and WIFE, Petitioner, entered into a Modification Agreement signed by the parties on February 1, 2010, and incorporated and approved in a Final Decree of Divorce entered in the 301st Judicial District Court of Dallas County, Texas, styled “In the Matter of the Marriage of HUSBAND and WIFE,” on February 1, 2010. The pertinent terms of the parties’ Modification Agreement are as follows:

3.1 Respondent’s Contractual Obligation to Pay Alimony to Petitioner

HUSBAND’s present obligation to pay contractual alimony to WIFE is modified and set forth as follows:

- a. *\$1,000 per month due and payable on the 5th day of each month until June 5, 2010;*
- b. *On June 5, 2010, such payments shall increase to \$1,000 per month and shall be due and payable in the same amount on the 5th day of each month thereafter until June 5, 2012;*
- c. *On June 5, 2012, such payments shall increase to \$1,000 per month and shall continue thereafter in such amount until the first to occur of the following events:*
 - i. *WIFE’s death; or*
 - ii. *July 5, 2018, provided all alimony payments have been paid as provided herein; or*
 - iii. *HUSBAND dies and WIFE receives life insurance proceeds from a policy on HUSBAND’s life and which she is named a*

beneficiary in a lump sum amount equal to or greater than the amount of the then unpaid alimony obligation; or

- iv. HUSBAND's estate pays to WIFE a lump sum payment equal to the amount of the then unpaid alimony obligation; or*
- v. WIFE remarries; or*
- vi. WIFE cohabits with another person of the opposite sex for a period of thirty (30) consecutive days.*

3.2 Respondent's Obligation to Pay Principal and Interest on Purchase Money Note

HUSBAND, Respondent, agrees to pay monthly installments of principal and interest on any secured purchase money note obtained by WIFE to purchase a new residential property of her choice, provided that a portion of the equity as required by any mortgage lender after the payment of sale expenses, closing costs, and any liens or mortgages are paid relative to the sale of the Texas property are applied to the purchase of the newly acquired residential real property selected by WIFE, and further provided that the purchase price of such newly-acquired residence shall not exceed \$500,000.

HUSBAND and WIFE further agree that until the note on the newly-acquired residential property has been fully paid, that HUSBAND will pay all real property taxes and homeowner's insurance premiums on such property.

3.3 Net Proceeds of Sale of Home are WIFE's Separate Property

Any net proceeds from the sale of the home not required to be paid as closing costs or not required to be applied to the purchase price of the newly-acquired residence shall be the separate property of WIFE.

4. Respondent's Obligation as Maker of Secured Promissory Note

On December 19, 2009, HUSBAND, Respondent, as Maker, executed a Secured Promissory Note Secured in Part by Real Estate (hereinafter "Promissory Note") payable to WIFE, Petitioner, as Payee. A copy of the Secured Promissory Note is attached hereto as Exhibit "C" and incorporated in full as if fully set forth herein verbatim.

4.1 Terms of Payment

Pursuant to the terms of the Secured Promissory Note, HUSBAND is obligated to pay a principal amount of \$1,500,000. The note shall be paid without interest and in ninety-five (95) equal monthly installments of \$10,416.66, with the first payment being due and payable upon execution, and with monthly payments being due on the first day of each month thereafter until December 1, 2017, when a final monthly payment of \$10,417.30 shall be due.

In addition to the monthly payments set forth above, this Secured Promissory Note shall be paid in annual principal reduction payments of \$125,000 each with the first annual principal reduction payment of \$125,000 being due and payable on December 1, 2014, and with identical annual principal reduction payments being due on December 1 of each year thereafter until November 1, 2017, when a final principal reduction payment of \$125,000 shall be due and payable. Interest shall accrue on the outstanding principal balance of this Note at a 0.00% annual rate.

4.2 Security for the Secured Promissory Note

The note is secured by a Deed of Trust to LAWYER, Trustee, on the house and lot located at Address (legal description omitted).

As additional security, the note is to be secured by a life insurance policy insuring the life of HUSBAND in the initial amount of \$3,000,000 and thereafter, in an amount at least equal to the then outstanding combined balance of this Promissory Note and HUSBAND's Alimony Obligation. This Note is also being issued pursuant to the Modification Agreement executed between HUSBAND and WIFE.

5. Respondent's Breach of Modification Agreement and Secured Promissory Note

Although Petitioner has fully performed Petitioner's obligations under the Modification Agreement and the Secured Promissory Note, Respondent has breached the agreement in failing to pay the contractual alimony as set out in the Modification Agreement and has further failed to make the payments set forth in the Secured Promissory Note to Petitioner. Respondent has failed and refused to pay this arrearage, although Petitioner has made numerous demands for payment.

6. Respondent's Default on Secured Promissory Note

Although Petitioner/Payee has fully performed Petitioner's obligations under the agreement, Respondent/Maker has failed to perform Respondent's obligations pursuant to the terms Secured Promissory Note and has caused the occurrence of one or more Events of Default set out in the Secured Promissory Note. Pursuant to the Events of Default and Remedies contained within the Secured Promissory Note, Petitioner declares the entire unpaid principal balance of the Secured Promissory Note immediately due and payable. The necessary terms of the Promissory Note are set forth below.

6.1 Events of Default and Acceleration of Obligation

At the option of WIFE, Petitioner and Payee, the entire unpaid principal balance of the Note with all accrued but unpaid interest, shall immediately become due and payable upon the occurrence at any time of any one or more of the following Events of Default:

- a. If Maker fails to pay any payment of principal due and payable under the terms of the note within five (5) days of the date on which payment becomes due and payable and such failure continues for a period in excess of ten (10) days from the date written notice of nonpayment is received from Payee, provided however that Payee shall only be obligated to deliver a total of three (3) such notices between December 1, 2009 and the date final payment is due; or*
- b. If at any time prior to the date of the final payment is due, Payee has given three (3) written notices to Maker of this failure to make an installment payment pursuant to the terms of the Note in accordance with (a) immediately above, then if maker shall fail to pay any installment under the terms of the Note within five (5) days of the date the payment is due, the entire unpaid principal balance of the Note shall immediately become due and payable without any notice to Maker; or*
- c. If Maker fails to obtain the life insurance policy and/or provide the original of the life insurance policy to Payee or to meet the other obligations with respect to the provision for life insurance as security for this Note and as set forth in the Final Decree of Divorce, and the failure continues for ten (10) days after written notice of such failure is provided to Maker by Payee.*

If an Event of Default should occur, Payee may, without notice, (a) decline the entire outstanding principal balance of the Note (and upon such declaration, the same shall be at once due and payable); (b) exercise any other remedy provide by law or equity. No remedy referred to herein is intended to be exclusive but each shall be cumulative, and the exercise of beginning of exercise by Holder hereof of any one or more such remedies shall not preclude simultaneous or later exercise of any such remedies. Any failure to exercise any rights of the Holder hereof may have in the event of any such Event of Default shall

not constitute a waiver of the right to exercise any such rights in the event of any subsequent Event of Default, whether of the same or different nature.

6.2 Acts and/or Omissions by Respondent Triggering Event of Default

Respondent/Maker's failure to procure an insurance policy insuring the life of HUSBAND in the amount of \$3,000,000 and additionally in an amount at least equal to the then-outstanding combined balance of the Secured Promissory Note and contractual alimony obligation due under the Modification Agreement, and Respondent/Maker's failure to provide Petitioner/Payee with an original copy of the insurance policy constitute an Events of Default pursuant to the Secured Promissory Note.

Further, Respondent/Maker's failure to pay installments to Petitioner/Payee in accordance with the terms of the Secured Promissory Note after written notice by Petitioner constitutes an Event of Default under the Secured Promissory Note.

7. Damages Resulting from Respondent's Breach of Modification Agreement

Respondent, without just excuse, has demonstrated a clear, present, and unconditional intention not to pay the remaining installments of contractual alimony due under the Modification Agreement, nor the payments as set forth under the Promissory Note, in that Respondent has failed to make 100% of said payments, thereby anticipatorily repudiating Respondent's agreement to pay contractual alimony and installments under the Promissory Note. As a result of this anticipatory breach, Petitioner has been damaged in an amount equal to the present value of the future installments of contractual alimony Petitioner would have received had Respondent fully performed Respondent's obligation under the agreement, and the installment payments under the Promissory Note Petitioner

would have received had Respondent fully performed Respondent's obligation under the agreement.

8. **Recovery of Attorney's Fees Incurred from Breach of Modification Agreement**

Petitioner presented the claim pursuant to the Modification Agreement to Respondent more than thirty (30) days before filing this action, but Respondent has failed and refused to pay Petitioner the amounts owing.

It was necessary to secure the services of Jim Mueller, a licensed attorney, and Verner Brumley McCurley Mueller Parker, P.C. to collect sums owing to Petitioner, and Petitioner should be granted a judgment for attorney's fees, in accordance with chapter 38 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE.

9. **Award of Attorney's Fees under Promissory Note**

Petitioner presented the claim pursuant to the Modification Agreement to Respondent more than thirty (30) days before filing this action, but Respondent has failed and refused to pay Petitioner the amounts owing.

The Secured Promissory Note provides for payment of reasonable attorney's fees incurred in its enforcement. As a result of Respondent's failure to comply with the terms of the Secured Promissory Note, it was necessary to secure the services of Jim Mueller, a licensed attorney, and Verner Brumley McCurley Mueller Parker, P.C. to collect sums owing to Petitioner, and Petitioner should be granted a judgment for reasonable attorney's fees, in accordance with chapter 38 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE.

10. **Prayer**

Petitioner prays that citation and notice issue as required by law and that Petitioner have judgment against Respondent:

- a.* For all past-due installments of contractual alimony described above, together with prejudgment and postjudgment interest on that amount at the legal rate.
- b.* For the present value of all future installments of contractual alimony and installments accruing from December 1, 2009 through April 1, 2015, together with prejudgment and postjudgment interest on that amount at the legal rate.
- c.* For the entire outstanding principal balance of the Secured Promissory Note, accelerated, due and payable immediately.
- d.* For reasonable attorney's fees and costs of court.

Petitioner prays for general relief and all other relief, in law and in equity, to which Petitioner shows herself justly entitled.

Respectfully submitted,

Verner Brumley McCurley Mueller Parker, P.C.
4311 Oak Lawn Ave.
Suite 450
Dallas, Texas 75219
Tel: (214) 526-5234
Fax: (214) 526-5234

By: _____
Jim Mueller
State Bar No. 24051791
jmueller@vbmmp.com
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on each attorney of record or party in accordance with the TEXAS RULES OF CIVIL PROCEDURE on

_____, 2016.

Jim Mueller
Attorney for Petitioner

This Court has continuing, exclusive jurisdiction of this case as a result of prior proceedings.

4. Parties Entitled to Notice

The parties entitled to notice are as follows:

Respondent, HUSBAND. Process should be served wherever he may be found.

5. Orders to be Enforced

On November 23, 1995, this Court entered a Final Decree of Divorce (hereinafter “Final Decree”) in this case under the following style: *In the Matter of the Marriage of HUSBAND and WIFE, and in the Interest of CHILD 1 and CHILD 2, Children*. Movant requests that the Final Decree be enforced to the fullest extent of the law.

Movant was the Respondent and Respondent was the Petitioner in those prior proceedings.

A copy of the Final Decree is attached hereto as Exhibit “A” and incorporated herein as if fully set forth at length verbatim.

The Final Decree, which appears in the minutes of this Court, Volume F51278, and page 032, states in relevant part as follows:

“Division of Marital Estate

...Respondent is awarded the following as Respondent’s sole and separate property, and Petitioner is hereby divested of all right, title, interest, and claim in and to such property:

6. 50% of Petitioner’s Navy retirement.

Temporary Spousal Support

It is further ordered and decreed that Respondent shall receive, in lieu of temporary spousal support from Petitioner, one-half (½) of Petitioner’s monthly retirement pension from the United States Navy, Navy federal account number 1046587-000. Said payments will be made monthly from the Federal Government

directly to Respondent, who will be responsible for all tax liabilities thereof....”

6. Violations

6.1 Movant received a letter from the Defense Finance and Accounting Service dated November 24, 2012, stating that Respondent was now in a non-pay status with regard to his Navy pension payments, and that they were terminating her payments under the Uniformed Services Former Spouse’ Protection Act. Said letter is attached hereto as Exhibit “B” and incorporated herein as if fully set forth at length verbatim. On December 27, 2012 Movant inquired of Respondent why he was on non-pay status, as the Navy will not discuss same with her. Respondent’s non-pay status also cancels Movant’s monthly pension payments from Respondent’s pension, as awarded to Movant in the Final Decree. As of the date of filing this Motion, Respondent will still not tell Movant why he is in non-pay status.

There are only two reasons retired Navy personnel, receiving monthly pension payments, can go into a non-pay status; 1) the retired person voluntarily places themselves in non-pay status, or 2) the retired person is still in Fleet Reserves and has been recalled to active duty.

On November 1, 2013, Movant received a letter from the Defense Finance and Accounting Service. Said letter is attached hereto as Exhibit “C”. It is apparent that the Respondent elected to waive his military retirement (pension) in August of 2011, in lieu of civil service retirement pay.

Respondent has failed to comply with the Final Decree described above and has violated the order as follows:

Violation 1: Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of

August, 2011, as awarded to her in the parties Final Decree of Divorce.

- Violation 2:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of September, 2011, as awarded to her in the parties Final Decree of Divorce.
- Violation 3:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of October, 2011, as awarded to her in the parties Final Decree of Divorce.
- Violation 4:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of November, 2011, as awarded to her in the parties Final Decree of Divorce.
- Violation 5:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of December, 2011, as awarded to her in the parties Final Decree of Divorce.
- Violation 6:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of January, 2012, as awarded to her in the parties Final Decree of Divorce.
- Violation 7:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of February, 2012, as awarded to her in the parties Final Decree of Divorce.
- Violation 8:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of March, 2012, as awarded to her in the parties Final Decree of Divorce.
- Violation 9:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of April, 2012, as awarded to her in the parties Final Decree of Divorce.
- Violation 10:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of May, 2012, as awarded to her in the parties Final Decree of Divorce.

- Violation 11:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of June, 2012, as awarded to her in the parties Final Decree of Divorce.
- Violation 12:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of July, 2012, as awarded to her in the parties Final Decree of Divorce.
- Violation 13:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of August, 2012, as awarded to her in the parties Final Decree of Divorce.
- Violation 14:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of September, 2012, as awarded to her in the parties Final Decree of Divorce.
- Violation 15:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of October, 2012, as awarded to her in the parties Final Decree of Divorce.
- Violation 16:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of November, 2012, as awarded to her in the parties Final Decree of Divorce.
- Violation 17:** Respondent is in violation of the prior order for failing to pay Movant 50% of his Naval retirement payment for the month of December, 2012, as awarded to her in the parties Final Decree of Divorce.

6.2 Movant requests that for each violation above, Respondent be held in contempt, jailed for up to 180 days, and fined up to \$500, and that each period of confinement run and be satisfied concurrently. Should the Court hold Respondent in criminal contempt for all or any portion of the violations alleged herein, Movant does not seek incarceration of Respondent beyond six (6) months nor a fine beyond \$500.00. Should the Court hold Respondent in civil contempt for all or any portion of the violations alleged

herein, Movant seeks the Court to incarcerate Respondent until he has purged himself of the sums owed by Respondent herein.

6.3 Movant believes, based on the repeated past violations of the Court's order by Respondent, that Respondent will continue to fail to comply with the order. Movant requests that Respondent be held in contempt, jailed, and fined for each failure to comply with the Court's order from the date of this filing to the date of the hearing on this motion.

7. Clarification Order

Movant requests that, if the Court finds that any part of the order sought to be enforced is not specific enough to be enforced by contempt, the Court enter a clarifying order more clearly specifying the duties imposed on Respondent and giving Respondent a reasonable time within which to comply.

8. Attorney's Fees

It was necessary to secure the services of Jim Mueller, and other licensed attorneys with the firm of Verner Brumley McCurley Mueller Parker P.C., to enforce and protect the rights of WIFE. Respondent should be ordered to pay reasonable attorney's fees, expenses, and costs, and a judgment should be rendered in favor of the attorney and against Respondent and be ordered paid directly to the undersigned attorney, who may enforce the judgment in the attorney's own name. Movant requests postjudgment interest as allowed by law.

9. Prayer

Movant prays that Respondent be held in contempt and punished as requested, that the Court order a bond or security, that the Court clarify any part of its prior order found not to be specific enough to be enforced by contempt, for attorney's fees, expenses, costs, and interest, and for all further relief authorized by law.

Movant prays for general relief.

Respectfully submitted,

Verner Brumley McCurley Mueller Parker, P.C.
4311 Oak Lawn Ave.
Suite 450
Dallas, Texas 75219
Tel: (214) 526-5234
Fax: (214) 526-5234

By: _____
Jim Mueller
State Bar No. 24051791
jmueller@vbmmp.com
Attorney for Movant

ORDER TO APPEAR

Respondent, HUSBAND, is ORDERED to appear and respond to this Motion for Enforcement in the 301ST Judicial District Court, 600 Commerce St., Dallas, Texas 75202 on _____ at _____ . m. The purpose of this hearing is to determine whether the relief requested in this motion should be granted.

SIGNED on _____.

DISTRICT JUDGE
DALLAS COUNTY, TEXAS

APPENDIX 7

CAUSE NO. DF-16-12345

**IN THE MATTER OF
THE MARRIAGE OF**

**HUSBAND
AND
WIFE**

**AND IN THE INTEREST OF
CHILD 1, CHILD 2, AND
CHILD 3,
MINOR CHILDREN**

§
§
§
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§
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§

IN THE DISTRICT COURT

301ST JUDICIAL DISTRICT

DALLAS COUNTY, TEXAS

**PETITION TO VACATE AND VOID ORDER AND IN THE
ALTERNATIVE MODIFY AND ENTER AMENDED QUALIFYING
RETIREMENT BENEFIT COURT ORDER FOR DIVISION OF CIVIL
SERVICE RETIREMENT SYSTEM BENEFIT**

Discovery in this case is intended to be conducted under level 2 of Rule 190 of the TEXAS RULES OF CIVIL PROCEDURE.

1. Petition and Order to Be Vacated Declared Void or in the Alternative Modified

This suit is brought by HUSBAND Petitioner, who files this “Petition to Vacate and Void Order and in the Alternative Modify and Enter Amended Qualified Domestic Relations Order” (hereinafter “Petition”) with regard to the “Qualifying Retirement Benefit Court Order For Division Of Civil Service Retirement System Benefit” (hereinafter “Order.”) signed by the court on September 20, 2013, to comport with the provisions of the Final Decree of Divorce entered in this cause on May 21, 2009. Respondent is WIFE.

2. *Jurisdiction*

This Court has continuing and exclusive jurisdiction of this suit under Chapter 9 of the *Texas Family Code*.

3. *Parties Affected*

The names and addresses of each party whose rights may be affected by this motion are:

Name: WIFE
Address: Texas

Process should be served on Respondent at that address, or wherever she may be found.

4. *Facts*

In support of this motion, Petitioner would respectfully show the Court as follows:

At the time of the parties divorce, Petitioner participated in the “Civil Service Retirement System” (hereinafter “C.S.R.S.”).

On May 21, 2009, the Court entered a Final Decree of Divorce (hereinafter “Decree”) a copy of which is attached hereto as Exhibit A. As part of the division of marital property the Court awarded Respondent, WIFE (page 25) the following:

“W-5. Fifty-percent (50%) of all sums as of December 31, 2008, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights related to any profit-sharing plan, retirement plan, Keogh plan, pension plan, employee stock option plan, 401(k) plan, employee savings plan, accrued unpaid bonuses after taxes, disability plan, investment account, or other benefits existing by reason of the Husband’s past or present employment, including but not limited to his employments with the Federal Bureau of Investigation.

The Order was signed by the Court on September 20, 2013 and is attached hereto as Exhibit B. The Order (page 2) awarded Respondent the following:

“WIFE is entitled to an amount equal to 50% of HUSBAND’s “gross” monthly

annuity under the Civil Service Retirement System which shall be computed effective December 31, 2008, as though HUSBAND had separated from a position in the United States Government covered by the Civil Service Retirement System on such date. In computing such amount of WIFE's share of HUSBAND's employee annuity, the United States Office of Personnel Management is hereby specifically instructed to limit the computation of HUSBAND's employee annuity to only service performed from the date of marriage through December 31, 2008 and not to apply any salary adjustments occurring after December 31, 2008. The United States Office of Personnel Management is direct to pay WIFE's share directly to Former Spouse..."

"Under Section 8341(h)(1) of Title 5, United States Code, WIFE is awarded a former spouse survivor annuity under the Civil Service Retirement System. The amount of the former spouse survivor annuity will be equal to a "pro rata" share."

The Order qualified with the plan administrator but does not comport with the terms of the Decree pursuant to TEX. FAM. CODE § 9.1045; *See Pate v. Pate*, 874 S.W.2d 186 (Tex.App.--Houston [14th Dist.] 1994, writ denied) (a QDRO, like any other order, cannot change or amend a final decree of divorce). The parties nor the attorneys signed the QDRO as to substance.

Petitioner, HUSBAND, requests that the Court vacate the ORDER the subject of this suit and deem it void for lack of subject matter jurisdiction, or in the alternative modify said order, as it does not comport with the Decree or TEX. FAM. CODE Chapter 9, specifically sections 9.007(a) and 9.1045.

5. *Argument and Authority*

A court may not alter the property division contained in the divorce decree in a QDRO. *Marshall v. Priess*, 99 S.W.3d 150, 156 (Tex. App.—Houston [14th Dist.] 2002, no pet.); TEX. FAM. CODE § 9.007(a). A court may amend a QDRO, even an original QDRO, if the QDRO conflicts with the portion of the decree that awarded the retirement benefit even if the parties agreed to it and the QDRO qualified with the plan. *Id.* at 159.

In *Marshall*, the parties were each awarded one-half of the other party's retirement. Marshall (Wife) participated in a 403(b) plan which required a QDRO to effectuate the transfer of Priess' portion of her benefits. Priess (Husband) participated in a plan that required an order to effectuate the transfer of Marshall's portion of Husband's benefits. An original COAP (the federal term for a QDRO under the Civil Service Retirement System) and QDRO were signed by the court to effectuate the transfer of each party's retirement

benefits in the other party's retirement. Both parties agreed to the decree, COAP and QDRO, and neither party appealed the decree, the QDRO or the COAP.

Two years after the entry of the decree and the original COAP and QDRO, Preiss moved to amend both the COAP and the QDRO so that they would comport with the decree. The court held that it had continuing jurisdiction and that the court was without subject matter jurisdiction to enter orders that changed, amended, altered or modified the decree of divorce. *Id.* at 156.

In *Marshall*, attached to the decree were exhibits evidencing the property division contained a statement that the retirement benefits "shall be apportioned and divided pursuant to the necessary Qualified Domestic Relations Order or such other document as may be required and approved by the respective Plan Administrator." *Id.* at 152. This provision states that the QDROs and other such documents will provide for the apportionment and division, which is much stronger than simply a reference as in the present case, however the *original* COAP and the *original* QDRO were amended to comport with the decree. *Id.*

Even though the decree in this case incorporated the QDRO by referring to it, the QDRO cannot be changed, amend, alter or modify the decree. *See id.*; *See also Gainous v. Gainous*, 219 S.W.3d 97 (Tex.App.—Houston [1st Dist.] 2006, pet. denied); *McCaig v. McCaig*, No. 12-06-00374—CV, 2007 WL 1765845 (Tex.App.—Tyler June 20, 2007, pet. denied) (mem. op.); *Vanloh v. Vanloh*, 2008 WL 3984373 (Tex.App.—Austin); *See also Freeman v. Freeman*, 2012 WL 1137103 (Tex.App.—El Paso, 2012) (trial court's order created reversible error by modifying the property division in the decree with a domestic relations order).

The result in *Marshall* was that the court amended the original COAP and the original QDRO because they both conflicted with the decree of divorce and entered an amended COAP and amended QDRO to comport with the division of the retirement in the decree of divorce. *Marshall* at 159, 161.

After a trial court enters the decree, the court has continuing jurisdiction to issue orders "to assist in the implementation of or to clarify the prior order." TEX. FAM. CODE Tex. § 9.007(a); *See also* § TEX. FAM. CODE 9.002. Such an order may not "amend, modify, alter, or change the division of property made or approved in the decree of divorce." TEX. FAM. CODE § 9.007(a). This prohibition applies to a QDRO because a QDRO is a type of post-decree enforcement or clarification order. *See Gainous v. Gainous*, 219S.W.3d 97, 107 (Tex.App.-Houston [1st Dist.] 2006, pet. denied) (op. on reh'g).

A QDRO is not an agreement of the parties and cannot be construed as such. QDROs are orders to *permit and effectuate* the transfer of retirement benefits and are

governed by TEX. FAM. CODE Chapter 9, Subchapter B, entitled “Post-Decree Qualified Domestic Relations Order”, §§ 9.101 – 9.106, and specifically § 9.101 (permitting payment) and § 9.105 (effecting payment). TEX. FAM. CODE § 9.1045 provides for a court *to retain jurisdiction to vacate and replace or amend QDROs* that do not comport with the decree and thus there is no statute of limitations.

TEX. FAM. CODE § 9.1045 provides as follows:

“§ 9.1045. Amendment of Qualified Domestic Relations Order

(a) 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.”

The QDRO is to effectuate the division of property ordered by the Court, not to change the substantive provisions that were not awarded by the Court.

QDROs are further governed by TEX. FAM. CODE Chapter 9 and a QDRO cannot amend, modify, alter or change the decree of divorce. *See* TEX. FAM. CODE §§ 9.007 (a) and (b) which provides in relevant part as follows:

“§ 9.007. Limitation on Power of Court to Enforce

(a) 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.

(b) 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.”

In *Gainous v. Gainous*, 219 S.W.3d 97 (Tex.App.—Houston [1st Dist.] 2006, pet. denied) the QDRO conflicted with the decree of divorce and was declared void. *Gainous* held that the QDRO was void pursuant to TEX. FAM. CODE §§ 9.007(a) and (b) which prohibits post-divorce orders that amend, modify, alter, or change the divorce decree's property division. *Id.* at 111. Thus, any QDRO that amends, modifies, alters or changes a decree of divorce is *void* under TEX. FAM. CODE §§ 9.007(a) and (b) and must be amended.

Following is the analysis as set out so clearly in *Gainous* to collaterally attack a QDRO or similar order:

“A judgment is void only when the court rendering judgment “ ‘had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court.’ ” *Saudi v. Brieven*, 176 S.W.3d 108, 113 (Tex.App.—Houston [1st Dist.] 2004, pet. denied) (quoting *Cook v. Cameron*, 733 S.W.2d 137, 140 (Tex. 1987)).” *Id.* at 105.

...

“ ‘Subject-matter jurisdiction may not be conferred by consent, waiver, or estoppel at any stage of a proceeding.’ ” *Saudi*, 176 S.W.3d at 113 (quoting *Tourneau Houston, Inc. v. Harris County Appraisal Dist.*, 24 S.W.3d 907, 910 (Tex.App.—Houston [1st Dist.] 2000, no pet.)). One may thus raise a collateral attack challenging a void order at any time, and *res judicata* is not a bar to the attack. *See id.* (reasoning that lack of subject- matter jurisdiction is fundamental error that may be recognized by appellate court sua sponte or by party for first time on appeal); *see also State ex rel. Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1995) (indicating that one need not appeal void judgment). *Id.* at 105.

...

“Section 9.007(b) provides that orders amending, modifying, altering, or changing the divorce decree's property division are “*beyond the power* of the divorce court,” and the section itself is entitled “Limitation on *Power* of Court to Enforce.” TEX. FAM.CODE ANN. § 9.007(b) (emphasis added). Similarly, when describing section 9.007's limitation on post-divorce enforcement and clarification, case law employs terms like “power,” “jurisdiction,” and “authority.” These terms indicate matters of subject-matter jurisdiction. *See Reiss v. Reiss*, 40 S.W.3d 605, 613–14 & n. 8 (Tex.App.—Houston [1st Dist.] 2001) (indicating that these and similar terms indicate jurisdiction), *rev'd on other grounds*, 118 S.W.3d 439 (Tex. 2003). Moreover, by their very nature, Family Code sections 9.002, 9.006, 9.008, 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. *Id.* at 107. (emphasis added)

...

“Accordingly, we hold that section 9.007 is jurisdictional and that orders violating its restrictions are void.” *Id.* at 108. (emphasis added)”

In *McCaig v. McCaig*, No. 12-06-00374—CV, 2007 WL 1765845 (Tex.App—Tyler June 20, 2007, pet. denied) (mem. op.) the Court found that the QDRO was void

because it altered the division of property in violation of § 9.007 of the TEX. FAM. CODE, and that § 9.007 is jurisdictional therefore the court was without subject matter jurisdiction to enter the QDRO. *Id.* at 2. The court ordered the QDRO to be amended as the QDRO is to effectuate the division of the court's order as set out in the decree. *See* TEX. FAM. CODE § 9.1045. In addition, the *McCaig* court held that a collateral attack on the QDRO was not barred by res judicata because the QDRO was void. *Id.* at 3.

In *Vanloh v. Vanloh*, 2008 WL 3984373 (Tex.App.—Austin), the divorce decree was signed in 1996 and the QDRO was signed in 1998. In June, 2006 when Husband began receiving his retirement benefits he realized that his ex-Wife was receiving part of his post-divorce salary adjustments. Husband filed a motion to clarify the decree because the *effect* of the QDRO gave ex-Wife a portion of his post-divorce salary adjustments, which ex-Wife was not awarded in the decree. *Id.* at 1. The court ordered the QDRO amended to conform to the provisions of the decree pursuant to §§ 9.007 and 9.1045 of the TEX. FAM. CODE. *Id.* at 2.

Subject matter jurisdiction cannot be conferred by waiver, or even by agreement of the parties. *Federal Underwriters Exch. v. Pugh*, 141 Tex. 539 (1943).

6. Requested Relief

Petitioner requests that the court enter a QDRO that only allows for Respondent to receive 50% of the Plan as of December 31, 2008 in accordance with the Decree and as is required by the Plan

Petitioner requests all such other relief to which he is entitled under the law.

7. Attorneys Fees

It was necessary for Petitioner herein to secure the services of Jim Mueller of Verner Brumley McCurley Mueller Parker P.C., consisting of licensed attorneys, to prepare and defend this suit. Judgment for attorney's fees, expenses, and costs through final judgment after appeal should be granted against Respondent and in favor of Petitioner for the use and benefit of Petitioner's attorney; or, in the alternative, Petitioner requests that reasonable attorney's fees, expenses, and costs through final judgment after appeal be taxed as costs and be ordered paid directly to Petitioner's attorney, who may enforce the order in the attorney's own name. Petitioner requests postjudgment interest as allowed by law. Petitioner requests attorney fees pursuant to TEX. FAM. CODE § 9.107.

Respondent is hereby notified that the undersigned attorney is hereby designated as a

person who will testify in this suit concerning reasonable and necessary attorneys' fees and costs pursuant to the TEXAS RULES OF CIVIL PROCEDURE.

8. Prayer

Petitioner prays that citation and notice issue as required by law and that the Court enter its orders in accordance with the allegations contained in this petition.

Petitioner prays for attorney's fees, expenses, and costs as requested above.

Petitioner prays for general relief.

Respectfully submitted,

Verner Brumley McCurley Mueller Parker, P.C.
4311 Oak Lawn Ave.
Suite 450
Dallas, Texas 75219
Tel: (214) 526-5234
Fax: (214) 526-5234

By: _____
Jim Mueller
State Bar No. 24051791
jmueller@vbmmp.com
Attorney for HUSBAND

APPENDIX 8

NO. DF-16-12345

IN THE MATTER OF THE MARRIAGE OF HUSBAND AND WIFE AND IN THE INTEREST OF CHILD 1, A CHILD	§ § § § § § § § § §	IN THE DISTRICT COURT 301 ST JUDICIAL DISTRICT DALLAS COUNTY, TEXAS
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**WIFE’S FIRST AMENDED ANSWER
TO PETITION FOR ENFORCEMENT**

This *First Amended Answer to Petition for Enforcement* is filed by WIFE, Respondent. The last three numbers of WIFE's driver's license number are 123. The last three numbers of WIFE's Social Security number are 345.

1. Objection to Assignment of Case to Associate Judge

WIFE respectfully objects to the assignment of this matter to an Associate Judge for a trial on the merits or presiding at a jury trial.

2. Denial of Allegations

WIFE enters a general denial, denies each and every, all and singular, the allegations of Petitioner, and demands strict proof thereof by the required evidentiary standard.

3. Request for Jury Trial

In Texas, if the punishment requested is incarceration for more than 180 days and/or a fine of more than \$500, the respondent is entitled to a jury trial. *Ex parte Gunther*, 758 S.W.2d 226 (Tex. 1988); *Ex parte Griffin*, 682 S. W.2d 261 (Tex. 1984). HUSBAND is requesting incarceration of WIFE for no definite period, and without requesting that each period run concurrently. WIFE does not waive her right to a jury trial, if incarceration for more than 180 days and/or a fine of more than \$500 is requested. WIFE requests this case be set to allow for a jury trial on the merits, unless Movant's pleadings clearly indicate a request for incarceration for less than 180 days and a fine of less than \$500.00.

4. Clarification, Motion to Dismiss, and Alternative Request for Special Exceptions

First, the orders sought to be enforced by HUSBAND are incapable of enforcement, in that they are ambiguous, and are not clear and specific enough in their terms that WIFE knows what duties or obligations are required.

Under Texas law, contempt is the process by which a court exerts its judicial authority to compel obedience to some order of the Court. *Ex parte Werblud*, 536 S.W.2d 542 (Tex. 1976). A person can not be held in contempt for violating an order unless that order sets forth the terms of compliance in clear, specific, and unambiguous terms so that the person charged with obeying the order will readily know exactly what duties and obligations are imposed on that person. *Ex parte Chambers*, 898 S.W.2d 257, 260 (Tex. 1995); *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967). One who is committed to jail for contempt should be able to find somewhere in the record the written order, which meets

the requirements of *Slavin. Ex Parte Padron*, 565 S.W.2d 921, 924 (Tex. 1978). The Orders sought to be enforced are not specific enough to be enforced by contempt. As such, it is unclear in the Orders exactly what duties and obligations are imposed on WIFE. The Court should find that, as a matter of law, the Orders sought to be enforced by HUSBAND are not specific enough to be enforced by contempt. WIFE objects to the violations as contained in HUSBAND's *Petition for Enforcement*, and requests this Court dismiss, and alternatively specially except, each and every violation:

4.1 Violation #1—As contained in HUSBAND's *Petition for Enforcement*, this violation is insufficient because it is vague, general, and ambiguous in nature, and as such, it is unclear as to exactly what duties and obligations were imposed on WIFE. Further, this violation fails to specifically apprise WIFE of the specific action that WIFE allegedly violated. As a result, WIFE is unable to determine what testimony will be relevant, and is not put on sufficient notice of any such violation. In addition, this violation alleges that WIFE violated the Decree in three (3) separate manners that are specifically addressed hereinbelow:

a. HUSBAND alleges that WIFE “failed to withdraw her portion of the funds from the account...and deliver such funds to HUSBAND no later than January 15, 2015.” However, the Decree is vague, general, and ambiguous in nature, and it is unclear as to exactly what duties and obligations were imposed on WIFE with regards to the delivery of any funds, as the Decree does not specify the manner, the place, the address, or the date or time WIFE is required to deliver such funds. Further, for the delivery of

funds to occur by WIFE to HUSBAND, the Decree requires, on page 53, for HUSBAND to designate an account to which the funds must be transferred and/or deposited. HUSBAND's *Petition for Enforcement* identifies no such account that was designated by HUSBAND, and further fails to identify the time, place, or manner in which HUSBAND designated such account, if any. As a result, this Court should dismiss HUSBAND's claims.

b. HUSBAND alleges that WIFE "failed to withdraw her portion of funds from an account...and deliver such funds to HUSBAND no later than January 15, 2015." However, the Decree is vague, general, and ambiguous in nature, and it is unclear as to exactly what duties and obligations were imposed on WIFE with regards to the delivery of any funds, as the Decree does not specify the manner, the place, the address, or the date or time WIFE is required to deliver such funds. Further, for the delivery of funds to occur by WIFE to HUSBAND, the Decree requires, on page 53, for HUSBAND to designate an account to which the funds must be transferred and/or deposited. HUSBAND's *Petition for Enforcement* identifies no such account that was designated by HUSBAND, and further fails to identify the time, place, or manner in which HUSBAND designated such account, if any. As a result, this Court should dismiss HUSBAND's claims.

c. HUSBAND alleges that WIFE "failed to withdraw fifty percent of the account...and deliver such funds to HUSBAND no later than January 15, 2015." However, the Decree is vague, general, and ambiguous in nature, and it is unclear as to

exactly what duties and obligations were imposed on WIFE with regards to the delivery of any funds, as the Decree does not specify the manner, the place, the address, or the date or time WIFE is required to deliver such funds. Further, for the delivery of funds to occur by WIFE to HUSBAND, the Decree requires, on page 53, for HUSBAND to designate an account to which the funds must be transferred and/or deposited. HUSBAND's *Petition for Enforcement* identifies no such account that was designated by HUSBAND, and further fails to identify the time, place, or manner in which HUSBAND designated such account, if any. As a result, this Court should dismiss HUSBAND's claims.

5. **Affirmative Defenses**

Notwithstanding WIFE's request that the Court should dismiss HUSBAND's *Petition for Enforcement* in its entirety, and notwithstanding WIFE's objections and arguments above herein, and without waiving such, WIFE asserts the following affirmative defenses:

WIFE asserts the affirmative defense of collateral estoppel.

WIFE asserts the affirmative defense of release.

WIFE asserts the affirmative defense of the unclean hands doctrine.

WIFE asserts the affirmative defense of waiver.

6. **Attorney's Fees, Costs, and Expenses**

It was necessary for WIFE to secure the services of Jim Mueller, and other licensed attorneys with the Law Firm of Verner Brumley McCurley Mueller Parker,

P.C., to prepare and prosecute this suit. To effect an equitable division of the estate of the parties and as a part of that division, and for services rendered in connection with conservatorship and support of the children, judgment for attorney's fees, expenses, and costs through trial and appeal should be granted against HUSBAND and in favor of WIFE for the use and benefit of WIFE's attorney and be ordered paid directly to WIFE's attorney, who may enforce the judgment in the attorney's own name. WIFE requests post-judgment interest as allowed by law.

7. **Prayer**

WIFE prays that all relief prayed for by HUSBAND be denied and that WIFE be granted all relief requested in this answer.

WIFE prays for attorney's fees, expenses, and costs as requested above.

WIFE prays for general relief.

Respectfully submitted,

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By: _____

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Attorney for WIFE

Certificate of Service

I certify that a true copy of the above was served on each attorney of record or party in accordance with the TEXAS RULES OF CIVIL PROCEDURE on August ____, 2016.

Attorney for WIFE

